IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

LAKES REGION CONSUMER ADVISORY BOARD (Cornerbridge) Plaintiff,	
v.	Case No.: 93-338-M
CITY OF LACONIA, NEW HAMPSHIRE Defendant.	

SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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BACKGROUND

On March 25, 1994, this Court heard oral argument on issues raised in its November 17, 1993, pretrial order. The United States moved to participate in this case as amicus curiae, because the pretrial order raised questions as to whether title II of the Americans with Disabilities Act ("ADA" or "the Act"), 42 U.S.C. §§ 12115-12141 (Supp. III 1992) and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (as amended) (1988 & Supp. IV 1993) ("section 504") apply to zoning enforcement activities. At oral argument, however, the defendant appeared to have entirely abandoned the arguments concerning the ADA and section 504. Instead, defendant focused entirely upon whether this case presents a "case-or-controversy" within the meaning of Article III of the United States Constitution, and, even if it does, whether abstention is appropriate, pending the outcome of the plaintiff's case in the New Hampshire Superior Court.

During the argument on behalf of the United States, the Court also raised some issues about the scope of the ADA's coverage, most notably as to whether the ADA permits a challenge to zoning ordinances and practices based upon disparate impact theory, and whether the ADA requires state and local governments to amend or make exceptions to zoning ordinances that would benefit only persons with disabilities.

This memorandum, submitted in response to the Court's invitation to all interested parties to file supplemental memoranda on any of the issues raised during oral argument, argues that: (1) this Court should retain jurisdiction of this matter; (2) facially neutral zoning ordinances and practices which have a disparate impact upon individuals with disabilities can violate the ADA; and (3) the ADA requires state or local governments, under some circumstances, to amend or make exceptions to zoning ordinances and activities which would apply only to persons with disabilities.

ARGUMENT

I. THIS COURT SHOULD RETAIN JURISDICTION OVER THIS MATTER.

A. The Court is Presented with a "Case-or-Controversy" which is Ripe for Adjudication.

The Court suggests that the determination of whether a case-or-controversy exists may depend upon whether the proceeding before the New Hampshire Superior Court constitutes "judicial review" of the decision of the Zoning Board of Adjustment ("ZBA"), or merely the final step in the application process for

a special exception to Laconia's zoning ordinance. The Court expressed concern that allowing this action to proceed would enable persons capable of alleging facts sufficient to support a claim of discrimination on the basis of disability to "short-circuit" state-created processes for obtaining special exceptions.

At oral argument, the Court referred generally to the New Hampshire statute authorizing the state's Superior Court to hear appeals of zoning decisions. Section 677:4 of the New Hampshire Revised Statutes says

> Appeal from Decision on Motion for Rehearing
> Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply to the superior court within 30 days after the action complained of has been recorded, by petition, setting forth that such decision or order is illegal or unreasonable, in whole or in part, and specifying the grounds upon which the decision or order is claimed to be illegal or unreasonable.

N.H. RSA 677:4 (1991).

This language itself compels no conclusion about whether the action brought by the Lakes Region Consumer Advisory Board ("LRCAB" or "Cornerbridge") in Superior Court for Bellknap County constitutes judicial review or part of the application process. Nor have we found New Hampshire case law addressing the issue with respect to N.H. RSA 677:4. However, at least one New Hampshire Supreme Court decision has described the virtually identical process for appealing planning board decisions, provided for by N.H. RSA 677:15 (1991), as judicial review.

Dumont v. Town of Wolfeboro, 137 N.H. 1, 622 A.2d 1238 (1992).[1] To the extent, therefore, that the justiciability of this case requires completion of the application process for a special exception, the instant case clearly presents a ripe case-or-controversy. LRCAB has completed the entire administrative process necessary to apply for a special exception to Laconia's zoning ordinance, and twice it has been denied this special exception.

Even if the action before the Superior Court is considered part of the application process, the plaintiff was not required to exhaust state administrative remedies before bringing an action in federal court. The House Education and Labor Committee explicitly stated that title II does not require the exhaustion of administrative remedies, See H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 22, 98, reprinted in 1990 U.S.C.C.A.N. 303, 381 (hereafter "House Report Part II"), and several courts have so

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[1] The time limit within which an appeal filed pursuant to N.H. RSA 677:15 must be filed, the form of the appeal, and the grounds on which such an appeal must be based, are exactly the same as those prescribed by N.H. RSA 677:4 for appeals of the decisions of the Zoning Board of Adjustment. N.H. RSA 677:15 reads, in pertinent part:

> . . . Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the planning board. . . .

N.H. RSA 677:15.1.

held. See Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ill. 1993); Finley v. Giacobbe, 827 F. Supp. 215 (S.D.N.Y. 1993); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276 (W.D. Wis. 1993). This result comports with several section 504 cases, which have held that persons who are not alleging discrimination by federal employers need not exhaust administrative remedies. See, e.g., Tuck v. HCA Health Services of Tennessee, Inc., 7 F.3d 465, 471 (6th Cir. 1993) (exhaustion of federal administrative remedies is not required); Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990) (same); Cheeney v. Highland Community College, 819 F. Supp. 749, 750 (N.D. Ill. 1993) (plaintiff not required to file action in state court prior to bringing section 504 suit in federal court). Indeed, section 203 of the ADA specifically links that legislation to section 504, stating that "[t]he remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act (29 U.S.C. § 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination . . . in violation of section 202." 42 U.S.C. § 12133 (Supp. III 1992).

The same rule has been applied with respect to other civil rights legislation. Plaintiffs in section 1983 cases are not required to exhaust administrative remedies. Patsy v. Florida Bd. of Regents, 457 U.S. 496, 500 (1981); Miller v. Hull, 878 F.2d 523, 530 (1st Cir. 1989); Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 259 (1st Cir. 1987). In Urbanizadora Versalles v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983), the First Circuit

applied this rule to a zoning case, concluding that the plaintiff was not required even to apply for a variance prior to filing suit in federal court. Id. at 998-999.[2] While zoning cases decided under the Fair Housing Act Amendments of 1988, 42 U.S.C. § 3601 et seq. (1988 & Supp. III 1992) ("FHAA"), do not appear to have squarely addressed the question of whether exhaustion of administrative remedies is required, courts have reviewed ordinances and zoning activities notwithstanding the pendency of state administrative and judicial procedures. See, e.g., United States v. City of Philadelphia, 838 F. Supp. 223, 227 (E.D. Pa. 1993) (federal court decides case prior to Pennsylvania Supreme Court's resolution of state law issues arising out of same dispute); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 454 (D.N.J. 1992) (federal court does not require plaintiffs to appeal decision of the defendant denying certificate of occupancy to the zoning board of adjustment).[3]

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[2] We believe that no exhaustion of administrative remedies is required. However, assuming, arguendo, that the plaintiff in the instant case was at least required to apply for a special exception prior to filing this action, see Oxford House, Inc. v. City of Virginia Beach, 825 F. Supp. 1251, 1263 (E.D. Va. 1993), this requirement has been met. The plaintiff has applied for and has been denied a special exception to the Laconia zoning ordinance.

[3] In Township of Cherry Hill, the defendant claimed to have denied Oxford House residents a certificate of occupancy because they did not meet the zoning ordinance's definition of a "family," which could include both related and unrelated persons living in a single residence. The court does not discuss whether the plaintiffs did or were required to exhaust state administrative remedies prior to filing their complaint. However, a New Jersey statute provides that "[a]ppeals to the board of adjustment may be taken by any interested party affected

This Court has also questioned whether an injury sufficient to make this a ripe "case-or-controversy" has yet occurred, given the defendant's willingness to allow LRCAB to use the facility at pending the outcome of the case in Superior Court. The fact that the defendant has not taken any action to enforce the ZBA's denial of the special exception by evicting the plaintiff does not render the filing of this case premature. See, e.g., Welsley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 102 (D. Mass. 1990) ("[t]he fact that the Commonwealth has not taken any enforcement action against [the plaintiff who is seeking a declaratory judgment] does not render the controversy . . . remote and hypothetical"). The plaintiff has applied to the ZBA for and has been denied a special exception. All of the facts necessary to give rise to a justiciable "case-or-controversy" have occurred. See Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 242 (1937); Riehl v. Travelers Insurance Co., 772 F.2d 19, 22 (3d Cir. 1985); Welsley Hills Realty Trust, 747 F. Supp. at 102.

Moreover, defendant has tacitly admitted the existence of some controversy. It has agreed to allow Cornerbridge to remain in its present location until the dispute in the New Hampshire

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by any decision of an administrative officer of the municipality based on or made in the enforcement of the zoning ordinance or official map." N.J.S.A. 40:55D-72.1(a) (1991) (emphasis added). Apparently, then, a state administrative procedure did exist by which the plaintiffs may have sought relief prior to filing their federal court action. Though the plaintiffs apparently did not avail themselves of this appeal process, the court entertained their FHAA claims.

Superior Court is resolved. Presumably if no court action at all had been instituted, the City of Laconia would have sought to evict Cornerbridge. Defendant's "case-or-controversy" argument is an attempt merely to shift the focus of this dispute from federal to state court. To allow the defendant to render this action nonjusticiable merely by agreeing to stay enforcement action pending the outcome of the dispute in state court would have the effect of denying the plaintiff a federal forum in which to adjudicate its claims based upon federal law. Defendant's "case-or-controversy" argument is, in reality, an abstention argument about whether a federal or state court is the most appropriate forum to decide the present dispute. For the reasons set forth below, defendant's abstention argument is unavailing.

B. Abstention is not Warranted in this Case.

The only principles of abstention arguably applicable in this case are those set out in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), and its progeny.[4] Colorado River set forth four factors that a federal district court must consider when determining whether

[4] The principles of abstention outlined in Pullman v. Railroad Commission of Texas, 312 U.S. 496 (1941) are inapplicable here, since this case does not present unclear issues of state law which may be dispositive of a case brought on federal constitutional grounds. Nor are the issues involved here so complex and so fundamentally a matter of state and local concern that abstention would be warranted under Burford v. Sun Oil Co., 319 U.S. 315 (1943). Finally, the plaintiff in this action is not seeking to enjoin a state criminal or civil proceeding. See Younger v. Harris, 401 U.S. 37 (1971); Casa Marie v. Superior Court, 988 F.2d 252 (1st Cir. 1993).

"exceptional circumstances" justify dismissing or staying an action in favor of parallel litigation in a state court: (1) whether either court has assumed jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which the forums obtained jurisdiction. Colorado River, 424 U.S. at 818. The case of Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), added two more factors: (5) whether federal or state law controls; and (6) whether the state forum will adequately protect the interests of the parties. Id. at 25-26. The First Circuit has also considered as a seventh factor the vexatious or contrived nature of the federal litigation. Burns v. Watler, 931 F.2d 140, 146 (1st Cir. 1991); Gonzalez v. Cruz, 926 F.2d 1, 3-4 (1st Cir. 1991).

Application of these factors demonstrates that abstention is inappropriate. The first factor is irrelevant, as this is not a proceeding in rem. The federal forum is no less convenient than the Superior Court in Bellknap County. See Burns, 931 F.2d at 147 (federal forum not rendered inconvenient by the fact that defendant was required to make two-hour drive to courthouse). LRCAB filed its federal suit almost a month prior to the appeal from the adverse decision of the ZBA. This fact not only weighs in plaintiff's favor with respect to the fourth Colorado River factor (the order in which jurisdiction was obtained), but suggests that the federal action was not vexatious or contrived.

The defendant contends that state law controls the outcome of this dispute, asserting that its resolution depends upon whether the ZBA properly applied Laconia's zoning ordinance when it denied LRCAB a special exception. According to the defendant, the ADA and section 504 issues cannot even be decided until the Superior Court has determined whether LRCAB's members met the requirements for a special exception, because both the ADA and section 504 protect only "qualified" individuals with disabilities.

On the other hand, the plaintiff's complaint attacks not only the method by which the ZBA applied arguably neutral eligibility criteria, but the sufficiency of those criteria themselves under the ADA and section 504. The plaintiff's disparate impact theory, as well as its contention that the ADA and section 504 require reasonable modifications to policies, practices, and procedures in order to avoid discrimination on the basis of disability, suggest that even if the Superior Court fairly applies the qualifications standards for a special exception, a violation of the ADA and section 504 might nevertheless result.

Without concluding whether discrimination actually occurred in this case, the government agrees with the plaintiff's positions concerning disparate impact and the need to make reasonable modifications to policies, practices, and procedures, and with its conclusion that federal law controls the outcome of this case. The fact that this Court may need to decide some

state and local law issues does not warrant abstention. The First Circuit has held that Colorado River abstention is not appropriate merely because a diversity case involves only issues of state substantive law. See, e.g., Burns, supra; Rojas-Hernandez v. Puerto Rico Electric Power Co., 925 F.2d 492 (1st Cir. 1991). Abstention is even less appropriate in this case, where issues of federal substantive law are so critical. See Moses H. Cone, 460 U.S. at 26 ("the presence of federal law issues must always be a major consideration weighing against surrender [of jurisdiction]").

The goals of avoiding piecemeal litigation and of adequately protecting the interests of all parties are also best served by a refusal to abstain. The defendant is correct that a finding by the Superior Court that the plaintiff is eligible for a special exception would obviate the need for litigation in the federal courts. However, a decision by the Superior Court in the defendant's favor would require LRCAB to return to federal court to adjudicate its section 1983, ADA, and section 504 claims. The state court action would not have resolved the questions of whether the criteria used for granting special exceptions have a disparate impact upon the plaintiff, or must be reasonably modified in order to avoid discrimination on the basis of disability. On the other hand, any decision reached by this Court will make the Superior Court action unnecessary. If this Court finds that the ZBA intentionally discriminated against the plaintiff, applied or engaged in policies, practices, and

procedures that had a disparate impact upon the plaintiff, or failed to make reasonable modifications to policies, practices, and procedures, then Laconia must grant LRCAB a special exception. A finding that no discrimination occurred would mean that the ZBA acted properly, and its decision would stand. This fact and every other consideration of importance to a federal court in determining whether abstention is appropriate under Colorado River and the cases following it, counsel against abstention in this case.

II. THE ADA PROHIBITS ZONING ENFORCEMENT ACTIVITIES WHICH HAVE A DISPARATE IMPACT UPON INDIVIDUALS WITH DISABILITIES, EVEN IF NO INTENTION TO DISCRIMINATE CAN BE SHOWN.

At oral argument, plaintiff's counsel clarified that the complaint in this action was intended to allege, in addition to intentional discrimination and failure to modify policies, practices, and procedures, a disparate impact theory. Title II of the ADA clearly was intended to prohibit formal policies and actions which, although neutral on their face, have a more burdensome effect upon persons with disabilities than upon others.

While section 202's broad prohibition of discrimination does not distinguish between intentional discrimination and the discriminatory effects of facially neutral rules that have a disparate impact upon persons with disabilities, section 2 of the ADA, which sets out the Act's findings and purpose, clearly

indicates that intentional discrimination is only one of several problems the ADA must remedy.

> (5) [I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101(a)(5) (Supp. III 1992).

The ADA's legislative history further demonstrates that Congress intended title II to prohibit more than intentional discrimination. The House Education and Labor Committee said that the broad prohibition of discrimination in section 202 of the ADA should be "interpreted consistent with Alexander v. Choate, 469 U.S. 287 (1985)." House Report Part II at 84, reprinted in 1990 U.S.C.C.A.N. at 367. The Committee explained its understanding of Choate in connection with its comments on section 102(b)(3) of the ADA, which defines employment discrimination to include "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3) (Supp. III 1992). The Committee said that this statutory language "incorporates a disparate impact standard . . . consistent with the interpretation of section 504 by the U.S. Supreme Court in . . . Choate . . .." House Report Part II at 61, reprinted in 1990 U.S.C.C.A.N. at 343. Clearly, then,

Congress both believed that Choate prohibits, under section 504, policies, practices, and procedures that have a disparate impact upon persons with disabilities, and intended section 202 of the ADA to prohibit such policies, practices, and procedures as well.

The title II regulation and the Department of Justice's commentary upon it accord with the language of section 2 of the ADA and with the legislative history of section 202. Section 35.130 of the regulation lists several forms of conduct which constitute unlawful discrimination under title II. Among them is use of criteria or methods of administration "[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability."[5] 28 C.F.R. § 35.130(b)(3)(i) (1993). The regulation's preamble explains that

> [t]he phrase 'criteria or methods of administration' refers to official written

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[5] Elsewhere in the same regulation specific forms of conduct are prohibited because they have a discriminatory effect upon individuals with disabilities. The use of criteria or methods of administration which "have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities" is prohibited. 28 C.F.R. § 35.130(b)(3)(ii) (1993). A public entity's selection of a site for its services, programs, or activities cannot "have the effect of" excluding individuals with disabilities from participation, denying them benefits, or otherwise subjecting them to discrimination, and cannot have the "purpose or effect" of defeating or substantially impairing the accomplishment of the objectives of the services, program, or activity, with respect to persons with disabilities. 28 C.F.R. § 35.130(b)(4)(i) and (ii) (1993). Finally, subsection 8 of the regulation says that a public entity "shall not impose eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity" unless the criteria are necessary for provision of the service, program, or activity. 28 C.F.R. § 35.130(b)(8) (1993).

> policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate.

28 C.F.R. App. A (1993).

The Department also adopted Congress's interpretation of Choate, and clearly states that title II prohibits policies, practices, and procedures having a disparate impact upon persons with disabilities. See Id.[6] Courts interpreting Alexander have also endorsed this view. See, e.g., Nathanson v. The Medical College of Pennsylvania, 926 F.2d 1368, 1383 (3d Cir. 1991) (interpreting Choate as prohibiting actions which have a disparate impact upon persons with disabilities); Carter v. Casa Central, 849 F.2d 1048, 1053 (7th Cir. 1988) (citing Choate for the proposition that lack of discriminatory intent is not a defense to a section 504 claim). See also NAACP v. Medical Center, Inc., 657 F.2d 1322, 1331-32 (3d Cir. 1981) (case decided prior to Choate which held that disparate impact constitutes discrimination under section 504 even if unintentional).

In housing cases, courts have on several occasions applied a disparate impact theory to zoning ordinances and practices, beginning with Metropolitan Housing Development Corp. v. Village

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[6] Indeed, the preamble states ver batim in connection with its discussion of § 35.130(b)(3)(ii) of the regulation what the House Education and Labor Committee said about section 102(b)(3) of the ADA. Compare 28 C.F.R. App. A, with House Report Part II at 61, reprinted in 1990 U.S.C.C.A.N. at 343.

of Arlington Heights, 558 F.2d 1283 (7th Cir. (1977), which held that facially neutral zoning ordinances having adverse effects upon racial minorities can violate the Fair Housing Act. The principles of this case have been applied specifically to zoning ordinances having a disparate impact upon individuals with disabilities, in violation of the FHAA. See, e.g., Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Administration, 740 F. Supp. 95, 103-107 (D.P.R. 1990); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182-1185 (E.D.N.Y. 1993); Support Ministries for People with AIDS, Inc. v. Town of Waterford, 808 F. Supp. 120, 133-136 (N.D.N.Y. 1992); Stewart B. McKinney Foundation v. Town Plan and Zoning Board, 790 F. Supp. 1197, 1211-1212, 1216-1220 (D. Conn. 1992); Horizon House Developmental Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 693-695, 697-699 (E.D. Pa. 1992); Township of Cherry Hill, 799 F. Supp. at 460-463; Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1295, 1297-1298 (D. Md. 1993); North Shore Chicago Rehabiliation, Inc. v. Village of Skokie, 827 F. Supp. 497, 499-500, 502 (N.D. Ill. 1993).

III. THE ADA REQUIRES PUBLIC ENTITIES TO MAKE REASONABLE MODIFICATIONS TO THEIR POLICIES, PRACTICES, AND PROCEDURES RELATED TO ZONING IN ORDER TO AVOID DISCRIMINATING ON THE BASIS OF DISABILITY.

At oral argument, the Court also expressed concern about the extent of a public entity's obligation under the ADA to make modifications to its policies, practices, and procedures to avoid

discriminating on the basis of disability. The Court questioned whether this obligation might allow persons with disabilities to obtain exceptions to zoning ordinances for which persons without disabilities would be ineligible.

The language of the ADA and of the title II implementing regulation clearly state that public entities are, indeed, required to make reasonable modifications to their usual policies, practices, and procedures where necessary to avoid discrimination on the basis of disability. Section 202 of the ADA prohibits discrimination against any "qualified individual with a disability." 42 U.S.C. § 12132 (Supp. III 1992). Section 201(2) defines "qualified individual with a disability" as

> . . . any individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (Supp. III 1992).

The title II regulation states the obligation even more pointedly. Section 35.130(b)(7) says that 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.

28 C.F.R. § 35.130(b)(7) (1993). See also Memorandum of the United States as Amicus Curiae at 9 (hereafter "Mem."). In its earlier memorandum, the United States called the Court's attention to the Department of Justice ADA Title II Technical Assistance Manual, which clearly demonstrates that this obligation was contemplated to apply to zoning enforcement activities. See Mem. at 9 (citing U.S. Department of Justice, The Americans with Disabilities Act -- Title II Technical Assistance Manual 14 (1993).

This interpretation of the ADA is perfectly consistent with FHAA cases which have interpreted similar language to require exceptions to facially neutral ordinances which would otherwise operate to exclude preclude persons with disabilities from obtaining housing in certain areas. The FHAA says that it is a discriminatory practice to refuse to make "a reasonable accommodation in rules, policies, practices, or services when such accommodation may be necessary to afford [an individual with a disability] equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(b) (1988 & Supp. III 1992). Several courts have expressed the opinion that reasonable accommodations must be made where a zoning ordinance has a disparate impact upon individuals whose disability requires them to live in group home situations. See, e.g., e.g., Town of Babylon, 819 F. Supp. at 1185; Horizon House Developmental Services, 804 F. Supp. at 699-700; Township of Cherry Hill, 799 F. Supp. at 462-63; Oxford

House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1344-45 (D.N.J. 1991).

The government expresses no opinion on the issue of whether, in fact, the City of Laconia is required, as a reasonable modification to its zoning policies, practices, and procedures, to allow LRCAB to use the facility at 24 Canal Street as a drop-in and support center. Resolution of this issue depends upon a development of the factual record. At this juncture, we ask only that the Court conclude that the ADA obligation to make reasonable modifications to policies, practices, and procedures does apply to zoning ordinances and to zoning enforcement activities under some circumstances.[7]

CONCLUSION

For all of the foregoing reasons, we respectfully request this Court to find: (1) that the matter before it constitutes a

[7] Whether the obligation to modify policies, practices, and procedures will actually require the defendant in this case to allow LRCAB's intended use of 24 Canal Street depends on such factors as: (1) whether other private clubs have been granted special exceptions allowing them to use facilities in or near the downtown area; (2) whether other facilities are available for the same use in other parts of Laconia; (3) whether, if such other facilities exist, they would be in all respects as desirable for LRCAB's intended use; (4) whether Cornerbrdige's use of the facilities at 24 Canal Street would adversely affect the downtown area; and (5) whether all of the facts developed at trial suggest that the defendant's reason for denying the special exception was pretextual. These factors are by no means the only ones that a court should consider. Determinations of what constitutes a "reasonable" modification to policies, practices, and procedures must necessarily be made on a case-by-case basis. No single factor is dispositive, and no bright-line test is possible.

ripe "case-or-controversy"; (2) that abstention is not warranted; (3) that the ADA permits a challenge to zoning ordinances and practices based upon disparate impact theory; and (4) that the ADA requires reasonable modifications to zoning ordinances and zoning enforcement activities, where necessary to avoid discriminating on the basis of disability.

Respectfully submitted,

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