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.	)	

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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STATEMENT OF THE CASE

This action was brought by the Lakes Region Consumer Advisory Board (Cornerbridge) ("LRCAB") against the City of Laconia, New Hampshire ("Laconia"). LRCAB alleges that Laconia violated title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131 et seq. (Supp. III 1992) ("Title II"), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (as amended) (1988 & Supp. IV 1993) ("Section 504"), by denying LRCAB a special use permit to operate Cornerbridge, a drop-in and support center for persons with mental illness who are beneficiaries of LRCAB's other mental health programs. LRCAB claims that Laconia's denial was discriminatorily based on the

mental disabilities of the individuals served by the Cornerbridge facility. Laconia claims its Zoning Board of Appeals ("ZBA") denied the permit because it concluded that Cornerbridge was a private club, a use the ZBA claims is not permitted in the Business-Central zone. LRCAB is also challenging the permit denial under State law in an action filed in Belknap County Superior Court.

This Court issued a pretrial order on November 17, 1993, expressing concern about several issues, including whether the ADA or the Rehabilitation Act apply to local zoning enforcement activities and whether the Court should suspend judgment on the merits of this action until the State court litigation is concluded. The United States files this memorandum of law as amicus curiae in support of LRCAB's claims that: (1) Title II applies to all zoning enforcement activities of public entities; and (2) Section 504 applies to all zoning enforcement activities of public entities or subdivisions that receive or are extended Federal financial assistance.

ARGUMENT

I. TITLE II OF THE ADA APPLIES TO ALL ZONING ENFORCEMENT ACTIVITIES UNDERTAKEN BY PUBLIC ENTITIES.

The ADA was enacted in 1990 to eliminate pervasive societal discrimination against individuals with disabilities. 42 U.S.C. § 12101 (Supp. III 1992). Congress found that individuals with disabilities had historically been subject to isolation and segregation, and had been discriminated against in "such critical areas as . . . recreation, . . . health services, . . . and

access to public services." Id. § 12101(a)(2),(3). This discrimination had taken various forms: both outright intentional exclusion as well as failures to make changes in existing practices and facilities, such that persons with disabilities are relegated to "lesser services, programs, activities, benefits, . . . or other opportunities." Id. § 12101(a)(5). Congress noted that persons with disabilities "are notably underprivileged and disadvantaged," and that they "are much poorer, have far less education, have less social and community life, participate much less often in social activities" than do persons without disabilities, and that these disadvantages are due to "discriminatory policies, based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices." H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 23 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 447-48 (hereinafter "House Report Part III").

In enacting the ADA, Congress sought to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (Supp. III 1992). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs, services, and activities, public and private transportation systems, telecommunications, public accommodations, and commercial facilities.

The ADA was meant to effect a considerable change in the ways in which private businesses and State and local governments treat and serve individuals with disabilities. It established new Federal civil rights, to be enforced Federally. Congress noted that "there is a need to ensure that the Federal Government plays a central role in enforcing these standards on behalf of individuals with disabilities." S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989) (hereinafter "Senate Report"); see H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 47-48, reprinted in 1990 U.S.C.C.A.N. 303, 329-30 (hereinafter "House Report Part II"). Congress stressed that Federal intervention was critical, because "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing."[1] Congress chose not to require the exhaustion of State or administrative remedies prior to the issuance of Federal judicial relief under Title II.[2]

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[1] The Senate Report declared:

> [E]nough time has . . . been given to the States to legislate what is right. Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action. . . . [E]xisting States laws do not adequately counter such acts of discrimination." Senate Report at 18.

[2] See Noland v. Wheatley, 835 F. Supp. 476, 482 (N.D. Ill. 1993); Finley v. Giacobbe, 827 F. Supp. 215, 219 (S.D.N.Y. 1993); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276 (W.D. Wis. 1993).

A. The Text and Legislative History of Title II Demonstrate Intent to Cover Local Zoning Enforcement Schemes.

Title II provides broad protections to individuals with disabilities in the provision of public services. It defines a covered "public entity" as: "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . ." 42 U.S.C. § 12131(1) (Supp. III 1992). The defendant City of Laconia, and its Zoning Board of Appeals, are unquestionably public entities covered by Title II.

Title II's antidiscrimination provision employs expansive language, intended to reach all actions taken by public entities. It states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

Id. § 12132. There is no suggestion in the statute that zoning or any other type of public action is to be excluded from this broad mandate. Zoning activities and decisions are plainly among the "services, programs, or activities" conducted by public entities. Moreover, the last phrase of Title II's nondiscrimination command is even more expansive, stating simply that no individual with a disability may be "subjected to discrimination" by a public entity. Id. This language prohibits a public entity from discriminating on the basis of disability in any manner, whether through zoning or any other official activity.

Indeed, to allow discrimination on the basis of disability in any area of government functioning denies persons with disabilities equal opportunity to benefit from those government functions, in direct contravention to the ADA's stated goals.[3] This is surely true in the context of zoning decisions and ordinances which govern the use of property by all residents.

Title II's legislative history leaves no doubt that Congress intended Title II to cover every action taken in every forum in which a public entity may function. In fact, the House Report states just that:

> The Committee has chosen not to list all the types of actions that are included within the term 'discrimination', as was done in titles I and III, because this title essentially simply extends the antidiscrimination prohibition embodied in section 504 to all actions of state and local governments.

House Report Part II at 84, reprinted in 1990 U.S.C.C.A.N. at 357 (emphasis added). The House Report reaffirms this notion later, stating:

> Title II of the bill makes all actions of State and local governments subject to the types of prohibitions against discrimination against qualified individuals with a disability included in section 504 (nondiscrimination).

Id. at 151, reprinted in 1990 U.S.C.C.A.N. at 434 (emphasis added).

Representative Tony Coelho, the ADA's principal sponsor in the House of Representatives, explained that the ADA was meant to

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[3] 42 U.S.C. § 12132 (Supp. III 1992). As a remedial statute, the ADA "must be broadly construed to effectuate its purposes." Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa. 1993), aff'd, 9 F.3d 1067 (3d Cir. 1993).

prohibit discrimination in both the enactment of local ordinances and in their enforcement. 134 Cong. Rec. 9606 (1988) (Title II "will prohibit discriminatory activities of State and local governments resulting from ordinances, laws, regulations, or rules.").[4]

B. Department of Justice Interpretations Explicitly Show That Title II Applies to Local Zoning Enforcement Schemes.

Consistent with Title II's broad language and its legislative history, the Department of Justice, in its Title II implementing regulation and other Title II analyses, has interpreted Title II to reach all actions by public entities, including zoning enforcement actions.[5]

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[4] It is also evident from other language in the ADA that the Act was intended to reach, and, in some cases, preempt local ordinances. Section 103 states that:

> Nothing in this [Act] shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to local food handling which is designed to protect public health from individuals who pose a significant risk to the health or safety of others . . . .

42 U.S.C. § 12113(d)(3) (Supp. III 1992); see also H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 61 (1990), reprinted in 1990 U.S.C.C.A.N. 565, 570. This section would have been unnecessary if the ADA was not otherwise intended to affect local ordinances.

[5] The Department of Justice issued its Title II regulation (28 C.F.R. Part 35) pursuant to statutory mandate. 42 U.S.C. § 12134(a) (Supp. III 1992). Accordingly, the regulation is to be given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of Title II of the ADA); see, e.g., Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993) (relying on

The Department of Justice's Title II implementing regulation (the "Regulation") repeats the statute's general nondiscrimination provision, that "no qualified individual with 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 public entity." 28 C.F.R. § 35.130 (1993), 56 Fed. Reg. 35694, 35718-19 (1991). The Regulation's preamble explains that "[a]ll governmental activities of public entities are covered, even if they are carried out by contractors." 28 C.F.R. App. A (1993); 56 Fed. Reg. 35694, 35696 (1991).

The Regulation enumerates several categories of specific prohibitions of activities that constitute discrimination by

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Justice Department interpretations of Title II); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (same).

Also pursuant to statutory directive, the Department of Justice published its Title II Technical Assistance Manual ("TA Manual") to assist individuals with disabilities and covered entities in understanding and complying with the statute and the regulation. 42 U.S.C. § 12206(c)(3) (Supp. III 1992); U.S. Department of Justice, The Americans with Disabilities Act -- Title II Technical Assistance Manual (1993) ("TA Manual"). As an agency's interpretation of its own regulation, the analysis in the TA Manual must be given `controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Stinson v. United States, 113 S. Ct. 1913, 1919 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); see United States v. Larionoff, 431 U.S. 864, 872-73 (1977); Udall v. Tallman, 380 U.S. 1, 16-17 (1965); cf. Noland, 835 F. Supp. at 483 (relying on TA Manual's interpretation of Title II); Petersen, 818 F. Supp. at 1278 (same).

For the Court's convenience, copies of the Regulation, as published in the Federal Register, and the TA Manual, are attached as Exhibits A and B, respectively. Citations to the Regulation will include Federal Register references.

public entities. 28 C.F.R. § 35.130 (1993), 56 Fed. Reg. 35694, 35718-19 (1991). One of these specific prohibitions requires public entities to make reasonable modifications to their policies, practices, and procedures, where such modifications are necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(7) (1993); 56 Fed. Reg. 35694, 35718-19 (1991). Commensurate with the Act, this provision uses broad language to cover the widest possible range of actions by public entities. Zoning enforcement actions, including the enactment of ordinances, and any administrative processes, hearings, and decisions by zoning boards, fall squarely within the category of "policies, practices, or procedures," mentioned in the Regulation. It is this provision of the Regulation Laconia is alleged to have violated when it denied LRCAB the special use permit to operate the Cornerbridge facility. See Complaint ¶¶ 30-34.

The TA Manual specifically uses a zoning example as one illustration of a public entity's obligation to modify its policies, practices, and procedures. It explains:

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

TA Manual at 14.[6] In its Answer (¶ 44), Laconia asserts that this

[6] The TA Manual also indicates that Title II reaches local ordinances generally. The Regulation requires public entities to

illustration fails to demonstrate that Title II covers all zoning activities. Laconia suggests that Title II applies only to zoning decisions concerning facilities open to the general public, and not to facilities like Cornerbridge, which serve a more limited clientele. This argument finds no support in the broad language of the statute or the Regulation. Title II makes no distinctions based on the portion of the public served by a program, service, or activity.[7]

So far as we know, only two courts, in unpublished decisions, have addressed the issue of whether Title II applies to zoning enforcement. See Moyer v. Lower Oxford Township, No. CIV.A. 92-3348, 1993 WL 5489 (E.D. Pa. Jan. 6, 1993); Burnham v. City of Rohnert Park, No. C92-1439SC, 1992 U.S. Dist. LEXIS 8540 (N.D. Cal. May 18, 1992).[8] Neither opinion provides any authority

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create an ADA self-evaluation plan, to assess all of their policies, practices, and procedures. 28 C.F.R. § 35.105(a) (1993); 56 Fed. Reg. 35694, 35718 (1991). The TA Manual's explanation of the self-evaluation requirement states that "[n]ormally, a public entity's policies and practices are reflected in its laws, ordinances, regulations, administrative manuals . . . . Other practices, however, may not be recorded and may be based on local custom." TA Manual at 44. Thus, the Title II requirement for modification of policies, practices, and procedures, and the rest of Title II, was intended to apply to local laws, ordinances, regulations, and customs.

[7] Laconia's other arguments in paragraph 44 of its Answer do not address whether Title II generally applies to zoning enforcement decisions, but rather claim that Laconia's zoning decision did not violate the statute because it did not discriminate on the basis of disability.

[8] The Court of Appeals for the First Circuit has recognized the limited value of unpublished opinions. See 1st Cir. R. 36.2(b)(6) (unpublished decisions may not be cited). The

or analysis of its determination that Title II does not cover zoning. The court in Burnham refused to enjoin defendant's zoning enforcement decision, on the grounds that no public programs under Title II were at issue. Id. at *10 n.9. The court cited no authority and provided no analysis for this point. Id. Similarly, in Moyer, the court denied plaintiff's ADA claim, stating only that the "[p]laintiff also cites no authority indicating that the ADA should be applied in a zoning context." 1993 WL at *2. The Moyer Court's only authority was the unpublished Burnham decision. Id.[9] We urge this Court to reject the Moyer and Burnham determinations which, as we have demonstrated above, find no basis in the statutory or regulatory language or the legislative history and purpose of Title II.

C. Construing Title II to Cover Zoning is Consistent With Judicial Interpretations of Other Civil Rights Statutes.

Our analysis of Title II is consistent with the courts' interpretations of other civil rights laws. Challenges to zoning actions have frequently been brought under the Fair Housing Act, 42 U.S.C. § 3601 et seq. (1988 & Supp. III 1992). The Fair

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courts for the circuits in which those decisions were rendered both reject unpublished decisions as having no precedential value. 3rd Cir. R. App. I, IOP 5.6; 9th Cir. R. 36-3.

[9] The only published opinion that mentions the issue states in dictum, that a city's actions to prevent housing for persons with mental disabilities may violate the ADA. City of Peekskill v. Rehabilitation Support Servs., Inc., 806 F. Supp. 1147, 1156 (S.D.N.Y. 1992); see also Oxford House, Inc. v. City of Virginia Beach, 825 F. Supp. 1251, 1264-65 (E.D. Va. 1993) (court declined to address the issue of whether the ADA or the Rehabilitation Act apply to zoning enforcement).

Housing Act makes it unlawful "[t]o refuse to sell or rent . . . or to refuse to negotiate . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Id. § 3604(a). Like Title II, the Fair Housing Act bars discrimination by using broad, general language, in order to reach all aspects of the housing process in which discrimination can occur. Courts, stressing Congress' use of expansive language, have interpreted the Fair Housing Act's general statutory language to cover local zoning decisions, even though zoning was not specifically mentioned in that Act. See, e.g., Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 257 n.6 (1st Cir. 1993) (citing H.R. Rep. No. 711, 100th Cong., 2d Sess. 22 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2183); South-Suburban Housing Ctr. v. Greater South Surburban Bd. of Realtors, 935 F.2d 868, 882 (7th Cir. 1991) (en banc); Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209-10 (7th Cir. 1984); United States v. City of Parma, 661 F.2d 562, 571 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289-1290 (7th Cir. 1977) (on remand), cert. denied, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).[10]

[10] In fact, the statute's administrative enforcement provision expressly mentions zoning, indicating that Congress intended the general nondiscrimination provision to cover zoning. See 42 U.S.C. § 3610(g)(2)(C) (1988) ("If the Secretary determines that the matter involves the legality of any State or

When the Fair Housing Act was amended in 1988, among other things, to prohibit discrimination on the basis of disability, Congress expressly indicated its intent that zoning decisions adversely affecting persons with disabilities be prohibited by the statute. H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988) reprinted in 1988 U.S.C.C.A.N. 2173, 2185. The 1988 Amendments included language similar to that in the Title II Regulation cited above. Section 3604(f)(3)(B) of the Act prohibits "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person [with a disability] equal opportunity to use and enjoy a dwelling . . . ." The courts have determined that zoning actions can be challenged under that provision as well. See, e.g., Casa Marie, 988 F.2d at 270 n.22; Potomac Group Home Corp. v. Montgomery Co., Md., 823 F. Supp. 1285 (D. Md. 1993); Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168, 1185 (N.D.N.Y. 1993).

II. SECTION 504 OF THE REHABILITATION ACT APPLIES TO ALL ZONING ENFORCEMENT ACTIVITIES OF PUBLIC ENTITIES THAT RECEIVE FEDERAL FINANCIAL ASSISTANCE.

Like the ADA, section 504 of the Rehabilitation Act[11] ("Section 504") uses expansive language and was intended to cover every action, including zoning enforcement actions, taken by

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local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General . . . .").

[11] 29 U.S.C. § 794 (1988 & Supp. IV 1993).

public entities or subdivisions that receive or are extended Federal financial assistance. The Rehabilitation Act of 1973, an earlier disability rights law, was enacted to discourage the segregation of persons with disabilities, and to expand their opportunities. 29 U.S.C. § 701 (1988). To that end, the statute established Federal grant programs to benefit persons with disabilities, and, in Section 504, it prohibits discrimination on the basis of disability in any "program or activity" of recipients of Federal financial assistance. Id. § 794.

Congress clarified the definition of "program or activity" in 1988 in the Civil Rights Restoration Act, to overturn an unduly narrow interpretation of that phrase by the Supreme Court. 20 U.S.C. § 1687 (1988); S. Rep. No. 64, 100th Cong., 2d Sess. 1-2 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 3-4. The clarified definition provides that:

> [T]he term 'program or activity' and 'program' means all of the operations of--
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> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

20 U.S.C. § 1687 (1988) (emphasis added). By using the phrase "all of the operations of," the definition demonstrates that Section 504 applies to every action taken by an entity receiving

Federal financial assistance.[12] Neither the Rehabilitation Act, nor the Civil Rights Restoration Act, nor their legislative histories, contain any references indicating congressional desire to exempt zoning enforcement from their coverage. The Civil Rights Restoration Act stresses "institution-wide" coverage,[13] and congressional debates during the enactment of the Civil Rights Restoration Act demonstrate that the broad language was understood to cover zoning activities.[14]

Those few courts to address the issue have concluded that Section 504 reaches zoning enforcement activities. E.g., Sullivan v. City of Pittsburgh, 811 F.2d 171, 181-83 (3d Cir. 1987), cert. denied, 484 U.S. 849 (1989) (court held that city's

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[12] Laconia is incorrect in claiming (Answer ¶¶ 36 & 48) that Federal financial assistance must be used directly for zoning board activities for those activities to be covered by Section 504. The zoning board's activities are covered so long as the City department that includes zoning activities receives or distributes Federal funds. See 29 U.S.C. § 794(b)(1) (Supp. IV 1993); Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991).

[13] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, 28 (1987) (codified as 20 U.S.C. § 1687 note). ("legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws") (emphasis added).

[14] During consideration of the Civil Rights Restoration Act, Senator Hatch stated:

> The zoning function of local government will likely be covered by these laws in ways never before achieved. . . . [I]t will be difficult, if not impossible, for localities and states to escape total coverage under the bill, including a locality's zoning function. . . . Thus, for example, zoning requirements falling with a disproportionate impact on a particular minority group can be struck down, even if they were not adopted for a discriminatory purpose. 134 Cong. Rec. 4259 (1988).

denial of permit to rehabilitation center for recovering alcoholics violated Section 504);[15] City of St. Joseph v. Preferred Family Healthcare, 859 S.W.2d 723, 725-26 (Mo. Ct. App. 1993) (Section 504 applied to city's denial of permit for group home); cf. Stewart B. McKinney Found. v. Town Planning & Zoning Comm'n of Fairfield, 190 F. Supp. 1197 (D. Conn. 1992) (court declined to rule on merits of Section 504 claim, because plaintiff prevailed on Fair Housing claim).

CONCLUSION

For the foregoing reasons, we urge this Court to find that: (1) Title II applies to all zoning enforcement activities of public entities; and (2) Section 504 applies to all zoning enforcement activities of public entities or subdivisions that receive or are extended Federal financial assistance.

Respectfully submitted,

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[15] The district court opinion in Sullivan has a more extended discussion of the applicability of Section 504. See 620 F. Supp. 935, 946 (W.D. Pa. 1985).