

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND  
BALTIMORE DIVISION

THE UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 CITY OF BALTIMORE, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

CIVIL NO. 09 CV 1049 (JFM)

**MEMORANDUM IN SUPPORT OF UNITED STATES'  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## I. INTRODUCTION

The United States alleges that the City of Baltimore (“City”) discriminates against individuals who receive treatment in residential substance abuse treatment programs, in violation of title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12131 et seq., and its implementing regulation. Under the City’s Zoning Code, “homes for the rehabilitation of non-bedridden alcoholics and for the care and custody of homeless persons” – the only applicable Zoning Code classification for these programs – cannot locate *anywhere* in the City until and unless the program obtains a Conditional Use Ordinance (“CO”), a process that is lengthy and burdensome. This requirement applies regardless of the size of the proposed program (whether intended to serve 8, 28, or 68 persons) or the location sought (whether zoned for single- or multiple-family residential or business). Virtually every other comparable use can locate *somewhere* in the City as of right.

The absence of any justifiable basis for classifying and treating residential substance abuse treatment programs in a manner so qualitatively different and worse than the City treats other similar uses – notably, group homes for individuals with mental illness and developmental disabilities, which can locate as of right in residential zones of appropriate density – supports only one conclusion: that the City’s Zoning Code discriminates against individuals recovering from substance abuse. Because such individuals are persons with disabilities under the ADA, the City’s Zoning Code is facially discriminatory. Indeed, two former mayors have tried and failed on three separate occasions to repeal the CO requirement for residential substance abuse treatment programs because of its facial invalidity. Moreover, the record clearly establishes that the defendant’s disparate treatment of residential substance abuse treatment programs is

premised on pervasive and ongoing animus against recovering addicts, concerns that go to the heart of the ADA's protections.<sup>1</sup>

There exists no genuine dispute as to the material facts underlying the United States' claims. The United States therefore moves this Court to grant its Motion for Partial Summary Judgment, on liability, under Federal Rule of Civil Procedure 56. In the alternative, the United States moves this Court to grant partial summary judgment for the United States on two discrete issues (or either one): (1) that individuals who receive treatment in certified residential substance abuse treatment programs in Baltimore are disabled under the ADA, and (2) that individuals who receive treatment in certified residential substance abuse treatment programs in Baltimore do not pose a direct threat to the health or safety of others, in order to narrow the issues for trial. The United States requests permission to subsequently brief the issue of damages if the Court rules in its favor on liability.

## II. PROCEDURAL BACKGROUND

Before this case was filed, the United States investigated an administrative complaint filed with the U.S. Department of Justice by the Baltimore City Substance Abuse Directorate (BCSAD) alleging that the City of Baltimore's Zoning Code discriminated against individuals with disabilities in recovery from substance abuse. The United States determined that the City of Baltimore was in violation of title II of the Americans with Disabilities Act and tried to resolve the investigation through a proposed settlement, which did not succeed. The United States filed its Complaint on April 23, 2009.<sup>2</sup> The City filed its Answer on July 17, 2009.<sup>3</sup> A related case, Baltimore City Substance Abuse Directorate v. Mayor and City Council of Baltimore, Civ. No.

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<sup>1</sup> For purposes of this summary judgment motion, the United States argues that the Zoning Code is facially and intentionally discriminatory. We reserve the right to argue additional legal theories, such as an "as applied" theory, if the Court does not resolve the case at this juncture.

<sup>2</sup> ECF No. 1.

<sup>3</sup> ECF No. 7.



JFM-09-1766, was filed on July 7, 2009. Both cases allege substantially the same facts and similar legal claims. The United States, BCSAD, and the City agreed to consolidate discovery of the two cases and proceed on the same scheduling order. Before the close of fact discovery on March 1, 2011, the parties conducted extensive fact discovery, including depositions of 21 witnesses and production of over 36,000 pages of documents. The Court then approved the parties' joint request to stay expert discovery and file partial summary judgment motions.<sup>4</sup>

### III. FACTUAL BACKGROUND

#### A. Zoning Process for Residential Substance Abuse Treatment Programs

The City of Baltimore's Zoning Code provides for three basic types of zoning approval. A land use may be: (1) permitted as of right; (2) a conditional use requiring the approval of the Board of Municipal and Zoning Appeals; or (3) a conditional use requiring the approval of the Mayor and the City Council of Baltimore.<sup>5</sup> A zoning permit *as of right* is typically received "over-the-counter" on the same day as the application.<sup>6</sup> A *conditional use requiring the approval of the Board of Municipal and Zoning Appeals* takes approximately six weeks, and requires a hearing before the Board of Municipal and Zoning Appeals.<sup>7</sup> A *conditional use requiring the approval of the Mayor and the City Council of Baltimore*, however, requires the City Council to pass a bill, which may take six months or more.<sup>8</sup> The CO process also requires two public hearings, written reports and recommendations from City agencies, and that the

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<sup>4</sup> ECF No. 47.

<sup>5</sup> City 30(b)(6) (David Tanner) Dep. 26:11-27:8 (July 27-28, 2010) (hereinafter "Tanner Dep.") (Ex. 1).

<sup>6</sup> Id. 27:9-28:23.

<sup>7</sup> Id. 29:6-14.

<sup>8</sup> Id. 21:25-23:16, 30:25-31:10.

applicant post signs on the property and place advertisements of the public hearings in the newspaper.<sup>9</sup>

A conditional use is defined as:

[A] use compatible with the permitted uses in a particular zoning classification. However, because of a characteristic such as noise, odor, or traffic, it requires special permission by the Board of Municipal and Zoning Appeals or an Ordinance of the Mayor and City Council. Examples of activities that require conditional use approval by Ordinance include parking lots in residential areas, high-density elderly housing, and drive-through restaurants.<sup>10</sup>

The Zoning Code, as enacted by the City Council, designates the type of zoning approval to which a particular land use classification is subject.<sup>11</sup>

1. Homes for the Rehabilitation of Non-Bedridden Alcoholics is a Conditional Use Requiring the Approval of the Mayor and City Council

This case concerns the zoning of residential substance abuse treatment programs (“RSATPs”) that are certified, or licensed, by the state of Maryland.<sup>12</sup> Under the City’s Zoning Code, the only classification that relates to substance abuse treatment is “[h]omes for the rehabilitation of non-bedridden alcoholics and for the care and custody of homeless persons.”<sup>13</sup>

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<sup>9</sup> Zoning Code of Baltimore City §§ 16-203, 16-301, 16-302, 16-401, 16-402 (Dec. 31, 2010) (hereinafter “Zoning Code”) (available at <http://www.baltimorecity.gov/Portals/0/Charter%20and%20Codes/Code/Art%20000%20-%20Zoning.pdf>) (Ex. 2); Answer ¶ 8, ECF No. 7; Baltimore City Dep’t of Planning, Development Guidebook at 14-16 (updated Nov. 17, 2010) (hereinafter “Development Guidebook”) (Ex. 3).

<sup>10</sup> Development Guidebook at 14 (Ex. 3).

<sup>11</sup> Tanner Dep. 32:22-33:20, 35:10-18 (Ex. 1).

<sup>12</sup> State certification is required for all programs providing substance abuse treatment and/or prevention. Md. Code Regs. (hereinafter “COMAR”) §§ 10.47.04.03. In order to be certified, programs must follow requirements relating to staff credentials, treatment plans, and the physical environment, among other things. COMAR 10.47.01.04 - .06, 10.47.02.06. Certified programs are subject to announced and unannounced inspections. COMAR 10.47.04.04 - .07. There are approximately 50 certified residential treatment programs in the City of Baltimore. City’s Supplemental Resp. to BCSAD’s Interrog. at Request No. 8, and Ex. A (Sept. 27, 2010) (hereinafter “Interrog. Resp. 9/27/2010”) (Ex. 4).

<sup>13</sup> See, e.g., Zoning Code § 4-1004(3); § 6-309(7) (Ex. 2). In the past, some residential substance abuse treatment programs were classified as a “substance abuse treatment center,” which no longer exists in the Zoning Code. See, e.g., Ordinance (hereinafter “Ord.”) 01-154 for 2421 McElderry St., MCCB 1708-09 (Ex. 5); Zoning Code of Baltimore City (2010) (no “substance abuse treatment center” classification) (available at

This classification is not defined in the Zoning Code, but has been applied to RSATPs.<sup>14</sup> As “homes for the rehabilitation of non-bedridden alcoholics,” residential substance abuse treatment programs are required to get a CO to locate in any zoning district in which they are permitted to locate.<sup>15</sup> The Zoning Code allows “homes for the rehabilitation of non-bedridden alcoholics and for the care and custody of homeless persons” to locate only in certain residential, mixed use and business zones (R-7, R-8, R-9, R-10, O-R, B-2, B-3, B-4, and B-5) with a CO.<sup>16</sup> This classification is not permitted at all in the other residential, business, and industrial zones (R-1 through R-6, B-1, and M-1 through M-3).<sup>17</sup>

## 2. The CO Process Requires Community Approval

To start the CO process, the City Council representative for the neighborhood in which the applicant seeks to locate must agree to sponsor and introduce a conditional ordinance bill.<sup>18</sup> In practice, although not written in the Zoning Code or elsewhere, City zoning officials and City Council representatives typically require an applicant to gain the support of its local community association(s) before the Council member will sponsor a CO. The Baltimore City Solicitor,

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<http://www.baltimorecity.gov/Portals/0/Charter%20and%20Codes/Code/Art%20000%20-%20Zoning.pdf>. A “substance abuse treatment center” was formerly defined in the Zoning Code as a nonresidential treatment center, and was required to get a CO in all zones. See Zoning Code of Baltimore City Compact Edition § 1-194, Table of Zoning Uses (2000) (Ex. 6).

<sup>14</sup> Tanner Dep. 177:6-15, 39:20-40:21, 44:7-22 (Ex. 1); See, e.g., Ord. 03-594 for 2926 Harford Rd., MCCB 1595-96 (Ex. 7); Ord. 06-207 for 14 S. Broadway, MCCB 2465-66 (Ex. 8); Ord. 10-260 for 2525 Maryland Ave., MCCB 19462-63 (Ex. 9); Ord. 84-62 for 2521 Maryland Ave., MCCB 20856 (Ex. 10); Ord. 74-772 for 2523 Maryland Ave., MCCB 20871-72 (Ex. 11); Ord. 71-1096 for 1611 Baker St., MCCB 20854-55 (Ex. 12); Ord. 75-916 for 1435 S. Hanover St., MCCB 25609-12 (Ex. 13); Ord. 82-765 for 7 W. Randall St., MCCB 20858-59 (Ex. 14).

<sup>15</sup> Zoning Code, §§ 4-1004, 4-1104, 4-1204, 4-1304, 5-204, 6-309, 6-409, 6-509, 6-609 (Ex. 2); Letter from Deepa Bhattacharyya, Asst. Solicitor, Law Dep’t, to President and Members of City Council, at 1 (Mar. 19, 2008), MCCB 9489-92 (Ex. 15) (hereinafter “Bhattacharyya Letter 3/19/2008”) (“for every zoning district in which one of these residential [drug treatment] programs would be permitted to locate, the passage of a City Council ordinance is required”).

<sup>16</sup> Zoning Code, §§ 4-1004, 4-1104, 4-1204, 4-1304, 5-204, 6-309, 6-409, 6-509, 6-609 (Ex. 2).

<sup>17</sup> See Zoning Code (available at

<http://www.baltimorecity.gov/Portals/0/Charter%20and%20Codes/Code/Art%20000%20-%20Zoning.pdf>).

<sup>18</sup> Answer ¶7, ECF No. 7; Bernard “Jack” Young Dep. 9:9-12 (Dec. 13, 2010) (Ex. 16).

George Nilson, admitted as much in a memorandum to former Mayor Sheila Dixon. He explained that City Council Bill 07-0002<sup>19</sup> would allow residential substance abuse treatment programs to locate as of right and therefore make “it possible for much needed facilities to locate in Baltimore City *without having to get the express up front approval of every nervous community association and council member.*”<sup>20</sup> Further, the community association approval step of the CO process is reflected in the Baltimore City Planning Department’s Development Guidebook, which states that “[c]ommunity review is an important component of the City Council bill process” and that “the applicant will be asked to meet with neighborhood groups to explain their proposal.”<sup>21</sup>

In addition, at least five RSATPs who sought COs in recent years testified that they were told by City representatives to get the approval of their community association as part of the CO process. In 2002, Nilsson House, a halfway house run by Tuerk House for 11 women at 5665 Purdue Avenue, sought to expand its facility on its one-acre lot so that it could serve 40 women.<sup>22</sup> Tuerk House was told by Planning Department officials and three City Council members for the district to get approval from the community association.<sup>23</sup> Ultimately, Nilsson House could not get the support of the Woodbourne Heights Community Association (even after hiring a community advocacy firm to develop community support for its expansion), no CO bill was introduced, and Nilsson House could not expand.<sup>24</sup>

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<sup>19</sup> As discussed *infra*, in Section III.C., City Council Bill 07-0002 would have allowed residential substance abuse treatment programs to locate in certain zones without obtaining a CO.

<sup>20</sup> Mem. from George A. Nilson, Baltimore City Solicitor, to Mayor Sheila Dixon at 1 (Feb. 12, 2008) (emphasis added), MCCB 9274-75 (hereinafter “Nilson Mem. 2/12/2008”) (Ex. 17).

<sup>21</sup> *Development Guidebook* at 14, 15 (Ex. 3).

<sup>22</sup> John Hickey Aff. (Sept. 6, 2007), ¶¶ 3, 6, US 3001-11 (hereinafter “Hickey Aff.”) (Ex. 18).

<sup>23</sup> *Id.* ¶¶ 8-9; Tuerk House 30(b)(6) (Elliot Driscoll) Dep. 139:20-140:4 (Sept. 7, 2010) (hereinafter “Driscoll Dep.”) (Ex. 19).

<sup>24</sup> Hickey Aff. ¶¶ 12-22 (Ex. 18). Tuerk House searched for, but was unable to find an alternative property on which to expand, and the valuable property it already owns remains under-used. *Id.* ¶¶ 22-24,

In 2003, Powell Recovery Center initiated plans to add a three-story rear addition to its building at 14 South Broadway.<sup>25</sup> Powell Recovery was told by both a City zoning official and Councilman James Kraft to get approval from the community association.<sup>26</sup> After more than two years and considerable effort, Powell Recovery obtained the support of the community associations and a CO was passed to enable it to expand.<sup>27</sup> The turning point came only after the program director, Bill Scott, happened to appear at one association meeting where the association member most opposed to Powell Recovery Center recognized Mr. Scott as the good Samaritan who had rescued her when she was assaulted on the street.<sup>28</sup> After seeing that Mr. Scott was affiliated with Powell Recovery, that association member decided to vote for the program's expansion and the association as a whole then approved the project.<sup>29</sup>

In late 2008, Tuerk House initiated plans to expand Weisman-Kaplan House, its halfway house for men, located at 2521-2523 Maryland Avenue.<sup>30</sup> Councilman Young told Elliot Driscoll that he needed to get community approval in order to get the councilman's support for the expansion and renovation of Weisman Kaplan House.<sup>31</sup> The CO bill ultimately passed

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26.

<sup>25</sup> William Scott Aff. (Aug. 12, 2010), ¶¶ 2-4, US 4070-76 ("hereinafter Scott Aff.") (Ex. 20).

<sup>26</sup> Powell Recovery 30(b)(6) (Bill Scott) Dep. 35:10-36:4, 134:19-136:1, 139:2-10 (Aug. 26, 2010) (hereinafter "Scott Dep.") (Ex. 21); Scott Aff. ¶¶ 5-6 (Ex. 20).

<sup>27</sup> Scott Aff. ¶¶ 12-20 (Ex. 20); Scott Dep. 86:9-88:13 (Ex. 21).

<sup>28</sup> Scott Aff. ¶ 15 (Ex. 20); Scott Dep. 86:9-88:10, 138:4-15 (Ex. 21).

<sup>29</sup> Scott Aff. ¶ 16 (Ex. 20); Scott Dep. 86:9-88:10, 138:4-139:1 (Ex. 21).

<sup>30</sup> Driscoll Dep. 75:2-5 (Ex. 19).

<sup>31</sup> Id. 74:18-76:11, 138:1-15; Email from Elliot Driscoll to Shannon Snow, Episcopal Housing (Mar. 23, 2009), BCSAD 7227 (Ex. 22) ("Shannon, I spoke with Jack Young, he is only willing to help us if the community board is on board with it."). Mr. Young testified that he could not recall the specifics of his conversation with Mr. Driscoll. Young Dep. 30:5-9, 10:6-12 (Ex. 16). His general assertion that he never talks with a drug treatment program seeking to locate about getting the support of the local community association (Id. 15:14-20) is contradicted by other evidence. For example, Dr. Eric Strain of Johns Hopkins testified that Johns Hopkins did not purchase a property at 1200 East Fayette Street to use as supportive housing for women recovering from substance abuse, in significant part, because Councilman Jack Young said that he did not think the community would support it and Young wouldn't support it. Johns Hopkins Health System 30(b)(6) (Eric Strain, M.D.) Dep. 23:3-24:19 (Oct. 27, 2010) (hereinafter "Strain Dep.") (Ex. 23). In addition, at the public hearing on City Council Bill 07-0002,

nearly a year after Tuerk House started the CO process.<sup>32</sup>

In 2008, Planning Department officials told Johns Hopkins Health System Corporation, which had contracted to purchase a property at 2926 Harford Road from Second Genesis (a RSATP) to use as housing for women recovering from substance abuse, to seek the support of the community.<sup>33</sup> Councilwoman Mary Pat Clarke said she would take whatever position the community took with respect to the project.<sup>34</sup> The community association refused to support the project and so Johns Hopkins terminated the contract to purchase the property.<sup>35</sup> In 2009, another organization, The Baltimore Station, sought to purchase the same Second Genesis property for a RSATP but the community association again opposed the use of the property for that purpose, and Councilwoman Clarke again said she would support the community association's position.<sup>36</sup> Thus, The Baltimore Station abandoned its attempt to purchase the property.<sup>37</sup>

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which would have amended the zoning code to allow residential substance abuse treatment programs to locate in certain zones as of right, Mr. Young made clear his opposition to the bill, stating: "we're elected to represent the people who vote for us and when they don't want something, that's part of the process. If they don't want it in their community and their neighborhood, that's part of the process." Transcript of Baltimore City Council Meeting on Bill 07-0002, May 7, 2008, US 1409-1716, at 1467 (59:16-21) (hereinafter "Council Mtg. Tr.") (Ex. 24). However, even if the Court were to find that there is a factual dispute as to whether community approval is required for a CO, the CO process is still facially discriminatory as a matter of law because it is a much lengthier and more burdensome process than being permitted as of right, even if the time and effort needed to obtain community approval is not considered.

<sup>32</sup> Ord. 10-260, MCCB 19462-63 (Ex. 9).

<sup>33</sup> Johns Hopkins Health System 30(b)(6) (Stanley Fine) Dep. 12:14-15:5, 16:1-16 (Oct. 27, 2010) (hereinafter "Fine Dep.") (Ex. 25).

<sup>34</sup> Id.

<sup>35</sup> Id. 18:14-24:12; Strain Dep. 14:14-16:3, 19:2-9 (Ex. 23); Johns Hopkins Health System 30(b)(6) (Jeffrey Koenig) Dep. 22:8-25:5 (Oct. 27, 2010) (hereinafter "Koenig Dep.") (Ex. 26); Letter from Jeffrey H. Koenig, Director of Leasing, Johns Hopkins Real Estate to Michael McGuiness, SG Housing Corporation (Mar. 27, 2008) (Ex. 27).

<sup>36</sup> Baltimore Station 30(b)(6) (Michael Seipp) Dep. 16:7-19:17 (Sept. 30, 2010) (hereinafter "Seipp Dep.") (Ex. 28); Second Genesis 30(b)(6) (Jack Klimp) Dep. 151:7-156:5 (Aug. 31, 2010) (hereinafter "Klimp Dep.") (Ex. 29).

<sup>37</sup> Seipp Dep. 19:1-12 (Ex. 28). On February 17, 2011, Second Genesis finalized the sale of the property to Esther's Place Inc. (a/k/a E & H Enterprises, LLC), which intends to operate an assisted living center for the elderly there. Agreement of Sale for 2926 Harford Road, US 4213-4239, at 4215, 4231

In addition to Solicitor Nilson’s admission and the experiences of these programs, those with long-term experience with Baltimore’s zoning procedures, testified that there is an unwritten rule that a residential substance abuse treatment program cannot locate without the approval of the local community association. For example, Stanley Fine, a lawyer who has been handling zoning matters in Baltimore for approximately 30 years, testified that “[w]hen you have a city council ordinance . . . , you always go to the community,” and that community associations “have a very significant role [in the city on issues of zoning and land use].”<sup>38</sup> In Fine’s many years of experience, he testified that “I don’t think there’s been a predevelopment meeting I’ve ever had with [the P]lanning [Department] that they haven’t said go out to the community.”<sup>39</sup> Mr. Fine testified that he has never attempted to secure a conditional use ordinance from the City Council without the support of the neighborhood association, and that “[t]ypically a councilperson would say go out to the neighborhood, I support the neighborhood. If the neighborhood doesn’t support it, the councilperson’s not going to introduce it, so it’s over.”<sup>40</sup> Likewise, Gale Saler, currently the Chesapeake Regional Director of Gaudenzia, Inc., an organization providing substance abuse treatment services, recounted identifying a row of small apartment buildings to purchase for a residential treatment program in Baltimore in the 1980s and 1990s and being told by the Addictions Director for Baltimore City at that time, “You will never get community approval for this. Forget it.”<sup>41</sup>

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(Ex. 30) (per counsel for Second Genesis, attached pages are no longer confidential or subject to protective order). The sale was contingent on the community association accepting the operation of an assisted living center for the elderly for zoning approval. Id. at 4231. From the date that the Johns Hopkins’ contract would have closed in 2008 until the sale of the property to Esther’s Place on February 17, 2011, Second Genesis was forced to maintain the property and pay the associated costs.

<sup>38</sup> Fine Dep. 6:12-22, 32:21-33:1, 26:13-27:15 (Ex. 25).

<sup>39</sup> Id. 26:18-27:15.

<sup>40</sup> Id. 37:21-38:9.

<sup>41</sup> Gale Saler Aff. (Sept. 18, 2007), ¶¶ 1, 13-14, US 3030-34 (hereinafter “Saler Aff.”) (Ex. 31); Gaudenzia 30(b)(6) (Gale Saler) Dep. 22:16-25:16 (Sept. 14, 2010) (hereinafter “Saler Dep.”) (Ex. 32).

3. Residential Substance Abuse Treatment Programs May Locate by Attempting to Utilize a Different Land Use Classification that Does Not Refer to Substance Abuse Treatment.

Although the only land use classification in the Zoning Code that relates to substance abuse treatment is “homes for the rehabilitation of non-bedridden alcoholics,” the City has allowed some RSATPs with more than four residents<sup>42</sup> to be classified as single-family dwellings, multiple-family dwellings, rooming houses, or other land uses that are not subject to the CO requirement.<sup>43</sup> Some of these programs were permitted to locate as of right while others had to receive conditional approval from the Board of Municipal and Zoning Appeals (BMZA), rather than undergoing the more burdensome process of obtaining a CO from the City Council.

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Subsequently, Gaudenzia, Inc. sought to open a residential treatment program on Woodland Avenue in Baltimore in 2003 to serve approximately 160 residents. *Saler Aff.* ¶¶ 4-5 (Ex. 31). Because of the CO process, Gaudenzia selected the Woodland Avenue site, which was an undesirable location (a dumping ground for parts and cars) in an industrial zone where there was expected to be little opposition to opening a drug treatment program. *Id.*; *Saler Dep.* 160:13-162:15 (Ex. 32). Were it not for the anticipated difficulty of getting community approval required for the CO process, Gaudenzia would have selected a more residential, attractive site with the amenities found in residential neighborhoods. *Saler Aff.* ¶ 5 (Ex. 31). The entire CO process took over a year. *Id.* ¶ 11.

<sup>42</sup> Residential substance abuse treatment programs can avoid the CO process altogether by locating as of right, according to the City’s definition of a family, if they do not have more than four residents. *Def.’s Resp. to United States’ Interrog.* at #4 (Jan. 6, 2010) (Ex. 33). Section 1-142(3) of the Zoning Code defines a “family,” in relevant part, as “a group of not more than 4 people, who need not be related by blood, marriage, or adoption, living together as a single housekeeping unit in a dwelling unit.” (Ex. 2) Indeed, RSATPs housing four or fewer people have located in residential districts without any special zoning permission. *See, e.g., Ex. A to Interrog. Resp.* 9/28/2010 at ID# 10, 30 (Ex. 4). However, there are both therapeutic and financial reasons why most residential substance abuse treatment providers choose to operate larger programs. *Recovery Network 30(b)(6) (Clark Hudak) Dep.* 80:16-81:20; 144:9-145:8 (Aug. 26, 2010) (hereinafter “Hudak Dep.”) (Ex. 34) (cost-effectiveness; therapeutic activities designed for a minimum of eight participants); *Scott Dep.* 128:9-130:11 (Ex. 21) (financial difficulties associated with operating smaller facilities); *Saler Dep.* 151:5-152:12, 188:7-189:9 (Ex. 32) (greater cost associated with operating smaller facilities, larger facilities are therapeutically beneficial because able to offer more services). The City does not dispute this. *Information Provided by Baltimore Housing – Office of the Zoning Adm’r*, [http://static.baltimorehousing.org/pdf/ra\\_app\\_ther.pdf](http://static.baltimorehousing.org/pdf/ra_app_ther.pdf) (last visited Jan. 26, 2011) (Ex. 35) (acknowledging that allowing more than four people with disabilities to live together may be therapeutically beneficial or financially necessary); *Baltimore Housing – Office of the Zoning Adm’r, Frequently Asked Questions - Application Form to Request a Reasonable Accommodation*, [http://static.baltimorehousing.org/pdf/ra\\_app\\_faq.pdf](http://static.baltimorehousing.org/pdf/ra_app_faq.pdf) (last visited Feb. 10, 2011) (Ex. 36).

<sup>43</sup> Zoning Code; *Tanner Dep.* 73:4-74:5 (Ex. 1); *see, e.g., Ex. A to Interrog. Resp.* 9/27/2010 at ID# 11, 32 (single-family dwellings); ID# 20, 29, 35, 41 (multiple-family dwellings); ID# 13, 34 (rooming houses); ID# 40, 47 (no zoning approval because state-owned); ID# 42 (planned unit development) (Ex. 4).



There are no criteria in the Zoning Code or elsewhere governing whether a particular RSATP is (1) required to go through the CO process as a “home for non-bedridden alcoholics,” which may result in delay or preclusion from locating because of the many steps involved in the process and the neighborhood approval requirement; (2) classified as a multiple-family dwelling and permitted to locate as of right or with BMZA approval; (3) classified as a single-family dwelling and permitted to locate with BMZA approval or a reasonable accommodation;<sup>44</sup> or (4) classified as a rooming house and permitted to locate as of right or with BMZA approval. If a savvy program chooses to seek zoning approval utilizing another land use classification, without mentioning its plan to use the property for residential substance abuse treatment, it may not be required to obtain a CO.<sup>45</sup> A program, however, that obeys the literal language of the Zoning Code and identifies its residential substance abuse treatment program as a “home for the rehabilitation of non-bedridden alcoholics” is subject to the CO process.

It is up to the program to read the over 400-page long Zoning Code and determine which land use classification applies and which zoning process it should pursue.<sup>46</sup> City officials, including David Tanner, the Executive Director of the BMZA and former Zoning Administrator from 1983 through 2001, and Geoffrey Veale, the current Zoning Administrator, confirmed as corporate designees for the City that the Zoning Administrator’s land use classification of an

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<sup>44</sup> The City created a written “Reasonable Accommodation Policy” in 2007. City of Baltimore, Office of the Zoning Adm’r, Reasonable Accommodations Policy and Procedures, MCCB 7327-48 (Ex. 37); City of Baltimore Press Release, Mayor Dixon Unveils New City Policy to Promote Better Access to Housing for Persons With Disabilities, Mar. 30, 2007, US 2327-28 (Ex. 38). This policy, which is not part of the Zoning Code, allows more than four unrelated persons with disabilities to live together in a single-family dwelling although that would otherwise be a violation of the Zoning Code’s definition of “family.” Id. Some RSATPs have located under the reasonable accommodation policy and thereby avoided having to get a CO. See, e.g., Ex. A to Interrog. Resp. 9/27/2010 at ID# 1, 2 (Ex. 4).

<sup>45</sup> Tanner Dep. 214:25-219:23 (Ex. 1) (three programs were permitted to locate without an ordinance when the treatment component of the programs was not mentioned).

<sup>46</sup> Def.’s Resp. to United States’ Third Interrog. at #2, Oct. 4, 2010 (Ex. 39); Tanner Dep. 70:13-71:20 (Ex. 1).

RSATP depends on how a program describes itself.<sup>47</sup> Based on the program’s explanation of its intended use, the Zoning Administrator’s interpretation of the Zoning Code, and his willingness to work with programs to find a less restrictive classification, a program may not be required to get a CO.<sup>48</sup>

The Zoning Administrator does not always ask whether the program actually meets the criteria that are defined for the proposed land use in the Zoning Code, and, as a result, may approve a land use classification to which the program is not legally entitled.<sup>49</sup> For example, the Zoning Code defines a rooming house as an establishment that charges rent to individuals on a daily, weekly, or monthly basis, and permits a rooming house to locate as of right in some zones and requires approval from the BMZA in other zones.<sup>50</sup> However, one program received BMZA approval to locate as a rooming house – thereby avoiding the lengthy and burdensome CO process it would be subject to as a home for non-bedridden alcoholics – even though there is no indication that it charges rent to residents.<sup>51</sup> Similarly, although a multiple-family dwelling is defined as having two or more dwelling units, each of which must contain a kitchen, a program got BMZA approval to locate as a multiple-family dwelling, even though it had only one kitchen.<sup>52</sup> Either these programs were classified under definitions that they do not satisfy, the City does not make inquiries or maintain records to ensure that programs meet the definitions established in the Zoning Code, or the City has not accurately reported how residential substance

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<sup>47</sup> Tanner Dep. 11:22-11:24, 40:22-41:12, 47:12-48:24, 49:25-50:24, 90:10-91:6 (Ex. 1); City 30(b)(6) (Geoffrey Veale) Dep. 21:15-25:11 (July 28, 30, 2010) (hereinafter “Veale Dep.”) (Ex. 40).

<sup>48</sup> Tanner Dep. 47:12-48:24 (Ex. 1) (describing how the Zoning Administrator may try to make an applicant’s use fit under a permitted, rather than a conditional or prohibited, classification).

<sup>49</sup> Id. 49:25-50:24.

<sup>50</sup> Zoning Code §§ 1-185(a), 4-1103, 4-1201, 4-1203, 5-201, 5-203, 6-306 (Ex. 2).

<sup>51</sup> Ex. A to Interrog. Resp. 9/27/2010, at ID# 34 (Ex. 4); Zoning Files for 2122-26 Mura Street, MCCB 20758-20765 (Ex. 41).

<sup>52</sup> Zoning Code §§ 1-136(c)(3), 1-137 (Ex. 2); Ex. A to Interrog. Resp. 9/27/2010, at ID# 29 (Ex. 4); Zoning Summary Card for 13-19 South Fulton Ave., MCCB 20724, 20726 (Ex. 42).

abuse programs were classified for zoning purposes.

B. History of the CO Requirement

The City of Baltimore adopted the CO requirement for homes for non-bedridden alcoholics in 1962.<sup>53</sup> Before the CO requirement was adopted, homes for alcoholics were not permitted to locate at all in residential neighborhoods in Baltimore.<sup>54</sup> Between 1959 and 1961, a treatment program, Flynn Christian Fellowship Houses, Inc., tried multiple times to get the City Council to pass an ordinance allowing treatment programs to locate in residential zones either as an accessory use by right, with the permission of the Zoning Board, or with the permission of the City Council by ordinance.<sup>55</sup> In November 1959, the Planning Commission and BMZA recommended against permitting such homes as an accessory use in a residential district because

this could result in misuses which would be a serious nuisance to adjoining residential properties. While the Commission is sympathetic to the aims and purposes of the Flynn Christian Fellowship Houses, Incorporated, it feels that the locations for such homes should be subject to individual considerations and controls, guides and standards which would not be required under the proposed ordinance.<sup>56</sup>

In seeking the conditional ordinance process in order to locate in residential zones, the Flynn Christian Fellowship Houses noted that “[t]his ordinance permits any neighborhood to vote whether they wish one of our homes in their vicinity and gives them ample chance to protest against us.”<sup>57</sup> Ultimately, the City Council adopted an ordinance allowing “non-profit homes for the rehabilitation of non-bedridden alcoholic persons and for the care and custody of homeless

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<sup>53</sup> Ord. No. 1295 Reported Favorably, with Amendment, and Ordered Printed for Third Reading, J. of City Council of Baltimore 1126 (Jan. 29, 1962) US 2632-33 (Ex. 43).

<sup>54</sup> Richard Frank, Council Asked to Reject Alcoholic Home Bill, Baltimore Evening Sun, June 15, 1961, at 18, US 2627 (Ex. 44).

<sup>55</sup> Id.

<sup>56</sup> Philip Darling, Dir., Planning Comm’n, Ord. No. 161 Disapproved by Planning Commission and Board of Municipal and Zoning Appeals, J. of City Council of Baltimore 537 (Nov. 16, 1959), US 2629-30 (Ex. 45).

<sup>57</sup> Arthur D. Pratt, Jr., President, Flynn Christian Fellowship Houses, Inc., Letters to the Editor, Baltimore Morning Sun, Oct. 2, 1961, US 2635 (Ex. 46).

persons” in some residential zones with the approval of the City Council and Mayor by ordinance.<sup>58</sup>

Additional opposition to drug treatment programs was recorded in 1972, when the Baltimore Commissioner of Health commented on a proposed bill that would authorize the Health Department to license and inspect drug abuse rehabilitation centers. The Commissioner opposed such authority, noting:

The primary problem involved with drug abuse rehabilitation centers is their location. Rightly so, many communities do not want such a center in their neighborhood because of the fear that it will attract drug addicts and the crime associated with such addicts to their areas. The best way that this problem can be handled is through zoning where both the City Council and the Zoning Commission can hold public hearings to determine best where such a center can or cannot be located.<sup>59</sup>

C. Community and City Council’s Opposition to Amending CO Requirement

In 2004, then-Mayor Martin O’Malley introduced two bills to amend the zoning code so that residential and outpatient substance abuse treatment facilities would not be required to obtain a CO in order to locate.<sup>60</sup> The Planning Commission recommended that the City Council pass Bill 04-1364, the residential facility bill.<sup>61</sup> The Planning Commission’s Staff Report summarized the bill as follows:

This bill is proposed in order to modernize the Zoning Code and to comply with Federal laws protecting persons who are disabled. The Code now requires that even small group homes obtain a City Council ordinance in order to operate in the City.<sup>62</sup>

Other city agencies supported the bill, including the Department of Housing and Community Development, the Commission on Aging and Retirement Education (CARE), the Department of

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<sup>58</sup> Ord. No. 1295 Reported Favorably, with Amendment, and Ordered Printed for Third Reading, J. of City Council of Baltimore 1126 (Jan. 29, 1962), US 2632-33 (Ex. 43).

<sup>59</sup> Robert Farber, M.D., Comm’r of Health, Re: Ordinance Introductory No. 200, J. of City Council of Baltimore 432 (Apr. 17, 1972), US 2642-3 (Ex. 47).

<sup>60</sup> Answer ¶ 18, ECF No. 7.

<sup>61</sup> Mem. from Otis Rolley, III, Dir., Dep’t of Planning, to President and Members of City Council (May 7, 2004), MCCB 2247-50 (Ex. 48).

<sup>62</sup> Id., Staff Report at 1.

Transportation, and the Health Department.<sup>63</sup> Neither Bill 04-1364 nor the outpatient bill was passed out of the Land Use and Transportation Committee due to pressure from residents opposed to the bill.<sup>64</sup>

In 2005, the Mayor re-introduced the residential facility bill as Bill 05-0221.<sup>65</sup> The Planning Commission Staff Report for Bill 05-0221 summarized the bill identically to Bill 04-1364.<sup>66</sup> Again, city agencies supported the bill, including the Health Department, Department of Housing and Community Development, and the Police Department.<sup>67</sup> On December 7, 2005, the residential bill was withdrawn by the Director of the Department of Planning on behalf of the Mayor, citing concerns expressed by community organizations, individual citizens, and state and local elected officials.<sup>68</sup> In 2005, the Mayor re-introduced the outpatient bill as Bill 05-0220, which was eventually enacted on November 8, 2006.<sup>69</sup> It made outpatient substance abuse treatment programs subject to the same zoning requirements as other outpatient medical clinics.<sup>70</sup>

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<sup>63</sup> See Mem. from Paul T. Graziano, Comm'r, Dep't of Hous. and Cmty. Dev., to the President and Members of the City Council (Sept. 8, 2004), MCCB 2299-2300 (Ex. 49); Mem. from John P. Stewart, Exec. Dir., Comm'n on Aging and Retirement Educ. (CARE), to President and Members of the City Council (May 27, 2003), MCCB 2242-43 (Ex. 50); Mem. from Alfred H. Foxx, Dir., Dep't of Transp., to President and Members of City Council (May 24, 2004), MCCB 2244 (Ex. 51); Mem. from Dr. Peter L. Beilenson, Comm'r, Health Dep't, to President and Member of City Council (May 12, 2004), MCCB 2245-46 (Ex. 52).

<sup>64</sup> Alec MacGillis and Lynn Anderson, O'Malley Says He'll Back Easing Way for Drug Treatment Centers, Baltimore Sun, May 17, 2005, US 2716-18 (Ex. 53); see also Douglas B. McCoach, III, Dir., Planning Comm'n, Staff Report on 07-0002 at 1 (Feb. 21, 2008), MCCB 11493-95 (Ex. 54).

<sup>65</sup> City of Baltimore Council Bill 05-0221 (First Reader), MCCB 2368-80 (Ex. 55).

<sup>66</sup> Otis Rolley, III, Dir., Planning Comm'n, Staff Report on City Council Bill 05-0221 at 1 (Oct. 20, 2005), MCCB 2550-52 (Ex. 56).

<sup>67</sup> See Mem. from Francine J. Childs, Acting Comm'r, Health Dep't, to President and Members of City Council (Nov. 2, 2005), MCCB 2357-58 (Ex. 57); Mem. from Paul Graziano, Comm'r, Hous. Dep't, to President and Members of City Council (Aug. 5, 2005), MCCB 2360 (Ex. 58); Letter from Errol L. Dutton, Deputy Comm'r, Police Dep't, to President and Members of City Council (Aug. 10, 2005), MCCB 2362-63 (hereinafter "Dutton Letter 8/10/2005") (Ex. 59).

<sup>68</sup> Mem. from Otis Rolley, III, Dir., Planning Dep't, to President and Members of City Council (Dec. 7, 2005), MCCB 2548-49 (Ex. 60); see also Letter from Mayor Martin O'Malley to President and Members of City Council (Dec. 8, 2005), MCCB 2356 (Ex. 61).

<sup>69</sup> City of Baltimore Council Bill 05-0220 (First Reader) (July 11, 2005), US 2720-23 (Ex. 62).

<sup>70</sup> City of Baltimore Ord. 06-342 (Nov. 8, 2006), MCCB 5426-29 (Ex. 63).

In 2007, the United States opened an investigation of the City of Baltimore regarding zoning of residential substance abuse treatment facilities. In response, then-Mayor Sheila Dixon re-introduced the residential substance abuse facility bill in December 2007 as Bill 07-0002.<sup>71</sup> In a memo dated November 29, 2007, Baltimore City Solicitor George Nilson recommended the introduction and passage of the bill to then-City Council President Stephanie Rawlings-Blake.<sup>72</sup> Mr. Nilson explained that the proposed bill was similar to two previously introduced City Council Bills: Bill 04-1364 and Bill 05-0221, and that “the purpose of the bill is to ensure that the City’s zoning standards and practices comply with the Americans with Disabilities Act.”<sup>73</sup> Additionally, the Law Department analyzed and endorsed the purpose of the bill, stating that:

Council Bill 07-0002 would accomplish two important purposes. First, it would help ensure that zoning standards are consistent with Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (the “FHA”) and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (the “ADA”). Second, it would conform zoning standards to state licensing provisions that regulate group homes and nursing homes.<sup>74</sup>

The other agencies to which the bill was referred also supported the bill, including the Planning Commission, the Board of Municipal and Zoning Appeals, Baltimore Housing, the Health Department, Baltimore Police Department, Department of Transportation, Parking Authority, and Baltimore Substance Abuse Systems, Inc.<sup>75</sup> The Land Use and Transportation

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<sup>71</sup> City of Baltimore Council Bill 07-0002 (First Reader) (Dec. 7, 2007), MCCB 6459-71 (Ex. 64).

<sup>72</sup> Mem. from George A. Nilson, City Solicitor, Law Dep’t, to Stephanie Rawlings-Blake, President of City Council (Nov. 29, 2007), MCCB 9194-95 (Ex. 65).

<sup>73</sup> Id.

<sup>74</sup> Bhattacharyya Letter 3/19/2008 (Ex. 15), at 2.

<sup>75</sup> See Mem. from Douglas B. McCoach, Dir., Planning Dep’t, to President and Members of City Council (Feb. 22, 2008), MCCB 8766 (Ex. 66); Letter from David C. Tanner, Exec. Dir., Bd. of Mun. and Zoning Appeals, to President and Members of City Council (May 2, 2008), MCCB 8770 (Ex. 67); Mem. from Paul T. Graziano, Comm’r, Hous. Dep’t, to President and Members of City Council (Apr. 25, 2008), MCCB 8771 (hereinafter “Graziano Letter 4/25/2008”) (Ex. 68); Mem. from Joshua M. Sharfstein, M.D., Comm’r, Health Dep’t, to President and Members of City Council (Feb. 23, 2008), MCCB 8772-73 (hereinafter “Sharfstein Mem. 2/23/2008”) (Ex. 69); Mem. from James H. Green, Dep. Legal Counsel, Police Dep’t, to President and Members of City Council (Apr. 28, 2008), MCCB 8775 (hereinafter “Green Mem. 4/28/2008”) (Ex. 70); Mem. from Alfred H. Foxx, Dir., Transp. Dep’t, to President and

Committee then held a public hearing on the bill on May 7, 2008, at which many Council members and community members expressed opposition to the bill.<sup>76</sup> For example, then-City Council member Jack Young (now City Council President) said he would vote against the bill, explaining that the community should get to decide whether a residential drug treatment program locates in their neighborhood, and that having a treatment program next door is undesirable.<sup>77</sup> No further action has been taken by the City Council on Bill 07-0002.

D. City's Draft Revised Zoning Code Eliminates CO Requirement in Favor of BMZA Approval

The City of Baltimore is currently in the process of rewriting its Zoning Code.<sup>78</sup> The proposed Zoning Code completely eliminates conditional uses requiring approval of the City Council.<sup>79</sup> Instead, all conditional uses are subject to approval by the Board of Municipal Zoning Appeals.<sup>80</sup> Under the draft Zoning Code, licensed residential substance abuse treatment facilities would be classified as “licensed residential care facilities.”<sup>81</sup> Such facilities would locate as of right or as a conditional use subject to the approval of the BMZA, depending on the number of residents and the district in which they seek to locate.<sup>82</sup>

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Members of City Council (Mar. 13, 2008), MCCC 8776 (Ex. 71); Mem. from Peter Little, Exec. Dir., Parking Auth., to President and Members of City Council (Dec. 11, 2007), MCCC 8777 (Ex. 72); Mem. from Adam Brickner, President, Baltimore Substance Abuse Sys., Inc. to City Council, MCCC 8774 (Ex. 73).

<sup>76</sup> Larry E. Greene, City Office of Council Services, Hearing Notes, Bill 07-0002 (May 12, 2008), MCCC 8782-84 (hereinafter “Greene Notes 5/12/2008”) (Ex. 74).

<sup>77</sup> Council Mtg. Tr. at 1457-58 (49:8-50:10), 1467 (59:16-21) (Ex. 24).

<sup>78</sup> Tanner Dep. 19:1-13 (Ex. 1); see generally The New Baltimore City Zoning Code, <http://www.rewritebaltimore.org/home.html> (last visited Feb. 11, 2011).

<sup>79</sup> Tanner Dep. 20:10-21:7 (Ex. 1); Baltimore Zoning Code Preliminary Annotated Outline (May 2009), MCCC 16987-17029, at 8, § 5.4 (Ex. 75).

<sup>80</sup> Id.; Baltimore Zoning Code Draft 1.0 (Apr. 2010), §§ 4-402 to 4-403, <http://baltimorecity-consult.limehouse.com/portal/zoning-apr-draft?tab=files> (follow Baltimore Zoning Code Draft.pdf hyperlink) (last visited March 10, 2011) (hereinafter “Zoning Code Draft”) (Ex. 76).

<sup>81</sup> See Zoning Code Draft, Title 1-13 (Ex. 76).

<sup>82</sup> Id., Tables 8-1 (single-family residential districts), 9-1 (multiple-family residential districts), 10-1 (commercial districts), 12-1 (office-residential districts), 12-3 (transit-oriented development districts).

The draft Zoning Code eliminates the CO process in order to ensure that the guidelines and standards established for conditional uses in the Zoning Code are applied properly, according to David Tanner, Executive Director of the BMZA and former Zoning Administrator.<sup>83</sup> Currently, the BMZA is required to apply certain standards when evaluating requests for conditional uses, but the City Council is not required to do so, and has not traditionally applied those standards.<sup>84</sup> Further, Mr. Tanner testified, the current conditional use ordinance process requires “two sets of hearings to apply the same standards that the board has been applying all along,” which makes the process more time consuming.<sup>85</sup> Thus, subjecting all conditional uses to BMZA approval will streamline the process.<sup>86</sup>

E. State Certified Residential Substance Abuse Treatment Programs Pose No Danger to the Community

The City’s 30(b)(6) representative on the safety of RSATPs, Colonel John Skinner, the Chief of Patrol for the Baltimore Police Department, admitted that state certified residential substance abuse treatment programs do not cause a significant risk to the health or safety of others.<sup>87</sup> He testified that there have not been any problems generally with RSATPs and they do not pose any negative impacts on their neighbors or surrounding community.<sup>88</sup>

In addition, the Baltimore Health Commissioner, Dr. Joshua Sharfstein, explained how drug treatment actually improves safety, in his memorandum to the City Council in support of Bill 07-0002, which would have eliminated the CO requirement for residential drug treatment facilities. Dr. Sharfstein stated that

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<sup>83</sup> Tanner Dep. 20:22-23:9 (Ex. 1).

<sup>84</sup> Id.

<sup>85</sup> Id. 22:21-23:16.

<sup>86</sup> See id.

<sup>87</sup> City 30(b)(6) (John Skinner) Dep. 20:22-22:15 (July 27, 2010) (hereinafter “Skinner Dep.”) (Ex. 77).

<sup>88</sup> Id.



Making effective drug treatment available is the foundation of a public health approach to drug addiction. Studies have shown that investing in drug treatment not only reduces drug use but also provides for a reduction in crime and many of the other negative consequences of addiction. “Steps to Success,” a report released by Baltimore Substance Abuse Systems has found that substance abuse treatment results in a decrease of illegal activity by 64% within a year of treatment. Similarly, the National Treatment Improvement Evaluation Study found that treatment results in a 64% decline in arrests. Over the last decade, funding for substance abuse treatment for uninsured individuals in the city of Baltimore has increased from \$17.7 million in fiscal year 1996 to \$52.9 million in 2005. . . . Over this decade, rates of crime and sexually transmitted diseases have dropped substantially.<sup>89</sup>

The Baltimore Police Department also supported Bill 07-002 and Bill 05-0221, its precursor.<sup>90</sup> In 2005, the Police Department wrote to the City Council that

The Baltimore Police Department (BPD) supports this bill. The facilities covered by this bill are important adjuncts to Baltimore City’s overall public safety strategy. It is important that such facilities be available for all those who need them, including persons who might be at risk of committing crimes or themselves being the victims of crimes. The Baltimore Police Department supports the continued growth of group homes, nursing homes, and emergency shelters, and it is our understanding that this bill would help to achieve this goal.<sup>91</sup>

Colonel John Skinner testified that the Police Department would not have supported any bill that posed a risk to public safety or police.<sup>92</sup> The Police Department also supported the passage of several CO bills for RSATPs, stating that substance abuse treatment was an important component of Baltimore City’s public safety strategy.<sup>93</sup>

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<sup>89</sup> Sharfstein Mem. 2/23/2008 (Ex. 69).

<sup>90</sup> Dutton Letter 8/10/2005 (Ex. 59); Green Mem. 4/28/2008 (Ex. 70).

<sup>91</sup> Dutton Letter 8/10/2005 (Ex. 59).

<sup>92</sup> Skinner Dep. 22:24-23:11 (Ex. 77).

<sup>93</sup> Dutton Letter 8/10/2005 (Ex. 59); see also Letter from Kenneth L. Blackwell, Dep. Comm’r, Police Dep’t, to President and Members of City Council (Dec. 22, 2003), MCCB 2149 (Ex. 78); Letter from Kenneth L. Blackwell, Dep. Comm’r, Police Dep’t, to President and Members of City Council (Aug. 27, 2003), MCCB 2087 (Ex. 79); Letter from Kenneth Blackwell, Acting Dep. Comm’r, Police Dep’t, to President and Members of City Council (Mar. 13, 2002), MCCB 1979 (Ex. 80).

## IV. ARGUMENT

### A. Summary Judgment Standard

Summary judgment is appropriate where the Court is satisfied that “there is no genuine dispute as to any material fact” and the moving party is entitled to judgment as a matter of law.<sup>94</sup> Evidence should be viewed in the light most favorable to the non-moving party.<sup>95</sup> Only disputes over facts that might affect the outcome of the case under the governing substantive law will properly preclude summary judgment.<sup>96</sup> “[A] mere scintilla of evidence is not enough to create a fact issue.”<sup>97</sup> To deny summary judgment, there must be “sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”<sup>98</sup> “[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate.”<sup>99</sup> Summary judgment is not “a disfavored procedural shortcut” but an important mechanism for weeding out “claims and defenses [that] have no factual bases.”<sup>100</sup>

### B. The City’s CO Requirement for “Homes for Non-Bedridden Alcoholics” Violates the ADA as a Matter of Law.

The City’s CO requirement for “homes for nonbedridden alcoholics” violates the ADA because it discriminates against people with disabilities on the basis of their disability, both on its face and by its intent. *First*, people in substance abuse treatment programs are persons with disabilities. Not only has the City conceded that RSATP residents have a disability but the

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<sup>94</sup> Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

<sup>95</sup> Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 124 (4th Cir. 1990).

<sup>96</sup> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

<sup>97</sup> Barwick v. Celotex Corp., 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627, 632 (E.D.N.C. 1966), aff’d, 388 F.2d 987 (4th Cir. 1967)).

<sup>98</sup> Anderson, 477 U.S. at 249-50 (citations omitted).

<sup>99</sup> Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991).

<sup>100</sup> Celotex Corp., 477 U.S. at 327.

licensing requirements for RSATPs in the State of Maryland *require* that only people with disabilities be admitted to their programs. *Second*, the CO requirement is discriminatory on its face because land uses comparable to RSATPs are permitted to locate as of right in the City. For example, group homes for individuals with mental illness and developmental disabilities can locate as of right in residential zones of appropriate density. *Third*, the CO requirement is intentionally discriminatory. There is overwhelming evidence from statements by City officials and the community that the CO requirement for “homes for nonbedridden alcoholics” is motivated by animus against people in recovery from substance abuse. For these reasons, discussed in more detail below, the United States’ Motion should be granted.

1. The Americans with Disabilities Act Protects Persons with Disabilities.

The ADA protects individuals who meet its definition of disability from discrimination on the basis of disability in a wide variety of situations. Title II of the ADA protects individuals with disabilities from discrimination in programs, services, or activities of state and local government entities, including zoning and land use decisions.<sup>101</sup> Title II provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.<sup>102</sup> A public entity covered by title II is not required, however, to permit an individual to participate in or benefit from its programs or services when that individual poses a direct threat to the health or safety of others.<sup>103</sup>

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<sup>101</sup> 42 U.S.C. § 12132; 28 C.F.R. § 35.130; Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 45-46 (2d Cir. 2002) (hereinafter “RECAP”); Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir. 1999); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44-46 (2d Cir. 1997); Start, Inc. v. Baltimore Cnty., 295 F. Supp. 2d 569, 576 (D. Md. 2003).

<sup>102</sup> 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).

<sup>103</sup> 28 C.F.R. pt. 35 app. A, Section 35.104 (2009); 28 C.F.R. § 35.139 (eff. Mar. 15, 2011); Bay Area, 179 F.3d at 735.

2. There is No Genuine Dispute of Material Fact That Individuals in Residential Substance Abuse Treatment Programs Are Persons With Disabilities

The ADA protects individuals who have, or have a record of, an impairment that substantially limits a major life activity.<sup>104</sup> Moreover, the ADA expressly contemplates protection of individuals who are “not engaging in current illegal use of drugs” and who are “participating in a supervised rehabilitation program.”<sup>105</sup> Thus, individuals seeking in-patient residential treatment for substance abuse addictions in Baltimore City have a disability under the ADA. The City has repeatedly conceded this point in internal memoranda and public hearings. Admissions criteria for such programs, established by Maryland statute, require a finding of disability. And federal courts routinely find such individuals disabled under the ADA.

a. The City has conceded that RSATP residents are persons with disabilities.

During the City’s unsuccessful efforts to pass legislation to amend its discriminatory zoning scheme, the City – including the Law Department, the same City agency responsible for defending this lawsuit – has conceded on multiple occasions that individuals who qualify for in-patient treatment have a disability and are entitled to coverage under the ADA. In February 2008, George Nilson, the City’s Solicitor, stated in a memo to then-Mayor Sheila Dixon supporting the proposed bill’s passage that recovering addicts who require in-patient treatment are persons with disabilities:

The effort here is by this legislation to put the types of licensed facilities (*whose residents are protected by the federal ADA*) in the same “status” as other facilities of comparable size and density so that it can no longer be said that these facilities

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<sup>104</sup> 42 U.S.C. §12102.

<sup>105</sup> 28 C.F.R. § 35.131; see also MX Group Inc. v. City of Covington, 293 F.3d 326, 339 (6th Cir. 2002) (“Congress recognized that many people continue to participate in drug treatment programs long after they have stopped using drugs illegally, *and that such persons should be protected under the Act.*”) (internal quotation omitted) (emphasis added).

are unlawfully restricted by the Zoning Code in a way that discriminates against populations protected by the ADA.<sup>106</sup>

Again, at a May 7, 2008 public hearing on Baltimore City Council Bill 07-0002, Mr. Nilson admitted that individuals recovering from substance abuse are persons with disabilities. When Councilwoman Mary Pat Clarke asked Nilson the following: “So if I’m a recovering or almost, I hope, pretty soon, recovering drug addicted person. Am I covered by ADA?[,]” Nilson replied, “You are.”<sup>107</sup>

- b. Maryland’s regulatory scheme for licensed substance abuse treatment programs effectively requires that RSATP residents have a disability

Individuals who qualify for in-patient residential treatment in Baltimore City, based on Maryland state regulations, are not capable of returning to family or independent living, and thus are disabled because they are substantially limited in the major life activity of independently caring for one’s self.<sup>108</sup> At a minimum, Maryland regulations require that patients appropriate for residential treatment meet the American Society of Addiction Medicine Patient Placement Criteria (“ASAM”) for Level III.1.<sup>109</sup> These include meeting the definition of a Substance Dependence Disorder in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”),

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<sup>106</sup> Nilson Mem. 2/12/2008 (Ex. 17) (emphasis added); see also Mem. from Deepa Bhattacharyya, Asst. Solicitor, Law Dep’t, to Edward Reisinger, Chairman, Land Use and Transp. Comm, (Sept. 5, 2008), MCCB 9425-31, ¶ 19 (hereinafter “Bhattacharyya Mem. 9/5/2008”) (Ex. 81) (state-licensed establishments affected by Bill 07-0002 “serve populations protected by the federal legislation . . .”); Bhattacharyya Letter 3/19/2008 (Ex. 15) (“[t]he purpose of the bill is to conform the City’s zoning standards to state licensing provisions and to federal laws that protect persons with disabilities.”).

<sup>107</sup> Council Mtg. Tr., at US 1444 (36:12-15) (Ex. 24). Other City agencies have similarly admitted that the populations served by the proposed Bill 07-0002 are protected by the ADA. See Graziano Letter 4/25/2008 (Ex. 68) (bill would ensure compliance with ADA); Sharfstein Mem. 2/23/2008, at 2 (Ex. 69) (same).

<sup>108</sup> COMAR 10.47.02.06(B); 42 U.S.C. § 12102; 28 C.F.R. § 35.104.

<sup>109</sup> COMAR 10.47.02.06. Drug treatment programs must be certified under Maryland law and the state regulations classify the programs for different levels of treatment. Md. Code Ann., Health-Gen. §§ 8-403(b) and 8-404(f); COMAR 10.47.02.01 - 10.47.02.09. Within Level III, the level for residential treatment, Level III.1 is the least intensive level. COMAR 10.47.02.06. If a patient who qualifies for a Level III.1 program has a disability, then any patient requiring a higher level of care also has a disability. Thus, this analysis will address individuals requiring care at a Level III.1 facility.

and specifications in the six ASAM dimensions.<sup>110</sup> The most relevant ASAM dimensions specify that without the structured, 24-hour monitored environment, the patient would likely suffer a relapse or recovery would be unachievable.<sup>111</sup> The Maryland regulation also specifies that patients appropriate for residential treatment are not ready to return to family or independent living.<sup>112</sup> Thus, based on both the ASAM criteria required by the Maryland regulation, and the separate requirement of the Maryland regulation, patients placed in a Level III.1 facility cannot live with their family or by themselves without likely relapsing back to their addiction.

c. Individuals requiring residential substance abuse treatment have a disability per federal case law.

Individuals who qualify for in-patient residential treatment in Maryland have an “actual” disability as well as a “record of” disability.<sup>113</sup> To qualify for protection under the ADA as a person with an actual disability, an individual must have: (1) a physical or mental impairment (2) that substantially limits (3) a major life activity.<sup>114</sup> Drug addiction and alcoholism are impairments under the ADA regulations.<sup>115</sup> Next, the addiction must substantially limit a major life activity. Courts have found that addiction qualifies as substantially limiting because it results in significant limitations and is long-term.<sup>116</sup>

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<sup>110</sup> ASAM Patient Placement Criteria for the Treatment of Substance-Related Disorders 98, 101 (David Mee-Lee et. al. eds., 2d ed. rev., American Soc’y of Addiction Med., Inc. 2001) (hereinafter “ASAM”) (Ex. 82).

<sup>111</sup> See id. at 116-26.

<sup>112</sup> COMAR 10.47.02.06(B)(2).

<sup>113</sup> 42 U.S.C. § 12102.

<sup>114</sup> Id. Effective January 1, 2009, the ADA Amendments Act revised the ADA to restore congressional intent to protect a broad class of persons under the ADA. See Pub. L. No. 110-325 (Sept. 25, 2008). The United States seeks damages for individuals harmed by the City’s discrimination both before and after January 2009. Because the amended ADA is broader than the 1990 statute, by establishing that individuals seeking residential treatment for their substance abuse addictions have a disability under the ADA, it is also established that they are disabled under the more expansive ADA, as amended. Consequently, this memorandum analyzes disability coverage under the original 1990 ADA.

<sup>115</sup> 28 C.F.R. § 35.104; see also A Helping Hand, L.L.C. v. Baltimore Cnty., 515 F.3d 356, 367 (4th Cir. 2008) (“Unquestionably, drug addiction constitutes an impairment under the ADA.”).

<sup>116</sup> MX Group, 293 F.3d at 338-39; RECAP, 294 F.3d at 48; see also Gillen v. Fallon Ambulance

The third element, a major life activity, is defined in the regulations as including “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>117</sup> The Fourth Circuit, in a case involving zoning of a drug treatment facility, recognized that caring for one’s self, working, and learning are major life activities.<sup>118</sup> Caring for one’s self includes “normal activities of daily living; including feeding oneself, driving, grooming and cleaning home.”<sup>119</sup>

Courts have routinely found that individuals’ addictions substantially limit their major life activities.<sup>120</sup> To determine whether residents of a treatment program had a disability, the Second Circuit relied on state regulations that prescribed admission criteria to a substance abuse treatment program.<sup>121</sup> The Second Circuit noted that under state law, individuals could only be

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Serv., 283 F.3d 11, 22 (1st Cir. 2002) (“[W]hen an impairment results in significant limitations, that impairment is substantially limiting....”).

<sup>117</sup> 28 C.F.R. § 35.104.

<sup>118</sup> A Helping Hand, L.L.C., 515 F.3d at 367-68; see also Start, Inc., 295 F. Supp. 2d at 577 (recognizing working, raising children, caring for oneself, and functioning in everyday life as major life activities, in a case involving zoning of a drug treatment facility).

<sup>119</sup> RECAP, 294 F.3d at 47 (internal quotations and citations omitted).

<sup>120</sup> See, e.g., MX Group, 293 F.3d at 337 (methadone users recovering from heroin addiction have a disability since they are substantially limited in the major life activities of employability, functioning socially, and parenting); RECAP, 294 F.3d at 47 (individuals with alcoholism are substantially limited in their ability to live independently and with their families); see also United States v. Borough of Audubon, 797 F. Supp. 353, 359 (D.N.J. 1991) (recovering addicts are handicapped under the Fair Housing Act since they are substantially limited in their ability to live independently and with their families, which constituted a substantial limitation on their ability to care for themselves); Human Res. Research and Mgmt. Group, Inc. v. Cnty. of Suffolk, 687 F. Supp. 2d 237, 252 (E.D.N.Y. 2010) (“[P]ersons recovering from alcoholism or drug addiction, and who are thereby substantially limited in a major life activity, are considered disabled under the FHA”). Accord Bryant v. Madigan, 84 F.3d 246, 248 (7th Cir. 1996) (“[A]lcoholism and other forms of addiction are disabilities within the meaning of the [ADA].”); Hispanic Counseling Ctr., Inc. v. Inc. Village of Hempstead, 237 F. Supp. 2d 284, 292 (E.D.N.Y. 2002) (clients of substance abuse treatment center are disabled); United States v. S. Mgmt. Corp., 955 F.2d 914, 923 (4th Cir. 1992) (individuals recovering from drug and alcohol abuse fall within the FHA’s definition of handicap). In a comprehensive search for zoning cases under title II of the ADA, the United States was unable to find a single case in which a court held that recovering addicts did not have an actual disability. But cf., A Helping Hand, L.L.C., 515 F.3d at 367 (holding that the clients of methadone clinic could not be found to have a disability as a matter of law under the “regarded as” prong). The United States is not at this stage attempting to establish disability coverage under the “regarded as” prong.

<sup>121</sup> RECAP, 294 F.3d at 47-48. The court noted that although the determination of disability is typically to be made on a case-by-case manner, the “existence of statutorily defined levels of impairment

admitted to the halfway house who “had been diagnosed as suffering from alcohol dependence” and “were determined to be unable to abstain without continued care in a structured supportive setting,” among other criteria.<sup>122</sup> Given these state-mandated admission criteria, the court found that individuals entitled to enter the halfway house had a disability because their addictions substantially limited their ability to live independently and to live with their families.<sup>123</sup>

Similarly, individuals who qualify for in-patient residential treatment in Baltimore City have an actual disability based on Maryland state regulations. They are not capable of returning to family or independent living, and thus are substantially limited in the major life activity of independently caring for themselves.<sup>124</sup> These individuals lack the coping skills and ability to live independently without relapsing, and the need to reside in a 24-hour staffed environment is to attain the skills to transition to living independently.<sup>125</sup> For these same reasons, individuals in need of in-patient substance abuse treatment also have a “record of” disability under the ADA.<sup>126</sup> Courts have routinely found that recovering addicts have a record of disability and are thus covered by the ADA.<sup>127</sup>

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obviates the concern . . . about varying intensities of symptoms.” *Id.* at 48 n.3.

<sup>122</sup> *Id.* at 47 (citing N.Y. Comp. Codes R. & Regs., tit. 14, § 375.8(c)) (internal quotations omitted).

<sup>123</sup> *Id.*

<sup>124</sup> COMAR 10.47.02.06(B)(2).

<sup>125</sup> See COMAR 10.47.02.06(A) (Level III.1 programs provide services “directed toward preventing relapse, applying recovery skills, promoting personal responsibility, and reintegration”).

<sup>126</sup> 42 U.S.C. § 12102; 28 C.F.R. § 35.104 (record of impairment defined as having a history of, or having been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities). In Maryland, individuals in Level III.1 treatment have a record of disability because they have been diagnosed as having Substance Dependence Disorder, which requires a maladaptive pattern of substance use, leading to clinically significant impairment or distress. See COMAR 10.47.02.06(B)(1); *ASAM* (Ex. 82) at 98; *DSM* (Ex. 83) at 197 (4th ed. – text rev., American Psychiatric Ass’n 2000).

<sup>127</sup> See *RECAP*, 294 F.3d at 48; *MX Group*, 293 F.3d at 339.



3. The CO Requirement for RSATPs Violates the ADA Because it is Facially Discriminatory

A zoning law is facially discriminatory if it subjects drug treatment programs to more restrictive standards than other comparable facilities.<sup>128</sup> Such a zoning law violates the ADA unless the treatment program can be shown to pose a direct threat or significant risk to the health or safety of others.<sup>129</sup> The City's CO requirement for "homes for nonbedridden alcoholics" is facially discriminatory because: (1) residential substance abuse treatment programs are subjected to more restrictive zoning standards than comparable residential facilities; and (2) individuals in residential substance abuse programs do not pose a direct threat to the health or safety of others that would justify more burdensome treatment.

Three different circuits have held that zoning restrictions on methadone clinics were facially discriminatory because they did not apply equally to comparable programs for people without disabilities. In New Directions Treatment Servs. v. City of Reading, 490 F.3d 293 (3d

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<sup>128</sup> New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 304-05 (3d Cir. 2007); MX Group, 293 F.3d at 344-45; Bay Area, 179 F.3d at 733-34; see also First Step, Inc. v. City of New London, 247 F. Supp. 2d 135 (D. Conn. 2003) (zoning code permitting educational establishments for adults with mental retardation or learning disabilities, but excluding educational establishments for adults with mental illness or drug or alcohol dependency, is facially discriminatory); Habit Mgmt. v. City of Lynn, 235 F. Supp. 2d 28, 29 (D. Mass. 2002). It should be noted that facial discrimination is a type of intentional discrimination claim and can serve as proof of discriminatory intent. Larkin v. Mich. Dep't of Social Servs., 89 F.3d 285, 289 (6th Cir. 1996); Bangerter v. Orem City Corp., 46 F.3d 1491, 1500-01 (10th Cir. 1995); First Step, Inc., 247 F. Supp. 2d at 150-51; Hispanic Counseling Ctr., 237 F. Supp. 2d at 292-93; Sunrise Dev., Inc. v. Town of Huntington, 62 F. Supp. 2d 762, 774 (E.D.N.Y. 1999).

<sup>129</sup> New Directions, 490 F.3d at 306-07; Bay Area, 179 F.3d at 737; Habit Management v. City of Lynn, 235 F. Supp. 2d 28, 29 (D. Mass. 2002). In determining whether a program poses a direct threat to the health or safety of others, a public entity

must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

Cir. 2007), the plaintiff sought to locate a methadone clinic.<sup>130</sup> The city denied a permit to the plaintiff, relying on a Pennsylvania statute that prohibited methadone clinics from locating within 500 feet of a school, playground, park, residential area, child-care facility, or place of worship, except by approval of the locality’s governing body.<sup>131</sup> The Third Circuit held that the Pennsylvania statute “facially singles out methadone clinics, and thereby methadone patients, for different treatment, thereby rendering the statute facially discriminatory” under the ADA.<sup>132</sup> The court then determined that the methadone clients did not pose a significant risk.<sup>133</sup> The Court thus concluded that the ordinance violated the ADA and remanded with instructions that the district court grant the plaintiff’s motion for partial summary judgment.<sup>134</sup>

In Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999), the operator and patients of a methadone clinic sued the City of Antioch after it adopted an ordinance prohibiting methadone clinics from locating within 500 feet of any residential property.<sup>135</sup> The Ninth Circuit concluded that the ordinance was facially discriminatory and a per se violation of title II of the ADA, 42 USC § 12132, because it subjected methadone clinics, but not other medical clinics, to a spacing limitation.<sup>136</sup> Having reached this conclusion, the Ninth Circuit said that the only remaining inquiry in determining the City’s liability under the ADA was whether the individuals treated at the methadone clinic pose a significant risk to the health or safety of others.<sup>137</sup> The Ninth Circuit remanded with instructions

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<sup>130</sup> 490 F.3d at 296-97.

<sup>131</sup> Id. at 298-99.

<sup>132</sup> Id. at 304.

<sup>133</sup> Id. at 306-7 (relying on “the objective viewpoint[]” of the National Institute on Drug Abuse, which reported that the criminal activity of individuals receiving methadone decreased by 51%, and concluding that the record demonstrated no link between methadone clinics and increased crime).

<sup>134</sup> Id. at 307.

<sup>135</sup> 179 F.3d at 727-28.

<sup>136</sup> Id. at 734-35.

<sup>137</sup> Id. at 735, 737.

that the district court reconsider the motion in light of the significant risk test.<sup>138</sup> Upon remand, the district court found that the clinic did not pose a significant threat to the surrounding community and enjoined the defendant from implementing the ordinance.<sup>139</sup>

In MX Group, Inc. v. City of Covington, 293 F.3d 326 (6th Cir. 2002), the city would not permit the plaintiff to locate a methadone clinic, in response to community opposition.<sup>140</sup> The city then adopted an amendment to the zoning code limiting the number of addiction treatment facilities to one facility for every 20,000 persons in the city, which completely foreclosed the plaintiff's opportunity to locate in the city.<sup>141</sup> The district court entered judgment for the plaintiff following a bench trial. The Sixth Circuit affirmed the district court's judgment and agreed that the ordinance was facially discriminatory.<sup>142</sup> The court also found that there was ample evidence that methadone clinics did not create a greater risk of drug trafficking and diversion than other facilities that deal with lawfully administered drugs, such as hospitals and pharmacies, and that the plaintiff's other clinic in another state had operated without incident of criminal activity.<sup>143</sup> Thus, the Sixth Circuit concluded that the district court correctly found that the city's decision to amend the zoning code to prevent the plaintiff from operating anywhere in the city violated the ADA.<sup>144</sup>

a. Comparable Uses to RSATPs are Permitted to Locate as of Right Under the Zoning Code.

Unlike (1) group homes for individuals with mental illness and developmental disabilities, (2) hospitals, and (3) single-family and multiple-family dwellings, which are

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<sup>138</sup> Id. at 737.

<sup>139</sup> Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, No. C 98-2651 SI, 2000 WL 33716782, at \*11-12 (N.D. Cal. March 16, 2000).

<sup>140</sup> 293 F.3d at 329-330.

<sup>141</sup> Id. at 330-31.

<sup>142</sup> Id. at 328, 344-45.

<sup>143</sup> Id. at 342.

<sup>144</sup> Id.

permitted to locate as of right in zones of appropriate density, “homes for nonbedridden alcoholics” must get a CO to locate anywhere in the City. Like the methadone clinics in Bay Area and New Directions that were not allowed to locate within 500 feet of certain property, residential drug treatment programs in Baltimore are not allowed to locate *anywhere* unless they get the approval of the City Council. Such approval is much more difficult to get, time-consuming, and costly, than a permit as of right.<sup>145</sup> In contrast, uses comparable to RSATPs, such as group homes for individuals with mental illness and developmental disabilities, hospitals, single-family dwellings, and multiple-family dwellings, are permitted to locate as of right in zones of appropriate density.

*First*, and most starkly, group homes for individuals with mental illness and developmental disabilities – which are licensed in the same way as RSATPs and also serve persons with disabilities – are permitted to locate as of right in single-family and multiple-family zones, depending on the size of the group home.<sup>146</sup> In terms of zoning characteristics, residential drug treatment facilities are most comparable to group homes for persons with mental illness or developmental disabilities. The City Department of Planning’s Development Guidebook defines a conditional use as a use compatible with the permitted uses in a particular zoning classification, but which because of a characteristic such as “noise, odor, or traffic” requires special permission

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<sup>145</sup> Procedural burdens and delays violate the ADA. See Project Life, Inc. v. Glendening, 139 F. Supp. 2d 703, 705-06 (D. Md. 2001) (a lengthy delay in granting a long-term lease, done for discriminatory reasons, violates the ADA, even if ultimately granted); Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285, 1296-97 (D. Md. 1993) (discriminatory procedural requirements themselves violate the FHAA; the requirement that a prospective provider of group home services to the elderly must notify neighbors and civic organizations of the type of disabilities of the persons who will live in the group home and must invite neighbors to comment is facially discriminatory); Cnty. Hous. Trust v. Dep’t of Consumer & Regulatory Affairs, 257 F. Supp. 2d 208, 223-24 (D.D.C. 2003) (\$57 certificate of occupancy filing fee plus inspection requirement is sufficiently burdensome to violate the FHAA). Courts have often analyzed the ADA and the FHA in tandem, noting similarities between the statutes. See, e.g., Tsombanidis v. West Haven Fire Dep’t, 352 F.3d 565, 573 n.4 (2d Cir. 2003).

<sup>146</sup> Md. Code Ann., Health – Gen. §§ 7-603(b), 10-514(b, d-e), 10-518(b); Bhattacharyya Letter 3/19/2008 (Ex. 15) at 3.

by the BMZA or an Ordinance of the Mayor and City Council.<sup>147</sup> There is no characteristic such as noise, odor, or traffic that differentiates group homes for individuals with mental illness or developmental disabilities from group homes for individuals recovering from substance abuse. The difference between them is the nature of the disabilities of the people living there. Because group homes for persons with mental illness and developmental disabilities are comparable to RSATPs, and are permitted as of right, the CO requirement for RSATPs is facially discriminatory.<sup>148</sup>

A private group home for individuals with *mental illness* is defined by state statute as “a residence in which individuals who have been or are under treatment for a mental disorder may be provided care or treatment in a homelike environment.”<sup>149</sup> A small private group home admits between 4 and 8 individuals, and a large group home admits between 9 and 16 individuals.<sup>150</sup> State law provides that:

- (b)(1) A small private group home:
  - (i) Is deemed conclusively a single-family dwelling; and
  - (ii) Is permitted to locate in all residential zones.
- (2) A large private group home is deemed conclusively a multiple-family dwelling and is permitted to locate in zones of similar density.
- (3) A private group home may not be subject to any special exception, conditional use permit, or procedure that differs from that required for a single-family dwelling or a multi-family dwelling of similar density in the same zone.<sup>151</sup>

A group home for individuals with *developmental disabilities*, by Maryland statute, means a residence that “[p]rovides residential services for individuals who, because of

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<sup>147</sup> Development Guidebook (Ex. 3) at 14.

<sup>148</sup> See Bhattacharyya Mem. 9/5/2008 (Ex. 81) at ¶ 2 (group homes for individuals with mental illness and developmental disabilities enjoy an advantage over residential substance abuse treatment programs under the Zoning Code).

<sup>149</sup> Md. Code Ann., Health – Gen. § 10-514(d)(1).

<sup>150</sup> Id. § 10-514(e, b).

<sup>151</sup> Id. § 10-518(b).

developmental disability, require specialized living arrangements” and “[a]dmits at least 4 but not more than 8 individuals. . . .”<sup>152</sup> The statute provides that,

To avoid discrimination in housing and to afford a natural, residential setting, a group home or an alternative living unit for individuals with developmental disability:

- (i) Is deemed conclusively a single-family dwelling;
- (ii) Is permitted to locate in all residential zones; and
- (iii) May not be subject to any special exception, conditional use permit, or procedure that differs from that required for a single-family dwelling.<sup>153</sup>

The Baltimore Zoning Code permits single-family dwellings in R-1 through R-10.<sup>154</sup>

Multiple-family dwellings are permitted as of right in R-6 through R-10 zones.<sup>155</sup> Thus, group homes for individuals with mental illness and developmental disabilities are permitted as of right in zones R-1 through R-10, depending on their size.

*Second*, hospitals present a zoning use comparable to larger residential drug treatment programs.<sup>156</sup> Although a hospital is not a dwelling, it is a facility where large numbers of people receive treatment and stay overnight, with large numbers of employees and visitors. In comparison, a residential drug treatment program that houses 25 or even 100 residents would pose a far smaller burden on the neighborhood in terms of traffic or noise than would a hospital. Thus, given that a hospital creates more noise and traffic than a residential drug treatment facility, there is no legitimate zoning-based reason for making a residential drug treatment facility a conditional use in zones R-8 and above, when hospitals are permitted as of right in R-8, R-9, R-10, B-3, and B-5.<sup>157</sup> Thus, the CO requirement for RSATPs is facially discriminatory.

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<sup>152</sup> Md. Code Ann., Health – Gen. § 7-101(h).

<sup>153</sup> *Id.* § 7-603(b)(1).

<sup>154</sup> Zoning Code (Ex. 2) §§ 4-201(1), 4-501(1), 4-601, 4-701, 4-901(1-2), 4-1001(1-2), 4-1101(1-2), 4-1201(1), 4-1301(1).

<sup>155</sup> *Id.* §§ 4-901(3), 4-1001(3-4), 4-1101(3-4), 4-1301(1).

<sup>156</sup> See Bhattacharyya Mem. 9/5/2008 (Ex. 81) at ¶ 2 (hospitals enjoy an advantage in the Zoning Code over licensed substance abuse treatment programs).

<sup>157</sup> Zoning Code (Ex. 2) §§ 4-1101(6), 4-1201, 4-1301, 6-406(29), 6-606(1).

In addition, the Zoning Code permits certain groups of unrelated individuals to live together as of right or as a conditional use with BMZA approval in certain zones. These include fraternities and sororities,<sup>158</sup> rooming houses,<sup>159</sup> foster care homes for children,<sup>160</sup> and convents, seminaries, and monasteries.<sup>161</sup> In contrast, residential drug treatment facilities must get a CO to locate in any zone in which they are permitted. Thus, residential drug treatment facilities are zoned more restrictively than these other uses involving unrelated individuals living together.<sup>162</sup> When compared to the zoning requirements for these other uses, the CO requirement for residential drug treatment facilities is facially discriminatory.<sup>163</sup>

*Finally*, residential substance abuse treatment programs are also comparable to single-family and multiple-family dwellings. Single-family dwellings are comparable to a residential substance abuse treatment program of up to eight or even 16 residents because they have a

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<sup>158</sup> *Id.* §§ 5-203(9), 6-306(33).

<sup>159</sup> *Id.* §§ 4-1103(4), 4-1201(3), 4-1203(2), 5-201(8), 5-203(20), 6-306(72).

<sup>160</sup> *Id.* §§ 5-203(8), 6-206(19).

<sup>161</sup> *Id.* §§ 4-201(6), 5-201(7), 6-306(70).

<sup>162</sup> *See Human Res. Research*, 687 F. Supp. 2d at 254 (holding law facially discriminatory under Fair Housing Amendments Act because it applied restrictions to substance abuse residences that were not applied to apartment houses, dormitories, multiple dwellings, or fraternity and sorority houses).

<sup>163</sup> The only residential use comparable in terms of zoning characteristics to residential drug treatment facilities, which is also required to get a CO in all zones, is nursing homes (including assistive living facilities). Zoning Code (Ex. 2) §§ 4-203(9), 4-204(2), 5-204(2), 6-309(3), 6-509(2). Nursing homes also house persons with disabilities and arguably are similarly discriminated against by the CO requirement. Nursing homes are not part of this suit, however, so we take no position here on the legality of the CO requirement applicable to them.

Other land uses that house unrelated individuals and are subject to the CO requirement in all zones are not comparable to RSATPs – “Housing for the Elderly,” “Community Correction Centers,” and “Service and Housing Centers”. First, none of these is a land use for individuals with disabilities or another protected class, and thus they do not get the protection of federal anti-discrimination law. Further, the “Housing for the Elderly” land use classification is subject to a CO because it allows a multiple-family dwelling to have greater density and fewer parking spaces than normal. Tanner Dep. (Ex. 1) 240:10-241:10; *see, e.g.*, Zoning Code (Ex. 2) §§ 4-506(c), 4-706(c), 10-207(d). Because this use does not follow normal zoning requirements for its density, it is reasonable for it to be treated as a conditional use. A “Service and Housing Center” is permitted by CO only in M-2, an industrial zone. Zoning Code (Ex. 2) § 7-308. Dwellings are not permitted in industrial zones. *Id.* § 7-105. Thus, a Service and Housing Center is not a residential dwelling and not comparable to RSATPs. A “Community Correction Center” cannot be compared to a drug treatment program, pursuant to state law. Md. Code Health – General § 8-402(c).

comparable population density, and such residential substance abuse treatment programs usually are located in a structure defined under the Zoning Code as a single-family dwelling.<sup>164</sup> The City has identified 26 currently operating RSATPs as having a zoning classification of “single-family dwelling,” each of which houses between four and 16 residents, and located through either a reasonable accommodation, through BMZA approval, or as permitted.<sup>165</sup> Even David Tanner, the Executive Director of the BMZA, testified that small group homes should be permitted as of right like any single-family dwelling.<sup>166</sup>

Multiple-family dwellings are comparable to residential substance abuse treatment programs with 9 to 16, or 17 or more residents because they have a comparable population density and such residential substance abuse treatment programs may locate in a multiple-family dwelling.<sup>167</sup> For example, the City identified four RSATPs with a zoning classification of multiple-family dwelling, which were approved either as permitted, through reasonable accommodation, or through the BMZA.<sup>168</sup>

As with single-family dwellings, whether the multiple-family dwelling houses individuals participating in substance abuse treatment, or whether it houses families related by blood or adoption, has no effect on zoning characteristics such as noise, traffic, and odor. As the City’s Corporate designee, David Tanner explained that a conditional use is one that has a potentially negative impact on its immediate neighbors.<sup>169</sup> Mr. Tanner admitted, however, that the only potentially negative impacts he could think of for RSATPs, such as the number of residents, the

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<sup>164</sup> Zoning Code (Ex. 2) § 1-136(c)(5); Ex. A to Interrog. Resp. 9/27/2010 (Ex. 4).

<sup>165</sup> Ex. A to Interrog. Resp. 9/27/2010 (Ex. 4) at ID# 2- 6, 8-11, 16- 17, 19, 21, 23-26, 28, 30-32, 43-44, 46, 18/22, “new”.

<sup>166</sup> Tanner Dep. (Ex. 1) 138:10-17.

<sup>167</sup> See Human Res. Research, 687 F. Supp. 2d at 254 (holding law facially discriminatory under Fair Housing Amendments Act because it applied restrictions to substance abuse recovery houses that were not applied to apartment houses or multiple dwellings, among other uses.)

<sup>168</sup> Ex. A to Interrog. Resp. 9/27/2010 (Ex. 4) at ID# 1, 20/29 (same facility), 35, 41.

<sup>169</sup> Tanner Dep. (Ex. 1) 38:18-39:2.



size of the facility, the proximity to neighbors, and the impact of light and air, are already regulated under the Zoning Code, Health Code, and Building Code equally for all types of facilities, not just RSATPs.<sup>170</sup> Another potentially negative impact, parking, is also already regulated by the Zoning Code for the type of dwelling and the zoning district.<sup>171</sup> Consequently, the only potential negative impacts that would exist for a RSATP exist for any structure, regardless of who is living there.

To specify further, Mr. Tanner was asked at his deposition to compare two kinds of structures: (1) three adjacent three-story townhouses, each of which has three dwelling units, with 27 individuals living there in total; and (2) three adjacent three-story townhouses that house 27 individuals in a substance abuse treatment program. Mr. Tanner was asked what impact the second structure (the RSATP with 27 people) would have on the neighbors that would be different from the impact that the first structure (9 dwelling units with 27 people) would have.<sup>172</sup> Mr. Tanner responded that he could not think of a specific impact the RSATP would have compared to the 27 people living in the three apartment buildings.<sup>173</sup> This comparison further supports that there is no difference in terms of zoning characteristics or impact on the immediate neighbors between a RSATP and a similarly densely populated single-family or multiple-family dwelling. Mr. Tanner further explained that zoning is not meant to regulate behavior, and that if a neighbor – any neighbor – exhibits problematic behavior, there should be a way to address that outside of the zoning process.<sup>174</sup>

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<sup>170</sup> Id. 85:17-90:9 (e.g., Zoning Code regulates the size and location of structures on a lot and the Housing Code regulates the number of residents under light and air requirements).

<sup>171</sup> Zoning Code (Ex. 2) § 10-405.

<sup>172</sup> Tanner Dep. (Ex. 1) 133:10-137:8.

<sup>173</sup> Id.

<sup>174</sup> Id. 85:17-90:9.

Since comparable uses to RSATPs – such as group homes for persons with mental illness and developmental disabilities, hospitals, and single and multiple-family dwellings – are permitted to locate as of right in zones of appropriate density, the CO requirement facially discriminates against RSATPs based on the disabilities of persons in recovery from substance abuse. This facially discriminatory CO requirement has prevented the location or expansion of some programs, such as Johns Hopkins, Baltimore Station, and Nilsson House, and delayed the location or expansion of other programs, such as Powell Recovery, Gaudenzia, and Weisman-Kaplan House.

b. Residential Drug Treatment Programs Do Not Pose a Significant Risk to the Health or Safety of Others

Under the second prong of the facial discrimination analysis, residential drug treatment programs in Baltimore do not pose a significant risk or direct threat to the health or safety of others.<sup>175</sup> Consequently, the Zoning Code’s facially discriminatory CO requirement violates the ADA. The City’s 30(b)(6) representative on public safety, Colonel John Skinner, the Chief of Patrol for the Baltimore Police Department, admitted that state certified residential substance abuse treatment programs do not cause a significant risk to the health or safety of others.<sup>176</sup> Colonel Skinner’s admission is sufficient to dispose of this issue. Additionally, as discussed above in Section III.E., statements by the former Baltimore Health Commissioner Dr. Joshua Sharfstein, the Baltimore City Police Department, and Colonel Skinner strongly support the conclusion that substance abuse treatment programs in Baltimore City improve safety, rather

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<sup>175</sup> Every court to have considered this issue in the context of drug treatment programs concluded that such programs did not pose a significant risk to the health or safety of others. See, e.g., Bay Area Addiction Research and Treatment, Inc., 2000 WL 33716782, at \*12; MX Group, 293 F.3d at 342; New Directions, 490 F.3d at 306-7; A Helping Hand, L.L.C. v. Baltimore Cnty., No. Civ. A. CCB-02-2568, 2005 WL 2453062, at \*15 (D. Md. Sept. 30, 2005); Habit Management, 235 F. Supp. 2d at 29.

<sup>176</sup> Skinner Dep. (Ex. 77) 10:6-8, 20:22-22:15 (“Q: Do residential substance abuse treatment programs cause a significant risk to the health or the safety of others? A: No. . .”).

than cause safety problems.<sup>177</sup> The record thus establishes, as a matter of law, that there is no dispute that residential drug treatment programs do not pose a significant risk or direct threat.

4. The CO Requirement Also Violates the ADA Because it is Intentionally Discriminatory

As established above, the City's zoning code treats RSATPs differently and worse than myriad comparable uses – such as group homes for persons with mental illness or developmental disabilities, single- and multiple-family dwellings, and hospitals. Unlike such uses, which can locate in permitted zones as of right, “homes for nonbedridden alcoholics” cannot locate *anywhere* in the City without obtaining a CO. That the City's maintenance of the CO requirement for RSATPs is motivated by consideration of the disabled status of affected individuals, and thus is intentionally discriminatory, is evinced by statements by the public and decision-makers during consideration of failed City Council Bill 07-0002, which would have eliminated the CO process for residential substance abuse treatment facilities. The absence of any legitimate, non-discriminatory reason for maintaining the CO requirement further supports a finding, as a matter of law, that the requirement is motivated by animus toward recovering addicts.

Under the ADA, a decision by a title II entity to deny a benefit is intentionally discriminatory if it “was motivated by unjustified consideration of the disabled status of individuals who would be affected by the decision.”<sup>178</sup> When a decision is “made in the context of strong, discriminatory opposition[, it] becomes tainted with discriminatory intent even if the

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<sup>177</sup> See *supra* Section III.E; see also Helping Hand, 2005 WL 2453062, at \*15 (citing 2002 Baltimore study that determined that “addiction-related crime decreases significantly as a result of effective treatment”).

<sup>178</sup> Pathways Psychosocial v. Town of Leonardtown, 133 F. Supp. 2d 772, 781 (D. Md. 2001); see also Helping Hand, L.L.C., 2005 WL 2453062, at \*16; Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 579-80 (2d Cir. 2003); RECAP, 294 F.3d at 49; Horizon House Dev. Servs. Inc. v. Twp. of Upper Southampton, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992).

decisionmakers personally have no strong views on the matter.”<sup>179</sup> To determine whether a decision is intentionally discriminatory, courts consider the decision’s historical background, the sequence of events leading up to the decision, and its legislative or administrative history (including contemporaneous statements by members of the decision-making body), among other factors.<sup>180</sup>

- a. The CO Requirement is Motivated by Animus Against Individuals in Recovery as Reflected in City Council Members’ and Residents’ Statements in Opposition to Bill 07-0002.

The CO requirement denies RSATPs the benefit of locating as of right and is motivated by discriminatory opposition to recovering addicts. The discriminatory animus against recovering addicts from City Council members and some vocal community members is reflected in the legislative history of City Council Bill 07-0002. City Council Bill 07-002, which failed, would have allowed residential substance abuse treatment programs to locate in certain zones without obtaining a CO. Therefore, the CO requirement is intentionally discriminatory, violates the ADA, and must be enjoined.

The legislative record of Bill 07-0002 includes the May 7, 2008, public hearing of the Land Use and Transportation Committee of the Baltimore City Council, letters from constituents to Council members, and notes of Committee workgroup sessions, among other things. The May 7, 2008 hearing lasted almost six hours.<sup>181</sup> At the hearing and in other parts of the legislative record, residents and Council members raised many concerns about residential substance abuse treatment facilities that reflected discriminatory animus against people in recovery, demonstrated the residents’ influence over Council members, and were virtually identical to statements about

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<sup>179</sup> Innovative Health Sys., 117 F.3d at 49.

<sup>180</sup> RECAP, 294 F.3d at 49-50; Helping Hand, 2005 WL 2453062, at \*17; Pathways, 133 F. Supp. 2d at 781-82.

<sup>181</sup> Greene Notes 5/12/2008 (Ex. 74).

proliferation, property values, crime, and undesirability made in other cases finding discriminatory intent.

Federal courts have relied on statements about *proliferation* to find discriminatory intent in zoning practices. In RECAP, the Second Circuit quoted several city officials in support of its conclusion that the plaintiffs' disabilities were a motivating factor behind a decision to deny a permit to a home for recovering alcoholics. In that case, the Mayor said:

And what I have tried to convey to RECAP and through different surrogates is that enough is enough. . . . Middletown is not the hub of human services programs. . . . Do [this program] in some other community that has not contributed to the extent, not even close to what Middletown has contributed in regards to participation and human service programs.<sup>182</sup>

Additionally, a Middletown Planning Board member said, "why do we have to have all the treatment facilities right here in Middletown?"<sup>183</sup> The chairman of the Board said, "there's an over-concentration of residential and social service facilities in the City."<sup>184</sup> The Second Circuit concluded, "this evidence more than suffices to establish the plaintiffs' prima facie case."<sup>185</sup>

As in RECAP, Council members and residents in Baltimore made numerous statements that reflect that the CO requirement is based on discriminatory animus against people residing in substance abuse treatment facilities, and support a finding of intentional discrimination under the ADA. Council members raised concerns about proliferation of drug treatment programs that reflected their discriminatory animus, including the following:

- Councilwoman Agnes Welch, referring to a map showing the location of drug treatment programs which were represented by dots on the map: "When you see a lot of dots in

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<sup>182</sup> 294 F.3d at 50.

<sup>183</sup> Id.

<sup>184</sup> Id.

<sup>185</sup> Id. at 50-51; see also Horizon House, 804 F. Supp at 690 (a town official's statement that thirty group homes was enough for the town supported a finding of discriminatory intent); Sunrise Development, 62 F. Supp. 2d at 768-76 (a resident's statement about an inundation of facilities that would alter the character of the town supported a finding of likelihood of success on the merits of a discriminatory intent claim).

your area that you represent, you don't want any more dots. You could live with what you have. You don't want one section of the city or one district to be inundated with new group homes.”<sup>186</sup>

- Councilwoman Sharon Middleton: “My concern is that, you know, that’s a concentrated area where they seem to be just loading the homes.”<sup>187</sup>
- Councilwoman Sharon Middleton: “How will we kind of limit the number, the amount, in certain communities . . . . We don’t want to have a thing where group homes are all in one area and prisons are in one area and homeless shelters are in one area. We want to try to equalize this thing.”<sup>188</sup>
- Councilwoman Mary Pat Clarke: “We got a lot [of licensed group homes] already. Now we’re going to get more if this bill passes.”<sup>189</sup>
- Councilwoman Rochelle Spector: “[Y]ou did mention two of the most important things that we hope that we can resolve by going through this process . . . . The fear that we have that our neighborhoods will be saturated . . . .”<sup>190</sup>
- Councilman William Cole: “One of the concerns is that, you know, the proliferation of those dots [on the group homes map] is going to be centered in neighborhoods that, quite frankly, can’t support a large number of group homes. . . . [I]f you put too many in one neighborhood it tips that balance.”<sup>191</sup>

City residents also expressed concerns about proliferation of group homes in their neighborhoods, including the following:

- “We’re also concerned about a super saturation of the licensed facilities in certain areas because that’s the only place that the programs can afford to locate.”<sup>192</sup>
- “This seems like such a NIMBY issue, but Lauraville seems to have a fair share of these homes already.”<sup>193</sup>

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<sup>186</sup> Council Mtg. Tr. (Ex. 24) at 1460 (52: 9-15)

<sup>187</sup> Id. at 1463 (55: 1-13)

<sup>188</sup> Id. at 1584 (176: 12-22)

<sup>189</sup> Id. at 1488 (80: 6-11)

<sup>190</sup> Id. at 1652 (244: 4-21)

<sup>191</sup> Id. at 1665-66, (257:17-: 258:6)

<sup>192</sup> Council Mtg. Tr. (Ex. 24) at 1647-48 (239: 22-240:4) (testimony of Jody Landers)

<sup>193</sup> Email from Sam Gallant forwarded to Councilman Robert Curran, Feb. 21, 2008 (Ex. 84),

- “My husband and I are . . . concerned about . . . how many group homes would be permitted on a given street or in a given area, as this can certainly affect the quiet residential nature of an area.”<sup>194</sup>
- “As for the Central Forest Park community we have several group homes already.”<sup>195</sup>

Many courts have also found that concerns about *property values* support a finding of intentional discrimination. In Potomac Group Home Corp. v. Montgomery County, this court ruled that Montgomery County violated the FHA and ordered it to modify its laws.<sup>196</sup> One of the factors the court considered was a petition opposing a home for elderly persons with disabilities stating that the home would “lead to the ‘demise’ of their ‘refined neighborhood’ and to the lowering of property values.”<sup>197</sup> Similarly, in Horizon House, this court enjoined a zoning ordinance, holding that its spacing requirement for group homes was motivated by discriminatory intent, based in part on a town supervisor’s observation that “people perceive that property values will go down.”<sup>198</sup>

Like the communities in these cases, Baltimore residents also opined that allowing residential substance abuse treatment programs to locate as of right would negatively impact property values, including:

- “Are you telling [community members] they should stand by as you change to a process that is guaranteed to lower their property values and take away from their quality of life?”<sup>199</sup>

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<sup>194</sup> Written Testimony of Beverly Horozko, May 7, 2008 (Ex. 85), MCCB 9187-90

<sup>195</sup> Letter from George Collins, President of Central Forest Park Community Association, to Councilman Edward Reisinger, (hereinafter “Collins Letter”) (Ex. 86), MCCB 9116-18

<sup>196</sup> 823 F. Supp. 1285, 1302 (D. Md. 1993).

<sup>197</sup> Id. at 1290.

<sup>198</sup> 804 F. Supp. at 690, 695-700; see also, e.g., Pathways, 133 F. Supp. 2d at 777 (concern about declining property values was evidence of intentional discrimination); Helping Hand, 2005 WL 2453062 at \*3 (concern that a substance abuse treatment facility would negatively impact property values was evidence of discriminatory intent).

<sup>199</sup> Collins Letter (Ex. 86) at MCCB 9118)

- “Nearing retirement, I am very concerned about the value of my property. I believe that additional group homes in my neighborhood will decrease the value of my property and put my major investment at risk.”<sup>200</sup>
- “There was also a concern regarding property values in a neighborhood once a group home has opened.”<sup>201</sup>

Courts have also found statements about perceptions of possible *criminal activity* to be evidence of discriminatory intent. In First Step, the court found strong evidence of intentional discrimination where a constituent said “[What] if there’s someone I have to go and tell that family or get a phone call that one of your loved one[s] just was killed by somebody from First Step.”<sup>202</sup> In this case, Councilman Robert Curran’s statements similarly demonstrate animus against people with disabilities:

- “Would this legislation allow the re-integration into communities of folks that are through the criminal justice system such as murderers to be re-integrated into communities in group homes?”<sup>203</sup>
- “[O]bviously those of the criminal justice system such as Mr. Hopkins, who murdered two councilmen 30 years ago, could be allowed to re-integrate into the community in the group home legislation that we are understanding here tonight.”<sup>204</sup>

Furthermore, in Project Life, Inc. v. Glendening, this court found an ADA violation based on the defendants’ “illegal acquiescence to [the] desire” not to have a program for recovering addicts “located in ‘their backyard.’”<sup>205</sup> Considering a zoning discrimination case under the ADA, the Third Circuit observed that, “This case presents the familiar conflict between the legal

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<sup>200</sup> Letter from Susan Magri to Councilman Reisinger, May 6, 2008 (Ex. 87), MCCB 9184)

<sup>201</sup> Larry E. Greene, Hearing Notes, Worksession 07-0002, June 26, 2008 (Ex. 88) MCCB 9205-06)

<sup>202</sup> First Step, 247 F. Supp. 2d at 143, 150; see also Pathways, 133 F. Supp. 2d at 776 (a Council member’s suggestion that residents would be violent and get in scrapes with the law was evidence of discriminatory intent).

<sup>203</sup> Council Mtg. Tr. (Ex. 24) at US 1428 (20: 8-12)

<sup>204</sup> Id. at US 1430 (22: 16-21)

<sup>205</sup> 139 F. Supp. 2d 703, 708 (D. Md. 2001).



principle of non-discrimination and the political principle of not-in-my-backyard.”<sup>206</sup> Based on this reasoning, Councilman Jack Young’s statements that no one would want to live next door to a group home also reflected animus against people with disabilities.<sup>207</sup> Non-discrimination must prevail over such animus.

The Fourth Circuit has held that “community views may be attributed to government bodies when the government acts in response to these views.”<sup>208</sup> Here, in addition to holding their own discriminatory views, the Council members felt obligated to represent their constituents’ views and were responsive to their constituents’ animus.<sup>209</sup> Because the CO requirement is impermissibly motivated by discriminatory animus against people with disabilities, as expressed by both the Council members and constituents to whom they were responsive, the requirement violates the ADA.

b. There Is No Legitimate Nondiscriminatory Reason For The CO Requirement

Notwithstanding evidence that the maintenance of the CO requirement is based on discriminatory animus against people recovering from addiction, the City may attempt to “conceal discriminatory intent by claiming that they relied upon objective, neutral criteria” when deciding to leave the requirement intact.<sup>210</sup> But the animus described above reveals that any

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<sup>206</sup> New Directions, 490 F.3d at 295.

<sup>207</sup> Council Mtg. Tr. (Ex. 24) at US 1457 (49:12-14) (Councilman Jack Young: “Would they put this next door to their homes? I don’t think so, you know.”), at US 1607 (199:19-22) (Councilman Jack Young : “[T]hey would not have them next door to their homes.”).

<sup>208</sup> Helping Hand, 515 F.3d at 366.

<sup>209</sup> See id. at US 1467 (59: 16-21) (Councilman Jack Young “[W]e’re elected to represent the people who vote for us and when they don’t want something, that’s part of the process. If they don’t want it in their community and their neighborhood, that’s part of the process.”); Larry E. Greene, Hearing Notes, Worksession 07-0002 - #3 (Oct. 2, 2008), (Ex. 89), MCCB 9197-98 (emphasizing “the council representative’s responsibility to protect the community from group home proliferation”).

<sup>210</sup> Helping Hand, 2005 WL 2453062 at \*18.

purported justifications are mere pretext.<sup>211</sup> No legitimate reasons exist for the maintenance of this requirement.

The City's own actions demonstrate that the requirement does not serve any legitimate interest. The Planning Department has proposed eliminating the CO requirement entirely, including for residential substance abuse treatment facilities.<sup>212</sup> And two Mayors, two Planning Directors, the City's current chief legal officer, and many other City agencies have supported repealing the requirement.<sup>213</sup> A process that the City's own planning and legal experts have recommended doing away with cannot genuinely advance any legitimate governmental interest. In addition, as discussed above in III.A.3., RSATPs have, in practice, located through every type of zoning approval – including through COs; through BMZA approval of a single-family dwelling, multiple-family dwelling, and rooming house; through permission as of right of a single-family dwelling and multiple-family dwelling; and with a reasonable accommodation for a single-family dwelling and a multiple-family dwelling.<sup>214</sup> The varying approaches that the City has taken to zoning RSATPs demonstrate that there can be no legitimate reason for subjecting these programs to the CO requirement in every zone and denying RSATPs the ability to locate in any zone as of right. An interest that is so frequently disregarded cannot be legitimate. In Potomac Group Home, the Maryland District court granted a motion for summary judgment after finding that the defendants had minimal, if any, legitimate interest in requiring group home providers to undergo a hearing, when they had often failed to hold a public hearing.<sup>215</sup> Similarly,

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<sup>211</sup> See Bangerter, 46 F.3d at 1505 n.23 (noting that an inquiry into motivations might shed light on whether justifications offered are bona fide).

<sup>212</sup> See supra Section III.D.

<sup>213</sup> See supra Section III.C.

<sup>214</sup> Ex. A to Interrog. Resp. 9/27/2010 (Ex. 4).

<sup>215</sup> 823 F. Supp. at 1298.

because the City has allowed RSATPs to locate in many instances without obtaining a CO, there is no legitimate interest served by requiring them to undergo this process.<sup>216</sup>

There are no material facts in dispute and the United States is entitled to a judgment, as a matter of law, that the CO requirement for RSATPs constitutes a facial and intentional violation of title II of the ADA.<sup>217</sup>

## V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant summary judgment to the United States, finding the Defendant liable for violating title II of the ADA because the zoning code facially and intentionally discriminates against persons with disabilities. In addition, the United States requests that the Court find invalid the Zoning Code

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<sup>216</sup> See also Smith Berch, Inc. v. Baltimore Cnty., 115 F. Supp. 2d 520, 524 n.8 (D. Md. 2000) (finding a hearing requirement for clinics not necessary to the zoning scheme where officials allowed clinics to locate as of right).

<sup>217</sup> The City may argue that its reasonable accommodation policy remedies the discriminatory nature of the CO requirement. Any such argument fails as a matter of fact and law. As a factual matter, the City's informal reasonable accommodation policy is arbitrarily implemented and subject to change or termination at the City's whim. As a legal matter, the Ninth Circuit considered and wholly rejected a similar defense to a facially discriminatory policy, explaining as follows:

[Section] 35.130(b)(7) [makes little sense in the context of a statute that discriminates . . . *on its face* rather than *in its application*. Section 35.130(b)(7) requires reasonable modifications where necessary to avoid discrimination unless such modifications would fundamentally alter the statute in question. The only possible modification of a facially discriminatory law that would avoid discrimination on the basis of disability would be the actual removal of the portion of the law that discriminates on the basis of disability. However, such a modification would fundamentally alter the ordinance.

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Therefore, we conclude that § 35.130(b)(7)'s reasonable modifications test does not apply to facially discriminatory laws. Instead, facially discriminatory laws present per se violations of § 12132.

Bay Area, 179 F.3d at 734-35; see also New Directions, 490 F.3d at 304; MX Group, 293 F.3d at 344-45. Just like the Bay Area scenario, here the only possible reasonable modification to avoid discrimination on the basis of disability would be to invalidate the Zoning Code's CO requirement for homes for nonbedridden alcoholics, which would result in a paradoxically prohibited fundamental alteration of the Zoning Code under 28 § 35.130(b)(7). Neither do reasonable modifications cure intentionally discriminatory laws. See, e.g., Larkin, 89 F.3d at 288-90; Bangerter, 46 F.3d at 1501-02; Potomac Group Home, 823 F. Supp at 1297-99, 1302.

provisions at §§ 4-1004(3), 5-204(6), 6-309(7), 6-509(3) requiring “homes for the rehabilitation of non-bedridden alcoholics” to obtain a conditional use ordinance; and enjoin the City from enforcing those provisions. Further, the United States requests that that the Court require the City to undertake appropriate action to zone residential substance abuse treatment programs as follows:

- *Residential treatment programs of 1 to 8 persons:* As of right, in all residential, office-residence, and business districts (R-1 to R-10, O-R, B-1 to B-5).
- *Residential treatment programs of 9 to 16 persons:* As of right, in residential districts where multiple-family dwellings are permitted as of right (R-6 to R-10), and all office-residence and business districts.
- *Residential treatment programs of 17 or more persons:* As of right, in the most densely populated residential districts (R-8 to R-10), and all office-residence and business districts.

In the alternative, if the Court does not grant summary judgment to the United States on liability, then the United States requests that the Court grant partial summary judgment on two discrete issues (or either one) by holding that: (1) individuals who receive treatment in certified residential substance abuse treatment programs in Baltimore are disabled under the ADA, and (2) individuals who receive treatment in certified residential substance abuse treatment programs in Baltimore do not pose a direct threat to the health or safety of others.

Date: April 15, 2011

Respectfully submitted,

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/s/

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