

HOUSING HOMELESS PEOPLE: Local Mobilization of Federal Resources to Fight NIMBYism

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ABSTRACT: *Local sentiments are rarely favorable to human service facilities. City governments and neighborhood organizations frequently utilize zoning restrictions to exclude various community facilities, including services and housing for homeless people. This exclusionary phenomenon is commonly referred to as “not-in-my-backyard” or “NIMBYism.” The power of NIMBYism is grounded in the local autonomy afforded municipalities concerning land use policies. However, recent cases suggest that the tradition of local authority over certain types of land uses is being reexamined and, even more frequently, challenged at the extra-local level. Given this trend, the purpose of this article is to question the assumption that local government will be able to preserve their authority over housing for homeless people. Using a case study of a local zoning battle over a proposed housing development for homeless people, the author argues that recent changes in the U.S. Department of Housing and Urban Development’s governance over Fair Housing Law enforcement and administration of Stewart B. McKinney Homeless Assistance funding, coupled with the agency’s more aggressive position on housing discrimination, may already have changed the balance of power on this issue. By examining the process by which a non-profit organization in Albany, New York, was able to reach a settlement with the city concerning a zoning denial by mobilizing federal resources, the author attempts to highlight a possible emerging federal role in facilitating local mobilization against NIMBYism as it applies to housing for homeless individuals.*

Contemporary homelessness emerged as a significant social problem in the United States during the early 1980s. Public interest in the issue was matched by the attentiveness of federal policymakers (Wright, Rubin, & Devine, 1998). By 1987, Congress had passed the Stewart B. McKinney Homeless Assistance Act. This legislation established a number of federally sponsored programs, administered by several federal agencies including Housing and Urban Development (HUD), Health and Human Services (HHS), Labor, and Education. Its purpose

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JOURNAL OF URBAN AFFAIRS, Volume 24, Number 1, pages 97–116.

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ISSN: 0735-2166.

was to assist local organizations across the country to develop programs for homeless people. Between fiscal years 1987 and 1997, Congress appropriated over \$8 billion to implement 29 McKinney Act programs including the development of transitional and permanent housing around the country (Foscarinis, 1996). However, for local providers getting this funding is only half the battle. The other half involves negotiating the local zoning approval process.

Recognized as a legitimate exercise of the government's common law police power, zoning is the primary means by which local governments regulate the use and development of land (Kanter, 1984). Yet, many (e.g., Logan & Molotch, 1987) argue that zoning regulations are one of the most widely used policy tools for promoting the special interests of those with local political and economic influence, not necessarily for the collective welfare of city residents. Because local sentiments are rarely favorable to human service facilities, city governments and neighborhood organizations frequently utilize zoning restrictions to exclude various community facilities, including services and housing for homeless individuals. Thus, even when federal or state resources are available for local organizations to develop facilities, restrictive zoning policies and neighborhood opposition can jeopardize their efforts.

This exclusionary phenomenon is commonly referred to as not-in-my-backyard or NIMBYism. As it relates to housing, NIMBY is a label most commonly applied to people who oppose subsidized dwellings, group homes for people with serious mental illnesses or other disabilities, and housing for homeless people (Pendall, 1999). NIMBY sentiments arise among those who live near a controversial site, and the fears of these neighbors can override all other considerations in the acceptance/rejection equation (Wolch & Dear, 1993). Because of this, NIMBYism can be potentially devastating to the provision of such housing. If area residents and businesses oppose the project in question, sponsors will have great difficulty getting local zoning approval (National Law Center on Homelessness and Poverty, 1995; Salsich, 1986).

Reports issued by the National Law Center on Homelessness and Poverty in 1995 and 1997 indicate that most cities in the United States do not have a sufficient number of facilities for homeless people because of the application of local exclusionary zoning tactics. The rationale for this exclusion typically builds on the widely held sentiment that these facilities will "attract undesirables from other places or cause property values and businesses to decline, traffic and crime to increase, and the quality of life to deteriorate" (National Law Center on Homelessness and Poverty, 1997, p. 5).

THE FEDS AS AGENTS OF SOCIAL CHANGE AT THE LOCAL LEVEL

The power of NIMBYism is grounded in the local autonomy afforded municipalities concerning land use policies (Judd & Swanstrom, 1998). Local opposition to various land uses has appeared in several realms, but can be examined according to two broad categories: 1) business opposition to projects that threaten exchange and/or use values; and 2) citizen opposition to projects endangering exchange and/or use values (Logan & Molotch, 1987). The term *exchange value* refers to the worth of an object, service or property based on the price it could bring if it were sold. *Use value* most commonly refers to the value derived from using an object—for example, living in a house—apart from its monetary value (Kleniewski, 1997). When both area businesses and residents see the same exchange and use values as potentially threatened, they routinely combine their efforts in opposing the proposed project, and they are often able to obstruct unwanted facilities by appealing to local government officials during the zoning approval process (Morrill, 1999).

Yet, historically, the balance of power between local, state, and national interests has ebbed and flowed (Fainstein, 1999; Judd & Swanstrom, 1998; Skocpol, 1985). Federalism, or the division of power among national, state, and local governments has always been a political

tug-of-war (Swanstrom, 1999). Therefore, the assumption of local authority over land use policy can be misleading. In fact, local autonomy, and its constitutionally implied degree of decentralization of power, is frequently compromised when wider level interests, government and non-government, are able to preempt local decision-making by appealing to the national level (Morrill, 1999).

The environmental movement clearly demonstrates this process (Holcombe, 1995). During the 1970s, grassroots mobilization and massive media attention made pollution a national issue. Subsequent federal mandates to preserve environmental quality have unarguably limited local business discretion to pollute the land, water, and air (Logan & Molotch, 1987; Robertson & Judd, 1989). Similarly, equal opportunity in housing based on federal civil rights legislation has enjoyed case-by-case victories at the national level. There have been many instances where low income housing advocates in urban areas appealed to federal courts to open up housing opportunities for poor and minority subpopulations, such as the 1976 Supreme Court consent decree in the Chicago Gautreaux case (Massey & Denton, 1993; Swanstrom, 1999).

With this in mind, the objective of this article is to examine whether local governments have been able to preserve their authority over local land use issues concerning housing for homeless people. Recent cases suggest that the tradition of local authority over certain types of land uses, including housing for special populations, is being reexamined and, even more frequently, challenged at the extra-local level (Haar, 1997). For example, the district court in *U.S. v. City of Taylor, Michigan* held that the city violated the Fair Housing Amendments Act (FHAA) by refusing to grant zoning approval for a group home in a single-family residential area for 12 elderly women (Beatty & Haggard, 1996). *U.S. v. City of Philadelphia, Pennsylvania* is another notable case in which the court held that the city's failure to grant a requested zoning permit for a proposed home for homeless persons constituted a refusal to make reasonable accommodations under the FHAA (*U.S. v. City of Philadelphia, 1993*). Beatty and Haggard (1996) also cite a number of other similar cases where the plaintiff was able to utilize Fair Housing legislation successfully.

I use a case study of a local zoning battle over a proposed housing development for homeless people to argue that recent changes in HUD's governance over Fair Housing Law enforcement and administration of McKinney funding, coupled with the agency's more aggressive position on housing discrimination, provide further evidence of increasingly successful federal challenges to local zoning denials concerning housing for homeless people. By examining the process by which a non-profit organization in Albany, New York was able to reach a settlement concerning a previous zoning denial with support from HUD, I will attempt to show that these federal legislative and administrative changes have made it easier for local non-profit organizations to mobilize federal legal mechanisms to fight NIMBYism. Whether this will be limited to housing for homeless people, and whether it will become evident in other battles in other places, remains to be seen. I also offer some suggestions about how local organizations can gain maximum leverage from the current situation.

The zoning battle reported here concerns the Homeless Action Committee's (HAC) Single Room Occupancy (SRO) residence in Albany, New York. The battle took place between 1995 and 1997. As a member of the HAC Board of Directors through this two-year period, I was able to participate in and observe the entire process. I argue that this case is particularly revealing because it is housing intended for active homeless alcoholics with co-occurring mental disabilities, a subpopulation generally perceived to be least desirable as neighbors (Dear, 1991). Therefore, no one anticipated that HAC would succeed. In fact, local opposition to this project was exceptionally fervent and backed by the coordinated efforts of powerful local actors including the mayor, the neighborhood association, business leaders, and elected community officials, as well as the neighborhood residents themselves.

THE ZONING APPROVAL PROCESS

To understand this case, some knowledge of the zoning process is required. Although the zoning process may vary across municipalities, typically various zoning ordinances will divide a community into single-family and multi-family residential districts and commercial districts. If a proposed building or land use falls within the structures and uses authorized in that particular district, it is permitted automatically (Beatty & Haggard, 1996). If a proposed building or land use is not expressly authorized, it normally requires approval of a use variance. Usually the sponsor of the proposed building or use has to attend a public hearing concerning their proposal and attempt to convince the zoning board, as well as the public participants, that the structure in question will not impair the general welfare of the community (Bergin, 1987).

In the HAC case, a use and area variance was requested to renovate and convert a vacant warehouse in an area zoned as industrial. Like many other municipalities, the city of Albany zoning ordinance stipulates that in order for the Board of Zoning Appeals to grant such a variance, the applicant must prove that the building in question could not be used for any other practical purpose without the requested variance. However, a use variance requested for the purposes of providing housing for persons with disabilities, which was the case with HAC, can fall under the "reasonable accommodation" clause of the FHAA. Discrimination under this act includes "a refusal to make reasonable accommodations in rules, policies or services when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling" (42 U.S.C. S 3604 (f)(3)(B) as cited in Beatty & Haggard, 1996, p. 27). The case law indicates a precedent that municipalities must modify zoning ordinances when necessary to afford individuals with disabilities the opportunity for housing. Such cases include: *Oxford House, Inc. v Town of Babylon, U.S. v. City of Philadelphia, Smith & Lee Associates, Inc. v. City of Taylor, Michigan (Homeless Action Committee v. City of Albany, 1997)*. Yet, municipalities have routinely ignored the FHAA reasonable accommodations clause in denying such use variances (National Law Center on Homelessness and Poverty, 1997). In fact, local opponents of a project continue to take full advantage of existing city zoning ordinances when a use variance is required.

More often than not, human service facilities in both residential and commercial districts require a use variance. This is because these areas are typically zoned for single-family homes (in the case of a residential area), or business facilities (in the case of a commercial district) (Mental Health Law Project, 1984). Group homes, shelters, permanent housing for special populations and similar facilities that bring together unrelated adults in a residential situation clearly breach most residential and commercial zoning codes (Wolch & Dear, 1993). To gain a use variance, the procedure normally requires proximate neighbors to be informed about the proposed change to a nonconforming use prior to the zoning hearing.

NIMBY tactics tend to exhibit certain regularities. During the initial stage, a vocal minority living within the vicinity of the proposed site expresses its concern about the project. Generally, they mask their true intentions of exclusion through a rhetoric of seemingly innocuous reasoning: inadequate level of public services to support another facility, preserving the neighborhood's historic character, and ensuring orderly development (Bates & Santerre, 1994; Wolch & Dear, 1993). Local residents, community leaders, and businesses often write letters to this effect to their elected officials, distribute petitions, demonstrate, and form neighborhood opposition groups (Silver, Fishback, & Kaye, 1996). They often suggest that the users of the facility would actually be better served in another location.

At the zoning hearing, the rhetoric of the opposition can become more hostile. Opponents speak of their neighborhood as being dumped on by city officials. They maintain that the pro-

posed facility will act as a magnet for undesirables or that the neighborhood is already saturated or overburdened with low-income housing and service institutions (Silver, Fishback, & Kaye, 1996). Because the local zoning board consists of citizens appointed by the local government, these oppositional arguments—especially if backed by substantial neighborhood support—tend to carry more weight than the proponents’ presentation of empirical research to the contrary (Beggs, 1994; Dear, 1991; Wolch & Dear, 1993).

EXISTING PROTECTIVE STATUTES

Federal statutes prohibiting discrimination in housing and a number of other public accommodations predate the FHAA by several decades. The Civil Rights Act of 1964 outlawed segregation in public accommodations, banned discrimination in employment, public education and housing, and barred the use of federal funds in programs that operated in a discriminatory manner (Quadagno, 2000). Congress enacted the Fair Housing Act in 1968 to prevent housing discrimination by private entities on the basis of race, color, religion, sex, and national origin (Beatty & Haggard, 1996). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by federal agencies and programs receiving federal funding (Dennis & Oakley, 1996). In 1988 the FHAA extended the full protection of the original legislation against housing discrimination by both public and private entities on the basis of disability (Salkin & Armentano, 1993). Finally, the Americans with Disabilities Act (ADA) of 1990 expanded the protection of the Civil Rights Act to people with disabilities (Bergdorf, 1991).

All of these anti-discrimination laws have been underutilized or completely overlooked in attempts to pressure city governments into equitable zoning policies and to fight NIMBYism concerning housing for homeless people (Silver, Fishback, & Kaye, 1996). Undoubtedly, the cumbersome bureaucratic investigation process, as well as the time and expense involved in litigation have discouraged sponsors of proposed housing for homeless people from utilizing federal protections. Likewise, in many cases a local zoning denial results in lost funding due to the sponsors’ inability to site the facility in a timely manner (DeBerri, 1999).

RECENT LEGISLATIVE AND ADMINISTRATIVE CHANGES AT THE FEDERAL LEVEL

Prior to the passage of the FHAA in 1988, federal agencies played a largely passive role in the enforcement of civil rights violations concerning housing (Lee, 1999). By the early 1990s, HUD and the U.S. Department of Justice had expanded their Fair Housing enforcement activities. The centerpiece of these efforts has been HUD’s Fair Housing Initiatives Program (FHIP) in which grants are provided to private Fair Housing groups to support their efforts to test real estate practices and litigate suspicious findings (Galster, 1999). In addition, Title III of the ADA took effect in 1992, providing a potentially useful remedy for challenging discrimination against people with disabilities by shelters for homeless people, health care facilities, and other service establishments, and municipalities excluding housing provisions for special needs populations through zoning (Beatty & Haggard, 1996).

HUD has also stepped up its official rhetoric on vigorously enforcing the housing rights of all persons, including homeless people and those who seek to provide housing and other service for them. For example, recommendations from *Priority Home! The Federal Plan to Break the Cycle of Homelessness*, published by HUD in 1994, included the aggressive enforcement of federal fair housing laws to “ensure that permanent housing—both housing providing supportive services and traditional low-income housing—be freely sited” (p. 86).

Less visible, but equally significant, were a number of administrative changes at HUD making the reporting and investigation of fair housing complaints a less burdensome and time consuming process (Galster, 1999). According to Galster (1999), these changes, which were implemented in the early 1990s, include the following:

1. Instead of reporting to a HUD field official who is also responsible for other HUD programs, investigators now report directly to HUD's chief enforcement official in Washington, DC.
2. The Office of the Assistant Secretary for Fair Housing and Equal Opportunity determines whether private-party housing complaints should be brought to trial rather than the field offices.
3. The investigation process has been revamped so that the number of cases closed administratively (that is, with no finding and no formal record of settlement) has been greatly reduced (p. 13).

These changes have resulted in more frequent HUD investigations concerning possible housing discrimination targeting homeless individuals. For example, in 1995, HUD investigated community groups in Berkeley and New York who opposed the placement of group homes for homeless persons in their neighborhoods (Galster, 1999).

There were also changes to the federal government's approach to homeless assistance. The Clinton Administration made homelessness a top priority at HUD and in 1993 began developing a coordinated plan to address the problem. After conferences with local government officials, homeless service providers, and housing specialists around the country, HUD recommended increasing the McKinney homeless assistance budget and implementing the Continuum of Care concept of assistance to homeless people (U.S. Department of Housing and Urban Development, 1994). Congress subsequently increased this funding from \$403.7 million in 1992 to \$1.1 billion in 1995 (Foscarinis, 1996). HUD also proposed consolidating five separate homeless assistance programs under the McKinney Act into a single formula grant to enable communities to more easily develop a coordinated Continuum of Care system (Fuchs & McAllister, 1996). Although this has yet to be enacted by Congress, HUD has incorporated the basic tenets of this consolidated approach by folding all separate McKinney programs into one annual funding competition.

HUD implemented its Continuum of Care approach in 1994 with one consolidated competition and an overhauled application process. Changes in the application process were designed to shift the focus from individual projects to community-wide strategies for addressing homelessness (Fuchs & McAllister, 1996). In addition, HUD changed the program criteria for funding to emphasize permanent housing projects rather than emergency shelter. Through an annual consolidated application process involving non-profit organizations and other housing providers, as well as local and state government agencies and businesses, localities are now expected to produce a unitary, locally developed strategy that identifies gaps in service and housing provision and generates plans for projects that fill these gaps with an emphasis on long term solutions (Fuchs & McAllister, 1996).

HUD's Continuum of Care process for McKinney programs is representative of administrative change rather than statutory enactment. However, its implementation, along with the agency's increasingly assertive position on housing discrimination have contributed to making federal enforcement mechanisms more readily accessible to small, non-profit organizations fighting local zoning opposition. For example, information on what constitutes a breach of Fair Housing and ADA law, as well as how to file a complaint, are included in the annual Notice of Funding Availability (NOFA) for the Continuum of Care. In addition, HUD's willingness to

work with local agencies through out the legal process was readily apparent in the HAC case. Despite the zoning denial, in written correspondence HUD implicitly encouraged HAC to move forward with the SRO project's technical requirements, providing several project extensions, as well as additional funding. HUD also provided HAC with clear and timely information concerning the status of their Fair Housing complaint against the city of Albany. Nevertheless, at the same time the case also demonstrates that a certain level of mobilization on the part of the plaintiff is required to set the federal system of intervention in motion. In other words, the responsibility for initiating legal action continues to remain in the hands of the provider.

SETTING AND METHOD

The Homeless Action Committee (HAC) is a small, non-profit organization located in Albany, New York. Albany is the capital of New York and has a population of approximately 100,000. It is located in east central New York at the convergence of the Hudson and Mohawk Rivers approximately 150 miles north of New York City. In 1997, the city's 11 shelters served 2,560 people (City of Albany, 1997c). According to Homeless and Traveler's Aid, an organization that serves as the central intake facility for homeless individuals in Albany, most area shelters are full on any given night (City of Albany, 1997c). Although the services in Albany for homeless individuals are generally good, few will take intoxicated individuals.

This case study was conducted between July 1995 and December 1997, representing the time period from HUD's initial funding approval for the project to the U.S. District Court's consent order officially reversing the zoning denial. Data collection activities included documenting meetings with the neighborhood and business associations of North Albany, the neighborhood's alderperson in the city council, as well as various city officials during the site selection process. I reviewed the official city transcript of the zoning hearing, all written correspondence of HAC with the mayor and area businesses, and legal correspondence with HUD and the US District Court.

HAC's Proposal for the SRO: The Beginning

HAC was formed in May 1989 as an advocacy organization focused on the root causes of homelessness. In November 1991, with a van donated by an area church, HAC began a mobile outreach effort providing transport to shelters and hospitals for people living on the streets. The mission of the mobile outreach van was, in the words of the organization's executive director, Donna DeMaria, "to provide compassionate human contact, a listening ear, referrals, connection to community resources, food, clothing, blankets, and transportation."

During the winters of 1991–1992 and 1992–1993, HAC also took on the operation of the 19-bed Lincoln Park shelter through a contract with the Albany County Department of Social Services. At the time, the Lincoln Park shelter was the only winter shelter of last resort in the city. Despite Lincoln Park being full to capacity, HAC was at constant odds with the city because the organization refused to require sobriety from those needing shelter. By the spring of 1993, so much controversy had arisen over HAC's position, that the organization withdrew their bid to run the shelter during the next winter season.

During fiscal year 1994–1995, HAC was awarded a three-year grant from HUD to expand its outreach van program. The grant also allowed for a six-bed winter shelter of last resort to prevent the most chronic public inebriants from freezing to death on the street. That winter, however, with the Lincoln Park shelter requiring sobriety as criteria for admission, it became clear that a six-bed facility was not enough. Further, the first apartment that HAC rented for the winter months in the Mansion Hill neighborhood was the source of a constant barrage of

complaints from the neighborhood's city council alderperson. During that winter, HAC had to move its location three times because of complaints from the neighborhood leaders.

Nevertheless, with the newly awarded HUD money, HAC began compiling statistics concerning those individuals encountered on the street. Although the vast majority (70 to 80%) had between one to five contacts with the van or winter shelter program, there was a core group of 30 to 50 people who had repeated contact with HAC and who had been chronically homeless for a number of years. This core group was, by and large, individuals with chronic alcohol problems, who had been on the streets and in and out of alcohol crisis and treatment facilities for a long period of time. According to the HAC concept paper, of this population, nearly half had lived in Albany for over 10 years, and 90% had lived there for more than four years. Not surprisingly, 95% of them had lived on the streets for more than two years and one-third, for 10 or more years.

Based on the success of two residential facilities located in St. Paul, Minnesota, HAC began developing a proposal for permanent housing for this subgroup in which sobriety would not be required. This facility, HAC proposed, would provide single room occupancy (SRO) permanent housing for 30 of the area's most chronic homeless public inebriants. In the proposal, HAC stated

the SRO residence will be a humane solution for homeless people who have not yet been able to stop drinking, but should not be living on the streets. [Such a project] will help keep people alive, safe and healthy. There will be fewer problems on our streets and in our neighborhoods.

The proposal called for limiting the search for potential sites to industrial districts, somewhat removed from both downtown areas as well as outlying residential neighborhoods, in an effort to minimize the perceived disruptive affects of the SRO. In addition, based on data obtained from the Minnesota project, HAC argued that the SRO would save the taxpayers money (Hennepin County Office of Planning and Development, 1995). HAC estimated that \$35,000 to \$40,000 per year was currently spent for one chronic street alcoholic in paramedic costs, emergency room visits, hospital stays, detoxification and treatment costs, jail, policy and court resources, but that it would cost only \$10,000 per year to house one of these individuals in the SRO.

Initially, meetings with the mayor of Albany, Gerald Jennings, were positive. In an official letter of support for the project, the mayor stated:

The city recognizes the importance of this housing option, as it will be a more permanent solution to the problem of people sleeping, panhandling, and drinking on the streets. In addition, the Emergency Services Departments in the City agreed that providing permanent housing for the most chronically homeless would ease their burden of dealing with many of the same individuals on a daily basis.

Subsequently, HAC received endorsements for the project from the Lark Street and Central Avenue Merchants Associations, the Bishop of the Archdiocese for Greater Albany County, the Albany Medical Center, St. Peter's Hospital, and other providers of services unable or unwilling to serve the targeted population. Despite this verbal support, however, in the fiscal year 1995 round for Community Development and Block Grant (CDBG) funds, HAC received no money for project development from the city.

HUD Funds the SRO and the Battle with the City Begins

HUD's role in the development of HAC's SRO project and the subsequent federal lawsuit that HAC filed against the city can be characterized as supporting. From the time of the initial funding award, HAC was able to call on HUD to clarify issues with the city, grant project extensions, and provide information concerning the status of the federal lawsuit. In addition, as mentioned earlier, HUD played a significant role in encouraging HAC to move forward with the project, providing technical assistance and additional funding despite a protracted site search and initial zoning denial.

In June 1995, HAC participated in the city's Continuum of Care application process for the first time. As part of this application process, each proposed project was rated in terms of overall priority in Albany's plan to assist homeless people by a group of community leaders. HAC's proposed SRO was ranked third. In the application, HAC requested \$896,000 in purchasing and renovation costs for a 25-bed SRO under the Supported Housing Program. HAC also requested \$1.044 million in Section 8 funds to pay the tenant rents for 10 years under the Section 8 Moderate Rehabilitation Single Room Occupancy Program. These Section 8 funds were to be administered by the Albany Housing Authority.

On July 10, 1995, the Albany Housing Authority received written notification from HUD's Office of the Assistant Secretary for Community Planning and Development that HAC was awarded the \$1.044 million in Section 8 funding for the SRO (HUD, 1995). On July 21, 1995, HAC received a letter from the Albany Department of Housing and Community Development acknowledging HUD's Section 8 award in the amount of \$1.044 but also informing HAC that HUD did not award the \$896,000 in purchase and renovation costs. Four days later, the mayor and the commissioner of Housing and Community Development publicly announced that the city was not sure if the \$1.044 million in HUD funding was specifically earmarked for the HAC SRO. The *Times Union*, one of the area's daily newspapers, reported that city officials acknowledged that they were trying to see how much flexibility the city had in shifting the HUD money to other projects ("HUD Funds," 1995). In response to this development, HAC and the Albany Housing Authority requested official clarification from HUD, through New York Senator Patrick Moynihan's office, concerning the \$1.044 million. In a letter dated August 1, 1995 from the Albany Housing Authority, HAC was informed that congressional notification from Senator Moynihan's office had been received "relative to the affirmative HUD decision to fund the 25 Section 8 certificates tied to the SRO for a total value over 10 years of \$1.044 million."

Finding a Site

With confirmation from HUD that the funds were intended for the SRO, HAC began focusing on finding a suitable site and securing the additional funds needed to cover purchase and renovation costs. From September 1995 to July 1996, HAC viewed over 50 properties in Albany County, evaluating them for expense, size, and proximity to residential areas, as well as public transportation. HAC's criteria for an appropriate site included close proximity to public transportation but a reasonable distance from residential neighborhoods and "people, places and things" that the proposed SRO residents might associate with alcohol and panhandling (*Homeless Action Committee v. City of Albany*, 1997). During this time, HAC attempted to procure three different sites. However, for various reasons agreements with the property owners never came to fruition. Finally, in July 1996 HAC settled on a vacant warehouse at 393 North Pearl Street, which had been unused and not maintained for approximately seven years. On August 30, 1996, HAC exercised the option to purchase this site, signing an agreement with the property owner.

The warehouse was located in the North Albany industrial zone, approximately 1.2 miles from downtown and at least one half mile from residential neighborhoods. After the purchase agreement was signed, HAC began meeting with the leaders of both the North Albany-Skaker Park Neighborhood Association and the North Albany Business Association. Despite the warehouse’s distance from both the Central Business District (CBD) and residential areas, neighborhood leaders became “concerned for their children” and several downtown businesses complained that the site was still too close to the CBD. The location of the proposed site in relation to the closest residential area and the Central Business District is shown in Figure 1.

HUD Awards HAC Additional Funding and a Project Extension

Meanwhile, HAC was awarded the following funds for purchase and renovation costs: \$50,000 from the New York State Legislature, \$70,000 from the Capital District Community Loan Fund, and \$45,000 from the New York State Housing Trust. In addition, HAC requested supplementary HUD funding to expand to 30 subsidized SRO units. In July 1996, HUD awarded HAC an additional \$208,200 in Section 8 funding. Also in July, HAC submitted purchase and renovation funding applications to the New York State Homeless Housing Assistance Program for \$749,800, the New York State Housing Trust for \$265,000, and the Affordable Housing Partnership for \$70,000.

Yet, due to the protracted site search process, HAC could not meet HUD’s initial deadline of March 1996 for the required technical submissions, including proof of site control. If these requirements were not met, HUD could take steps to recapture the funds and allocate them to other homeless providers. On the advice of HUD’s Office of Special Needs Assistance Pro-

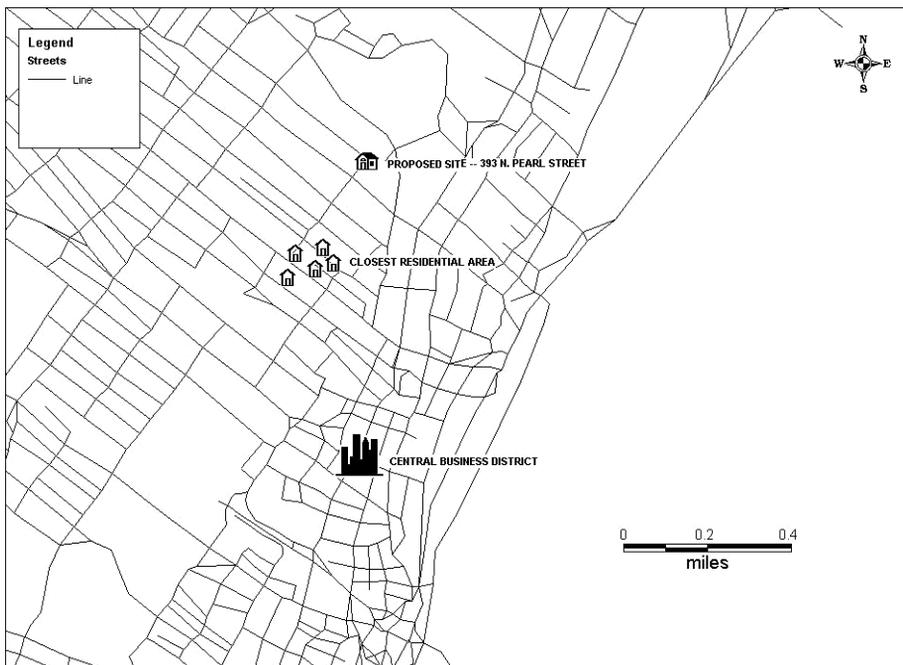


FIGURE 1
Location of Proposed Site in the North Albany Neighborhood

grams, HAC sent a letter to HUD on February 21, 1996 requesting an extension. On May 10, 1996, HAC received written confirmation from HUD that an extension to December 31, 1996 had been granted. The letter stated, “Given the diligent efforts of the Homeless Action Committee to secure funding and to meet the requirements of the technical submission, we are granting the request for an extension . . . we appreciate your dedication to solving the problem of homelessness.”

The Local Zoning Process for HAC’s SRO

With the purchase agreement in place for 393 North Pearl State, on August 30, 1996, HAC applied to the city of Albany, Bureau of Buildings for a use and area variance to renovate and convert the warehouse. By requesting a use and area variance directly from the Bureau of Buildings, HAC was hoping to streamline the zoning approval process (*Homeless Action Committee v. City of Albany, 1997*). Two weeks later HAC received written notification from the Bureau of Buildings that their request for a use and area variance was denied on the grounds that the property was located in an area zoned industrial and that the proposed facility would not comply with Section 375-75 of the city of Albany Zoning Ordinance (City of Albany, 1997a). This meant that HAC had to apply for the variance through the Board of Zoning Appeals (BZA) and would be in jeopardy for not meeting the new HUD project deadline of December 31, 1996.

Again, under the advice of HUD’s Office of Special Needs Assistance Programs, HAC sent a letter to HUD updating the department on the status of their efforts to secure site control, additional funding, and zoning approval for the project. On December 11, 1996, HAC received written approval from HUD granting another project extension. The letter stated:

Although your project has taken a good deal more time to complete than we would like, we appreciate the difficulties in obtaining site control and the necessary financing to complete your project. Therefore, based upon your efforts to move this project forward, we will extend your deadline for technical submission until June 30, 1997.

As mentioned earlier, HAC required a use and area variance to convert the 393 N. Pearl Street warehouse into a residential SRO because the location was zoned for industrial use. Under Section 375-75 of the city of Albany zoning ordinance, a use and area variance can be granted if the applicant presents credible evidence that the property in question would not be used for any other practical purpose. However, in HAC’s October 3, 1996 application to the BZA, it was requested that the use and area variance be granted under the “reasonable accommodations” requirement of the FHAA. The application stated the following:

The 30 people who will be housed at our SRO are all disabled and as such are protected under the Fair Housing Amendments Act and the Americans with Disabilities Act. Municipal ordinances are subject to the FHAA “reasonable accommodations” requirements. Under it, municipalities are required to make “reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling.” This encompasses an obligation to change rules or practices if they are necessary to allow a person with a disability an opportunity to live in the community (City of Albany, 1996).

The BZA subsequently scheduled the required public zoning hearing for November 11, 1996. Prior to the zoning hearing, representatives from HAC met with the mayor and North Albany neighborhood leaders on several occasions. Unlike prior, less formal meetings at city hall, Mayor Jennings had his corporate counsel (lawyers for the city of Albany) with him along with the

director of the Office of Planning and Neighborhood Development. At a meeting held in late September 1996, the mayor informed representatives from HAC that it was “beyond his power” to sway the BZA if neighborhood opposition precluded granting a use variance. Similarly, in the same meeting, the director of the Office of Planning and Neighborhood Development stated that perhaps it would be in everyone’s best interest if HAC attempted to locate a site in the suburbs, because the city of Albany was literally becoming saturated with special needs housing.

Likewise, meetings with the North Albany neighborhood leadership resulted in very vocal, though polite discouragement of HAC siting its facility at 393 N. Pearl Street or at any other location in the neighborhood. In fact, one of the primary complaints was that city hall had repeatedly ignored pleas from the neighborhood for a police foot patrol and for a fence around nearby railroad tracks. In one such meeting, Donna DeMaria, HAC’s executive director, was told, “not to take it personally, but the neighborhood really was not equipped for such a facility.”

Zoning hearings are public affairs. Two weeks prior to the hearing scheduled for November 11, 1996, the Office of Planning and Neighborhood Development posted a public notice in North Albany announcing the zoning hearing for HAC’s proposed facility. Citizens were invited to testify either for or against the proposed facility at the hearing. This notice allowed neighborhood leaders enough time to mobilize opposition. This opposition came in the form of flyers distributed around North Albany warning citizens that “mentally ill alcoholics” were moving into the area.

On a less public front, the North Albany neighborhood and business association leaders visited every business within a one-mile radius of the proposed site urging them to testify against the SRO at the hearing. As a result, businesses previously supportive of the project suddenly changed their minds, and new, more distantly located businesses such as a large furniture store, Huck Finn’s Warehouse, joined the opposition team. The location of businesses, including Huck Finn’s, in the North Albany neighborhood are shown in Figure 2.

The format of the November 11, 1996 hearing was divided into three sections. First, representatives for HAC presented the project to the zoning board, and others supporting the project were given time to testify. Second, the opposition presented their reasons for opposing the project. Third, after opposition testimony was heard, HAC was allowed time for rebuttal. The general public is always invited to these hearings and anyone can sign up to testify for or against the proposed projects. In this case, the Common Council Chambers was full to capacity with opponents on one side of the room and proponents on the other.

Donna DeMaria, HAC’s Executive Director, was the first to testify, followed by the project’s architect, lawyer, and an expert on housing issues concerning homeless people, in addition to several HAC board members. Two items stood out in this testimony. The first item was the building plans. In designing the space, it was argued that HAC had made a concerted effort to accommodate neighborhood concerns. For example, the plans included an inner courtyard where residents could smoke, thus avoiding potential complaints from area businesses of loitering.

Second were the house rules. These rules, to be strictly enforced by 24-hour staffing, included the following: 1) No alcohol use on the premises or in the immediate neighborhood; 2) N. Pearl Street (north of the building), Broadway, the closest residential area (see Figure 1), and all surrounding businesses, (including Huck Finn’s Warehouse) would be off limits to residents; 3) Any resident who trespassed on neighboring properties, panhandled, or caused a disturbance in the immediate neighborhood would be warned once. The second offense would result in discharge from the house; 4) No illegal drug use by tenants; and 5) Violent behavior (physical or verbal) would lead to eviction (Homeless Action Committee, 1996).

Other notable testimony in support of the project came from Deborah Dennis, director of the National Resource Center on Homelessness and Mental Illness, a federally funded program operated locally by Policy Research Associates, Inc. Recognized nationally as an expert

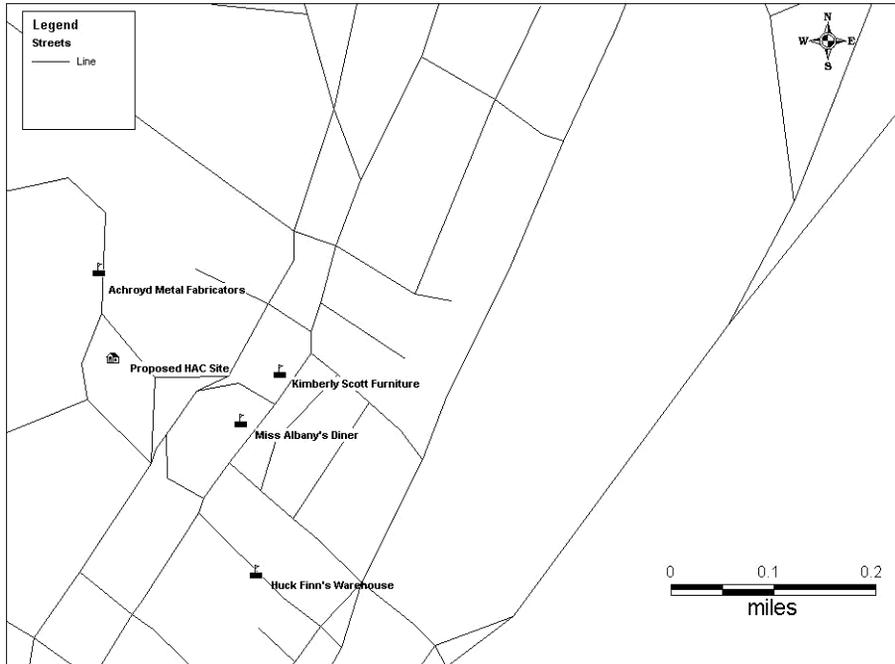


FIGURE 2
Location of Businesses in the North Albany Neighborhood

on housing issues concerning homeless individuals, Dennis had visited 43 cities across the country in which she saw many innovative and successful housing programs for homeless individuals. In her testimony she addressed several factual inaccuracies concerning the opponents' portrayal of the HAC SRO and presented data concerning the positive impact similar programs have had on neighborhoods in New York City (City of Albany, 1997b).

After HAC's supporters finished their testimony, the opposition took the floor. Fifteen representatives from area businesses, four homeowners, two leaders of the North Albany-Skaker Park Neighborhood Association, and the North Albany Alderperson testified against the SRO. Testimony was emotional and acrimonious. Clifford Brown, president of Miss Albany Diner stated that

we have experienced vagrants, with easy access to toilet facilities, they quietly enter the premises, occupy the jon (sic) for 15 minutes while they literally take a bath. Then leave, leaving the room wet from top to bottom and smelling so bad it can't be used for half an hour . . . what [our business] doesn't need is a facility that will bring more incorrigible life into the immediate area.

Similarly, Paul Zabinski of Achroyd Metal Fabricators stated that "if Albany is sincere about cleaning up our city and attracting new businesses, let's stop HAC right now! Let's stop drug addicts, alcoholics, and crime from entering our area even more." Sarah Curry-Cobb, the city council alderperson representing North Albany stated, "the residents and businesses of North Albany's Fourth Ward are sick of being dumped on" (City of Albany, 1997b).

At the Monday, February 24, 1997, zoning hearing the BZA voted unanimously to deny HAC the use and area variance for 393 North Pearl Street on the grounds that the area was purely commercial, zoned industrial, and that there were no permissible residential variances permitted under that scheme. In the official "Notification of Local Action," dated March 5, 1997, the BZA made no mention of the FHAA reasonable accommodation requirements. The notice stated the following:

1. The applicant did not prove unnecessary hardship with competent financial data. An affidavit of the property owner, not the applicant, did not prove that no permitted use in this zoning district would provide a reasonable return. Rather, it sets forth in the broadest of terms that the property is encumbered by mortgages, tax delinquency and that the County commenced foreclosure action.
2. There is nothing unique about this property that doesn't apply to all properties in this area. Although the property has apparently been vacant for some time, there is nothing to indicate that it may not be utilized by a commercial business.
3. The hardship, if any of the applicant and of the owner of the property is self-created. Certainly, each party was aware, or should have been aware of the zoning restrictions in this area (City of Albany, 1997d).

HAC Files a Lawsuit Against the City

On March 7, 1997, with pro bono legal representation from Disability Advocates, a local legal aid and advocacy organization, HAC notified the city that it was planning to file a federal lawsuit against the city of Albany and the Board of Zoning Appeals. HAC gave the city 10 days to either grant HAC a reasonable accommodation under the FHAA, or find an alternative but suitable site for the SRO. On March 13, Mayor Jennings denied HAC's reasonable accommodations request but agreed to develop a plan to find an alternative site. To accommodate this search, HAC permitted the city three additional weeks either to reconsider the reasonable accommodation request or to find HAC an alternative site. The city offered HAC four alternative locations for the SRO but HAC claimed that they were all unacceptable. According to the legal briefs filed on HAC's behalf in *Homeless Action Committee v. City of Albany* (1997), the first site was too small; it was a 1,000 square foot facility when HAC required 11,000. The second site was unacceptable because it was located in the Port of Albany. HAC asserted that this site was rejected by both state and federal funding sources due to its excessive noise and pollution levels. The third site was deemed unacceptable because it was located under highway access ramps and directly next to the parking lot of a bus company. The fourth site proposed by the city was the Veteran's Administration Hospital. HAC rejected this site because HUD regulations governing the use of the funds set aside for the project prohibited the use of a hospital for housing.

With no further cooperation from the city, on April 4, 1997, HAC filed a lawsuit against the city with the U.S. District Court, Northern District of New York under the FHAA. The complaint stated that the

Defendants' refusal to make reasonable accommodations in their rules, policies, and practices, which is necessary to afford the proposed SRO residents an equal opportunity to use and enjoy housing for which they are qualified, violates the Fair Housing Amendments Act, as well as the Americans with Disabilities Act (*Homeless Action Committee v. City of Albany*, 1997).

In addition, a complaint against the city alleging violations of the FHAA was filed by HAC with HUD's Office of Fair Housing and Equal Opportunity on May 6, 1997 (*Homeless Action Committee v. City of Albany, 1997*).

HUD Grants HAC Another Project Extension and Investigates the FHAA Complaint

Anticipating that the lawsuit and FHAA complaint would not be resolved prior to HUD's June 30, 1997, project deadline, HAC requested an indefinite extension until court actions were resolved. This request was sent to HUD the same week the lawsuit against the city was filed. In addition, HAC informed HUD that their legal council anticipated filing for summary judgment concerning the lawsuit on the grounds of the reasonable accommodation requirement of the FHAA. On April 9, 1997, HAC received written correspondence from HUD indicating that the Department did not grant indefinite extensions but would instead extend the project deadline to December 30, 1997. The letter stated the following:

The Department believes that HAC is making a good effort to move this project forward, however, it does not grant indefinite extensions . . . [Correspondence] from HAC indicates that protracted litigation may not be necessary and that the case could be resolved in the next several months. Given this, HUD will extend the current due date of June 30, 1997 by six months in order to give HAC time to resolve the variance issues and will review the situation at the end of the six month period. The new deadline is December 30, 1997.

On May 21, 1997, HAC received written confirmation from HUD stating that the FHAA complaint against the city had been filed. In early June, an investigator from HUD's New York State Office contacted HAC and requested additional documentation concerning each time HAC had made a request for FHAA reasonable accommodations to the city of Albany. HAC submitted this documentation to the HUD New York office on June 24, 1997. Also during June, HAC received notification from the New York State Homeless Housing Assistance Program of a funding award totaling \$749,800 for purchase and renovation costs.

On July 18, 1997, HAC filed for summary judgment concerning the lawsuit against the city on the grounds that the city had illegally discriminated against HAC under the FHAA. The legal brief filed by HAC argued that they had established a prima facie case of disability-based discrimination because the city had failed to make reasonable accommodation a matter of law (*Homeless Action Committee v. City of Albany, 1997*). The city cross-moved for summary judgment on the grounds that the FHAA did not permit disabled individuals to circumvent the regulatory process in determining zoning variances (*Homeless Action Committee v. City of Albany, 1997*).

The Outcome

During the course of the legal process, the mayor attempted to discredit the need for an SRO by targeting homeless alcoholics with co-occurring mental disorders. In May 1997, he publicly challenged the project by questioning the estimated numbers of the target population in the city of Albany. He was quoted in the *Times Union* as saying "the proposed residence for homeless alcoholics is too large and over funded . . . perhaps [such a program] could be done more discretely in a few homes" ("Mayor's Shelter," 1997, p. 2b). In that same article, the mayor conveyed his plan to appoint a task force comprising area service providers for the purposes of coming up with a more accurate estimate of homeless persons meeting the SRO cri-

teria. HAC responded by providing the *Times Union* with the official statement required by HUD's Continuum of Care application indicating municipal support. The following was reported in the paper: "The questions Mayor Jennings is raising appear to be a reversal of his and the city's support of the project . . . On June 10, 1995 Jennings and the city's Department of Housing and Community Development submitted a form [to HUD] stating that the SRO was consistent with the City's Consolidated Plan" ("Mayor's Shelter," 1997, p. 2b).

By September, the task force was going nowhere largely because it had become evident that conducting such an assessment would not only be costly but would also require submission of the proposed study to an Internal Review Board (IRB) to ensure human subject confidentiality. Also in September both HAC and the city received notification from HUD's New York State Office that the investigation of HAC's FHAA complaint against the city had been forwarded to the U.S. Department of Justice for further review. The notification indicated that the projected completion date for the investigation was December 17, 1997. In a telephone conversation on September 19, 1997, a HUD senior investigator informed HAC's executive director that further review by the Department of Justice was necessary in order to determine whether or not the city's refusal to make reasonable accommodation constituted a pattern of action or intended discrimination. Given this development, HAC's legal counsel approached the city again with a request to make a reasonable accommodation. This was declined on the basis that the criteria for meeting the use variance test was not met by HAC under the city of Albany's zoning ordinance (*Homeless Action Committee v. City of Albany*, 1997).

On October 23, 1997, Judge Kahn of the U.S. District Court, Northern District of New York issued his decision to deny both HAC's motion for summary judgment on the Fair Housing Act claim and the city's cross-motion for summary judgment. The decision was based on the assumption that no other variance had been given for residences in the zone in question. Therefore, the written decision stated: "HAC had failed to establish that a variance to allow a residential use in a purely commercial area was reasonable" (*Homeless Action Committee v. City of Albany*, 1997). However, the decision went on to state: "should it come to light that residence variances have been and are granted within this zone, HAC's burden of showing reasonableness under the FHAA would be met" (*Homeless Action Committee v. City of Albany*, 1997). The city's cross motion was denied because further review of past BZA variance decisions was needed.

Legal counsel for HAC subsequently reviewed BZA decisions on use and area variances issues over the past five years finding a significant number of incidences where variances had been granted by the BZA to permit residential uses in industrial zones. On November 14, 1997, a brief was submitted to Judge Kahn citing this new evidence and requesting summary judgment concerning the lawsuit against the city. The brief stated

given the new evidence, the court grant HAC summary judgment and issues a permanent injunction ordering the city of Albany to modify the application of the zoning ordinance so that HAC may establish its SRO housing at 393 North Pearl Street for homeless individuals with a disability (*Homeless Action Committee v. City of Albany*, 1997).

On November 19, 1997, HAC received a telephone call from city hall requesting a meeting to negotiate a settlement concerning the lawsuit. At the meeting, an agreement was reached between HAC and the city. It stipulated that HAC would not seek punitive damages from the city; in exchange HAC would gain approval of the use variance for 393 N. Pearl Street. On December 19, 1997, Judge Kahn issued a consent order to permit the establishment of the SRO at 393 N. Pearl Street (*Homeless Action Committee v. City of Albany*, 1997). Two weeks after the consent order was issued HAC received notification from HUD that an additional \$400,000

would be allocated to the project. Thus, HAC not only received site control but the remainder of the funds needed to make the SRO a reality.

EVALUATION AND RECOMMENDATIONS

No one knows why the city decided to settle the lawsuit with HAC. There was speculation that HUD's secretary at the time, Andrew Cuomo, personally encouraged the mayor to settle. Others speculated that the decision to settle was based on HAC's submission of evidence concerning previous BZA decisions to grant use variances for residences in industrial zones. Regardless, the fact remains that the HAC case is a success story. It illustrates how local providers can overcome the power of NIMBYism by utilizing HUD as a resource in fighting exclusionary zoning policies concerning housing for homeless individuals. However, the case also illustrates how the cards remain stacked against the provider at the local level. HUD's more aggressive position on housing discrimination and its implementation of the community-wide Continuum of Care process clearly were not among the considerations at the time of the initial zoning denial. In fact, the mayor and other city officials appeared confident that they had the law on their side. This confidence may have been rooted in the assumption that HAC, as a small non-profit operating on a shoestring budget, did not have the knowledge or initiative to challenge the decision.

HUD was able to provide support because of HAC's persistence in locating a site, securing additional funding, and fighting the zoning denial through federal law. Indeed, in all probability, the project would have died if HAC had given up after the initial zoning denial. In other words, the available federal resources had to be mobilized to challenge the zoning denial. For HAC, mobilization required: 1) the determination to pursue the case; 2) knowledge of current federal resources; and 3) access to legal assistance.

One important implication is that both knowledge and access to the federal system of intervention have to be made more readily available to the small, local nonprofit. HUD could easily achieve this through expanded knowledge dissemination initiatives focused on informing developers of housing for homeless people about the federal legal options available to combat exclusionary zoning policies and how to tap them. In addition, HUD could add a section to the Continuum of Care application requiring localities to submit a plan concerning the site selection that would include government officials and neighborhoods leaders in the process. This would make it more difficult for municipalities to deny zoning permits to projects that receive Continuum of Care funding.

By taking these steps, HUD could accomplish four objectives. First, the agency would increase the knowledge base concerning the federal system of intervention among the organizations attempting to develop housing with federal funds. Second, a more informed nonprofit housing sector would increase the likelihood of mobilizing the federal system of intervention. Third, the requirement to create an inclusive plan for the site selection process as part of the Continuum of Care application, would make it more difficult for local governments to deny zoning permission to funded projects. Last, faced with more informed providers not intimidated by the power of NIMBYism, local governments may be forced to rethink zoning barriers imposed on special needs housing.

CONCLUSION

The HAC case illustrates how recent changes in HUD's governance over Fair Housing Law enforcement and administration of McKinney funding, coupled with the agency's more aggressive position on housing discrimination, have made the agency a valuable resource in com-

bating local exclusionary zoning policies targeting housing for homeless individuals. By examining the process by which HAC was able to reach a settlement with HUD's support, I have highlighted that at the very least HUD was willing to work with HAC throughout the process to bring the SRO project to fruition. The fact that a small local non-profit was able to utilize HUD as a resource may also be indicative of a trend in fighting municipal jurisdictional authority concerning zoning opposition to housing projects for homeless people.

However, the case also illustrates that providers of housing for homeless people need to be pro-active in mobilizing these powerful federal allies. Indeed, it is the local provider who must access the federal system of intervention in order to set the available resources in motion. Complacency among local governments concerning the legality of zoning barriers to this type of housing is most likely entrenched in the assumption that small non-profits lack the determination, knowledge, and resources to pursue these cases at the federal level. Therefore, knowledge and access to the federal system of intervention should be made more readily available to these local housing organizations.

ACKNOWLEDGMENTS: I thank John R. Logan, Todd Swanstrom, Robert Adelman, and the anonymous reviewers for their helpful comments and criticisms; the Lewis Mumford Center for Comparative Urban and Regional Research, the Homeless Action Committee, as well as Disability Advocates, Inc. for providing resources; and the National Resource Center on Homelessness and Mental Illness, operated by Policy Research Associates, Inc. under contract with the federal Center for Mental Health Services, for bibliographic information. A previous version of this paper won the 1999 Society for the Study of Social Problems Graduate Student Paper Competition, Conflict, Social Action and Change Division Award.

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