Brigham Young University Journal of Public Law

Volume 24 | Issue 2 Article 6

3-1-2010

The Role of the Exhaustion and Ripeness Doctrines in Reasonable Accomodation Denial Suits Under the Fair Housing Amendments Act

Matt Hall

The Role of the Exhaustion and Ripeness Doctrines in Reasonable Accommodation Denial Suits Under the Fair Housing Amendments Act

I. INTRODUCTION

Bryant Woods Inn, Inc. seemingly resolved the question of when a locality may require a disabled party to appeal an adverse accommodation request.[1] There, a nursing home operator sued Howard County for failing to make a reasonable accommodation under the Fair Housing Act to allow it to expand its operation.[2] The County argued that because the operator failed to appeal the County's preliminary decision denying the reasonable accommodation request to the County Board of Appeals, the operator failed to exhaust its administrative remedies.[3] Additionally, Howard County argued that because the operator failed to complete the administrative process by failing to appeal, the claim was unripe for judicial determination.[4]

The Fourth Circuit rejected the exhaustion defense argument, holding that the Fair Housing Act provides that a reasonable accommodation plaintiff need not exhaust administrative remedies.[5] The court rejected the ripeness argument on the ground that a reasonable accommodation violation occurs when the petitioner is first denied their request, and is therefore sufficiently concrete, regardless of the availability of subsequent administrative proceedings.[6]

This Note argues that *Bryant Woods Inn* has summarily and incorrectly foreclosed the possibility of a judicially-imposed exhaustion requirement. Analogizing to the same takings jurisprudence to which the court referred in its foreclosure, this Note argues that prudential ripeness counsels against judicial involvement in reasonable accommodation disputes until the prescribed administrative process has been completed.

---

1. Bryant Woods Inn, Inc. v. Howard County Maryland, 124 F.3d 597 (4th Cir. 1997). While this case is over ten years old, the correctness of its holding that a party need not exhaust its locality-provided administrative remedies has not been challenged by court or commentator, and it has been cited.

2. *Id.* at 599–601.

3. *Id*. at 601.

4. *Id.*

5. *Id.*

6. *Id.* at 602.

First, this Note provides a brief background on the Fair Housing Act of 1968 and the Fair Housing Amendments Act of 1988. Next, it explores ripeness and exhaustion doctrines in general. Third, it argues that *Bryant Woods Inn* has incorrectly interpreted Congressional intent with respect to the elimination of an administrative remedy exhaustion requirement. Finally, it analogizes that just as a plaintiff must invoke multi-step administrative procedures for just compensation after an alleged taking before a taking claim is ripe for judicial resolution, so should a plaintiff have to invoke multi-step administrative procedures for a reasonable accommodation before an FHA violation claim is ripe.

II. THE FAIR HOUSING ACT

Title VIII of the Civil Rights Act, popularly known as The Fair Housing Act ("FHA"), was enacted by Congress in 1968 in response to the civil unrest of the mid 1960s.[7] As originally passed, the FHA protected individuals from discrimination in the sale or rental of housing based on race, color, religion, or national origin.[8] In 1974, Congress amended the FHA to add a prohibition against discrimination on the basis of sex.[9]

In 1988, in what was widely seen as a major victory for the civil rights movement in its quest to improve the enforcement of the FHA,[10] Congress enacted the Fair Housing Amendments Act ("FHAA").[11] In addition to its primary goal of improving enforcement of the 1968 act,[12] especially with respect to the prohibition against racial discrimination,[13] the FHAA was passed to protect handicapped individuals and families with children from discrimination.[14]

---

7. *See* H.R. REP. NO. 100-711, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2176.

8. PUB. L. 90-284, § 804 (codified as amended at 42 U.S.C. §§ 3601–3619 (2000)).

9. Housing and Community Development Act of 1974, PUB. L. 93-383, § 808(b)(1).

10. *See, e.g.* Thomas J. Leuck, *The New Teeth in the Fair Housing Law*, N.Y. TIMES, March 12, 1989, *available at* http://www.nytimes.com/1989/03/12/realestate/the-new-teeth-in-the-fair-housing-law.html ("'The law is a big victory,' said Wade Henderson, a lawyer with the American Civil Liberties Union in Washington. 'It provides the missing link in the enforcement stream of the American civil rights movement.'").

11. Fair Housing Amendments Act of 1988, PUB. L. 100-430 (codified at 42 U.S.C. §§ 3601-3619 (2000)).

12. H.R. REP. 100-711, at 15 (1988) ("The Committee, after extensive review and analysis over a number of Congresses, views [the current limited means for enforcing the law] as *the primary weakness* in existing law." (emphasis added)).

13. *Id.* (discussing housing discrimination and segregation solely in the context of race).

14. *Id.* at 17-19; 42 U.S.C. §§ 3604–3606.

A. FHAA's Enforcement Provisions

The 1968 Act's enforcement provisions gave Housing and Urban Development ("HUD") only limited power in instances of individual discrimination to "eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion."[15] The Act gave the Attorney General the power to enforce it in federal court, but only against persons who had "engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights granted by [the] title."[16] While the Act permitted individuals to enforce the law in federal court against violations that did not constitute a pattern or practice, it limited recovery of attorneys' fees to those plaintiffs who were financially unable to pay them.[17]

By 1988, there was bipartisan agreement that the enforcement provisions needed strengthening due to HUD's lack of power to sue violators[18] and litigants' financial inability to do so.[19] Thus, the FHAA provided a new remedy—the administrative proceeding.[20] Noting that states and federal agencies have economically and efficiently used administrative proceedings for many years, the House Judiciary Committee Report stated that "[i]f conciliation fails . . ., then HUD can bring the case to a hearing before an administrative law judge. Because HUD can continue to enforce the law if the conciliation is unsuccessful, there is a real incentive for both parties to conciliate and resolve the complaint in the early stages."[21] However, Congress took care to note that the creation of this new administrative proceeding remedy was not to impair individuals' ability to bring a civil action against those parties that discriminated against them. Rather, "[t]he Committee intend[ed] for the administrative proceeding to be a primary, but not exclusive, method for persons aggrieved by discriminatory housing practices to seek redress."[22]

As an additional enforcement-strengthening provision, the FHAA eliminated the FHA's attorneys' fee recovery provision, allowing the

---

15. PUB. L. 90-284, § 810(c).

16. *Id.* at § 813(a) (emphasis added).

17. *Id.* § 812(c).

18. H.R. REP. 100-711, at 16-17, n.20 (1988) ("The gap in enforcement is the lack of a forceful back-up mechanism which provides an incentive to bring the parties to the conciliation table . . . [T]he exclusive reliance upon voluntary resolution is . . . an[] invitation to intransigence. Reform of the Fair Housing Act is a necessity that is acknowledged by all." (internal quotation marks omitted)).

19. *Id.* at 16.

20. *Id.* at 17; 42 U.S.C. § 3612 (2000).

21. H.R. REP. 100-711, at 5; 42 U.S.C. § 3612(b) (providing that if a complainant or respondent elects not to have his HUD charge of unlawful discrimination adjudicated in federal court, the Secretary of HUD shall set a hearing before an administrative law judge).

22. H.R. REP. 100-711, at 23.

court, or administrative law judge, to award attorneys' fees to the prevailing party regardless of his ability to otherwise pay them.[23] Finally, the FHAA eliminated the "pattern or practice" limitation with respect to the violations against which the Attorney General may sue on behalf of the aggrieved individual.[24] Thus, the FHAA improves the FHA's enforcement provisions by instituting an administrative process, allowing all parties to be awarded attorney's fees, and providing full enforcement powers to HUD.

B. FHAA's Handicapped and Familial Status Provisions

The FHAA's secondary purpose is to extend equal housing protection to the handicapped and families with children.[25] It defines handicap broadly, as a person who has "a physical or mental impairment which substantially limits one or more of such person's major life activities."[26] This definition purposefully mirrors the definition of handicap under the Rehabilitation Act of 1973 ("RA"), presumably with the intent that the case law defining "substantially limits," and "major life activities" under the RA would aid courts in deciding cases under the FHAA.[27]

The reasonable accommodation provision of the FHAA, with which this Note is particularly concerned, provides that discrimination under the FHAA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[28] As with the definition of handicap, Congress relied on the long history of RA case law to help define the concept of reasonable accommodation.[29] While the statute fails to indicate whether the reasonable accommodation requirement was intended to apply to zoning, the House Judiciary Committee Report states that "[t]he Committee intend[ed] that the prohibition against discrimination against those with

23. 42 U.S.C. § 3612(p) (stating that the ALJ or court may award attorney's fees and costs to the prevailing party, so long as the party is not the United States).

24. *Id.* § 3612(o)(1).

25. H.R. REP. 100-711 at 13.

26. 42 U.S.C. § 3602(h)(1).

27. H.R. REP. 100-711 at 13 (1988) ("Handicapped persons have been protected from some forms of discrimination since Congress enacted the Rehabilitation Act of 1973, and the bill uses the same definitions and concepts from that well-established law."). "The Committee intends that the definition be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act." *Id.* at 22.

28. Fair Housing Amendments Act of 1988, PUB. L. 100-430 § 804(f)(3)(B) (1988).

29. H.R. REP. 100-711 at 25.

handicaps [as provided by Section 804(f)(2)] apply to zoning decisions and practices."[30]

Thus, Congress enacted the FHAA to achieve two separate goals: (1) Enhance the ability of individuals and the government to enforce anti-discrimination law by, inter alia, creating a lower-cost,[31] easier-to-use[32] administrative proceeding, and (2) expand the coverage of the FHA to include the handicapped and families with children. The next section explores the history of the ripeness and exhaustion of administrative remedies doctrines. Following this history, this Note argues that the Committee's intention that a party need not exhaust the administrative proceeding has no relation to the locality-provided reasonable accommodation hearing process. Additionally, this Note argues that takings jurisprudence suggests that some reasonable accommodation controversies may not be ripe until the locality-provided reasonable accommodation hearing process has been completed.

III. RIPENESS, FINALITY, AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

Several gatekeeping mechanisms exist through which a court may avoid or defer examining controversies involving administrative agencies.[33] Central among these mechanisms are the doctrines of ripeness, finality of agency action, and the exhaustion of administrative remedies.[34] Each doctrine has important implications for the reasonable accommodation process in the zoning context.

The basic rationale behind the ripeness doctrine is that courts should avoid becoming entangled in abstract disagreements.[35] There are two types of ripeness doctrines. The first, constitutional ripeness, serves as a limitation on the judiciary's power.[36] The second, prudential ripeness, is

30. *Id.* at 24.

31. *See id.* at 16 (noting that the FHA's enforcement has been hampered by the "limited financial resources of . . . litigants.")

32. By creating an internal administrative judiciary system, the FHAA allows the HUD to enforce the law "in-house," whereas under the FHA, if the HUD's conciliation efforts failed, the aggrieved party's only option, at least where the offense didn't constitute a pattern or practice, was to proceed on its own in a civil action. *See infra* Section III.A; *supra* note 18; H. R. REP 100-711 at 16, n.16. "In order to redress the ordinary individual case of discrimination, the victim of discrimination must bring a lawsuit in court." *Id.*

33. R. George Wright, *The Timing of Judicial Review of Administrative Decisions: The Use and Abuse of Overlapping Doctrines*, 11 AM. J. TRIAL ADVOC. 83, 83 (1987).

34. *Id.*

35. Abbott Labs v. Gardner, 387 U.S. 136, 148 (1966) (overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977)).

36. *Id.* at 357.

a more flexible doctrine that helps courts avoid adjudicating disputes that may resolve themselves.[37]

The following section distinguishes the two types of ripeness and explains how the concepts of finality and exhaustion apply under each.[38]

A. Constitutional Ripeness

Article III of the United States Constitution provides that the federal judicial power extends to those cases and controversies that arise under the Constitution.[39] Constitutional ripeness limits the judiciary to deciding only those cases and controversies that have taken concrete form.[40] The doctrine "prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it."[41] Because constitutional ripeness is a jurisdictional prerequisite, a court must note its absence sua sponte should a party fail to raise the issue.[42]

While a ripeness inquiry will generally consist of two prongs, the "fitness of issues for judicial decision" and "the hardship to the parties of withholding court consideration,"[43] the latter is not relevant to constitutional ripeness but only to prudential ripeness.[44] To determine whether an issue is fit for review, courts consider the type of alleged harm, the finality of an agency's decision, and whether it would be futile for the aggrieved party to go through further proceedings.[45] Finality is concerned with whether the "initial decision maker has arrived at a definite position on the issue that inflicts an actual, concrete injury."[46] Futility is an exception to the exhaustion of administrative remedies requirement—for example, where a party can show that an agency has

37. N.Y. Civil Liberties Union v. Grandeau, 528 F.3d 122, 131 (2d Cir. 2008).

38. While the doctrines of ripeness, finality, and exhaustion of administrative remedies are said to all overlap, each relating to the timing of an action, when viewed through the lens of administrative agency action, ripeness is a "generic concept dealing with the related doctrines of exhaustion of remedies, finality and ripeness." Wright, *supra* note 33, at 84. Therefore, this Note treats the doctrines of exhaustion and finality as being somewhat subsumed into ripeness. While this may be overly simplistic, the extent of the doctrines' overlap is beyond this Note's scope.

39. U.S. CONST. art. III, § 2.

40. *N.Y. Civil Liberties Union*, 528 F.3d at 131.

41. *Id.* (quoting Simmonds v. I.N.S., 326 F.3d 351, 357 (2d Cir. 2003)).

42. *Simmonds*, 326 F.3d at 358, n.8.

43. Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967) (overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977)).

44. McInnis-Misenor v. Maine Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003).

45. Marriott Senior Living Servs., Inc. v. Springfield Twp., 78 F. Supp. 2d 376, 386 (E.D. Pa 1999).

46. Williamson County Reg'l Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 193 (1985).

predetermined its position, it is not required to go through the formal, foredoomed process of applying for relief to that agency.[47]

A party's failure to exhaust its administrative remedies, like a failure to demonstrate constitutional ripeness, can also bar a federal court from exercising jurisdiction over a controversy, where the exhaustion of remedies are prescribed by statute.[48] Exhaustion is strongly tied to the finality requirement and the boundary between the two is unclear.[49] Nevertheless, the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* stated the distinction between the two as:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definite position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.[50]

Finally, the distinction between exhaustion of administrative remedies and primary jurisdiction warrants review. The difference between primary jurisdiction and exhaustion is that "primary jurisdiction determines whether a court or an agency has *initial* jurisdiction; exhaustion determines whether *review* may be had of agency action that is not the last agency word in the matter."[51] In other words "the exhaustion doctrine prevents premature judicial interference with administrative proceedings, while the primary jurisdiction doctrine denies jurisdiction where agency proceedings have not yet begun."[52] Under either, a case or controversy may not have taken sufficient form for the dispute to be constitutionally ripe.

---

47. United States v. Vill. of Palatine, 37 F.3d 1230, 1234 (7th Cir. 1994); Tucker v. Def. Mapping Agency Hydrographic/Topographic Ctr., 607 F.Supp 1232, 1243–44 (D. R.I. 1985).

48. *See* McKart v. United States, 395 U.S. 185, 193 (1969) ("The doctrine provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938))).

49. Wright, *supra* note 33, at 85.

50. 473 U.S. at 193.

51. Wright, *supra* note 33, at 90 (quoting B. SCHWARTZ ADMINISTRATIVE LAW § 8.23, at 485. (2d ed. 1984).

52. Wright, *supra* note 33, at 90 (quoting SCHWARTZ, *supra* note 51 at 486).

B. Prudential Ripeness

Where constitutional ripeness serves as a jurisdictional bar, prudential ripeness is a more flexible doctrine courts use, *inter alia*, to promote judicial efficiency.[53] Under the doctrine of prudential ripeness, a court may refrain from hearing a case even where it involves a concrete dispute affecting constitutionally recognizable rights.[54] Furthermore, the doctrine serves as "an important exception to the usual rule that where jurisdiction exists a federal court must exercise it."[55] Thus, prudential ripeness is unlike constitutional ripeness, where the initial decision maker has failed to come to a definite position or where the aggrieved party has not exhausted the statutorily prescribed administrative remedy. Rather, under prudential ripeness, a court may choose to refrain from deciding a case where it "will be better decided later."[56]

The elements of fitness and hardship must be analyzed to determine whether a case or controversy is prudentially ripe.[57] The fitness analysis "is concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur."[58] The existence of an administrative remedy may prevent adjudication indefinitely. For example, in *American Savings Bank, FSB v. UBS Financial Services, Inc*, the court abstained from hearing a dispute because the case was not yet prudentially ripe, reasoning in part that "[t]he fact that [the plaintiff] has not yet exhausted its administrative remedies counsels in favor of invoking the prudential ripeness doctrine."[59] The court noted, with implicit approval, the trial court's determination that "judicial economy and common sense dictate that a party cannot circumvent agency regulations by seeking court intervention *before* it has exhausted its administrative remedies."[60] In addition to the judicial economy consideration, "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors."[61]

The hardship prong considers whether a litigant will suffer harm and the extent of the harm if the court decides to defer adjudicating the

53. Simmonds v. I.N.S. 326 F.3d 351, 357 (2d Cir. 2003).

54. *Id.*

55. N.Y. Civil Liberties Union v. Grandeau, 528 F.3d 122, 131 (2d Cir. 2008); McCarthy v. Madigan, 503 U.S. 140, 146 (1992) ("[F]ederal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given to them." quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976))).

56. *N.Y. Civil Liberties Union*, 528 F.3d at 131.

57. *Id.* at 131, 134.

58. American Savings Bank, FSB v. UBS Financial Servs. Inc., 347 F.3d 436, 440 (2d Cir. 2003) (quoting Isaacs v. Bowen, 865 F.2d 468, 478 (2d Cir. 1989)).

59. *Id.* at 440.

60. *Id.* at 439.

61. McKart v. United States, 295 U.S. 185, 195 (1969).

controversy.[62] In assessing this prong, a court will "ask whether the challenged action creates a direct and immediate dilemma for the parties."[63] The possibility of a future injury is insufficient to constitute hardship unless the possibility creates a present detriment.[64]

C. Exhaustion of Administrative Remedies

The exhaustion of administrative remedies doctrine serves two purposes—to promote administrative autonomy and to enhance the efficiency of administrative agencies and the judiciary.[65] The requirement may be imposed either by statute or by judicial discretion.[66] This section distinguishes between statutorily and judicially imposed exhaustion requirements and their implications on constitutional and prudential ripeness.

Statutory requirements that a party exhaust its administrative remedies implicate constitutional ripeness. This is especially true in zoning disputes, where local or state agencies are tasked with applying zoning regulations. For, a court is unable to adjudicate a concrete dispute unless it knows how far a regulation may go, and it is unable to determine how far the regulation may go until the aggrieved party has exhausted its administrative remedies.[67] Additionally, "[w]hen the Legislature vests exclusive jurisdiction in an administrative agency, trial courts have no jurisdiction over claims governed by the relevant statute until the administrative process is exhausted."[68]

Judicially imposed exhaustion, on the other hand, implicates prudential ripeness. The Supreme Court affirmed the principle that exhaustion can be a matter of judicial discretion in *McCarthy v. Madigan*.[69] There, the Court noted that exhaustion gives deference to Congressional delegation to administrative agencies, and exhaustion is of particular concern where the dispute involves the agency's discretionary power.[70] The Court reiterated the principle that an agency should be

62. *N.Y. Civil Liberties Union*, 528 F.3d at 134.

63. *Id.* (quoting Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 478 (2d Cir. 1999) (internal quotation marks omitted).

64. *N.Y. Civil Liberties Union*, 528 F.3d at 134.

65. 73 C.J.S. *Public Administrative Law and Procedure* § 81 (2009).

66. *Id*. § 80.

67. Williamson County Reg'l Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 186 (1985).

68. State v. Fid. & Deposit Co., 223 S.W.3d 309, 311 (Tex. 2007).

69. 503 U.S. 140, 144–49 (1992) *superseded on other grounds by statute*, Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), *as recognized in* Kakaygeesick v. Salazar, 656 F. Supp. 2d 964, 979 (D. Minn. 2009) ("Nevertheless, as an exposition of the salutary purposes of administrative exhaustion, McCarthy continues to have legitimacy and force.").

70. *Id.* at 145 ("[T]he exhaustion doctrine recognizes the notion, grounded in deference to

given the chance to find and fix its own mistakes before defending its actions in federal court.[71] Further, the Court recognized that the exhaustion requirement promotes judicial efficiency by mooting the controversy when the agency corrects its errors and by allowing the parties to develop a more substantial factual record for judicial review.[72] Counterbalancing the administrative autonomy and judicial efficiency concerns is the "virtually unflagging obligation" federal courts have to exercise jurisdiction when it is given to them.[73] A court may therefore choose to refrain from requiring exhaustion where the remedy would prejudice the individual's ability to bring a federal claim, where doubt exists about whether the agency has the power to grant relief, and where the administrative body has predetermined the issue.[74] Thus, the hardship prong of the prudential ripeness analysis mirrors the exceptions to the exhaustion requirement. Just as a litigant may have their otherwise prudentially-unripe claim heard where they face immediate harm, a litigant may have their otherwise administratively unexhausted claim heard where their federal claim may be prejudiced or they may be unable to obtain relief from the administrative agency.

Thus, failure to exhaust administrative remedies can cause a dispute to be constitutionally unripe where the administrative process is necessary for the dispute to take shape, or it can cause a dispute to be prudentially unripe, where principles of judicial economy and a desire to allow an administrative agency the opportunity to correct its own errors counsels against judicial intervention.

IV. MISAPPLICATION OF CONGRESSIONAL EXHAUSTION INTENT IN *BRYANT WOODS INN*

This section explains how, given the legislative history of the FHAA, *Bryant Woods Inn* has misconstrued the legislative intent with respect to whether a court may require a party to exhaust the locality-provided administrative remedies.

Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer.").

71. *Id.*

72. *Id.* at 145–46.

73. *Id.* at 146 (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976)).

74. *Id.* at 146–49.

A. Factual and Procedural Background

In *Bryant Woods Inn*, a nursing home operator brought suit against Howard County for failure to make a reasonable accommodation under the Fair Housing Act after Howard County denied the nursing home's request to expand its operation from eight to fifteen residents.[75] The suit came after a hearing before the Howard County Planning Board where residents opposed the expansion, arguing that it did not fit with the character of the neighborhood and lacked sufficient parking to support the expansion.[76] The Board denied the application and the nursing home's subsequent motion for reconsideration. The nursing home subsequently failed to appeal to the Howard County Board of Appeals as allowed in the Howard County Code.[77]

The district court spent substantial effort considering whether to impose an exhaustion of administrative remedies requirement.[78] The court questioned whether the county's decision "ha[d] the requisite degree of finality to satisfy traditional prudential requirements for federal court review of challenged state administrative actions, which can involve such often interrelated issues as ripeness [and] exhaustion . . . ."[79] The district court relied on *McCarthy v. Madigan* which held that, the intentions of Congress govern whether an exhaustion requirement should be imposed, but where Congress is silent on the matter, the court has discretion to impose such a requirement.[80] The court reasoned that none of the *McCarthy* factors that might weigh against imposing a ripeness requirement—prejudice to the individual's ability to bring a federal claim, doubt about whether the agency has the power to grant relief, and the agency's predetermination of the issue—were present.[81] However, the court was concerned that no reported case in which plaintiff's failure to exhaust administrative remedies caused it to be denied relief from the courts.[82] Additionally, the court concluded that an appeal to the Howard County Board of Appeals was not required because the county's appeals process was not clearly apparent.[83]

With respect to finality and ripeness, the district court reasoned that the County's decision was ripe and final because it constituted Howard County law and restricted the nursing home operator from expanding his

75. Bryant Woods Inn v. Howard County, 124 F.3d 597, 599–601 (4th Cir. 1997).
76. *Id.* at 600.
77. *Id.* at 600–01.
78. Bryant Woods Inn v. Howard County, 911 F. Supp. 918, 926–27 (D. Md. 1996).
79. *Id.* at 926.
80. *Id.*
81. *Id.* at 926–27.
82. *Id.* at 927.
83. *Id.*

operations. Thus, the district court held that it had jurisdiction to hear the nursing home's claim even though it was "on the margin of federal judicial power".[84]

On appeal to the Fourth Circuit, the court failed to consider whether there might be room for a judicially-imposed exhaustion requirement. The court rejected the County's argument that the nursing home needed to have exhausted its administrative remedies prior to bringing suit and concluded "the Fair Housing Act provides otherwise. It permits private enforcement of the Fair Housing Act 'whether or not [an administrative] complaint has been filed.'"[85] In support of its conclusion the court reasoned that the House Judiciary Committee Report on the Fair Housing Amendments Act of 1988 stated that "[a]n aggrieved person is not required to exhaust the administrative process before filing a civil action. The Committee intends for the administrative proceeding to be a primary, but not exclusive, method for persons aggrieved by discriminatory housing practices to seek redress."[86] However, the following section demonstrates that the court misinterpreted this statement and misapplied it to the administrative appeals process.

B. Textual Analysis

The *Bryant Woods Inn* Court's reasoning demonstrates a fundamental misunderstanding of the intent of Congress when it explicitly stated the FHAA may be privately enforced even if an administrative complaint had not been filed and of the intent of the Judiciary Committee when it stated there was no exhaustion requirement. A review of the relevant text of the statute in context readily reveals the error. Section 3610(1)(A)(i) addresses the process whereby an aggrieved party filed a complaint with the HUD Secretary and provides that "[a]n aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint."[87]

Section 3613(a)(1)(B)(2) refers to the above section and provides that "[a]n aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section

84. *Id.* at 928.

85. *Id.* at 926.

86. Bryant Woods Inn v. Howard County, 124 F.3d 597, 601 (4th Cir. 1997) (quoting House Judiciary Committee Report on the Fair Housing Amendments Act of 1988, H.R. Rep. 100-711, at 39 (1988), *reprinted in*, 1988 U.S.C.C.A.N. §§ 2173, 2200).

87. 42 U.S.C. § 3610(a)(1)(A)(i) (1994).

3610(a) of this title."[88] The relevant text from the Judiciary Committee's comments to this section states, "An aggrieved person is not required to exhaust the administrative process before filing a civil action, [t]he Committee intends for the administrative proceeding to be a primary, but not exclusive, method for persons aggrieved by discriminatory housing practices to seek redress[]," and is found in the legislative history discussing § 813 of Public Law 100-430, as codified, § 3613.[89] Thus, it is clear that the House Judiciary Committee report cited by the *Bryant Woods Inn* Court is specifically referencing § 3613(a), which in turn references § 3610. The "administrative process" provided under § 3610 refers only to the process of filing a complaint with the HUD Secretary, *not* a locality-provided administrative remedy such as an appeal from an adverse decision regarding a request for reasonable accommodation.[90] The *Bryant Woods Inn* Court either missed this essential limiting relationship, or chose to ignore it.

Further, had the Committee wished to indicate it wanted to eliminate all exhaustion requirements, including those imposed by the judiciary, it could have used the phrase "*an* administrative proceeding," thereby suggesting that perhaps the administrative proceeding referenced through § 3610 was merely illustrative. Instead, the Committee used the singular "*the* administrative proceeding," suggesting it was concerned with the proceeding where a complainant files a discrimination complaint with the HUD Secretary and HUD investigates the complaint as provided by § 3610. Therefore, it is improper to make inferences about Congressional exhaustion intent from the House Judiciary Committee's statement that it intended to foreclose the judiciary from imposing exhaustion in reasonable accommodation cases.[91]

C. Historical Analysis

The final indication that the Committee's comments were not referring to locality-provided administrative remedies is the context in which the FHAA's enforcement provisions and its inclusion of handicapped individuals arose. The primary purpose of the FHAA was to

88. *Id.* § 3613(a)(1)(B)(2).

89. H.R. REP. 100-711, at 28.

90. *See* 42 U.S.C. § 3610 (1994).

91. For a reasonable accommodation case in which the court stated that judicially-imposed exhaustion might be appropriate, *see* Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43, 46 (6th Cir. 1992). There, a group-home operator sued a city after the city's law director denied a reasonable accommodation request. *Id.* at 44–46. The court stated, albeit in dicta, "[a] puzzling aspect of this appeal is disregard below for whether the case was ripe for consideration by the district court, since plaintiff may have failed to exhaust administrative remedies that could have afforded it immediate and complete relief." *Id.* at 46.

enhance the enforcement mechanisms available to HUD and the Attorney General.[92] While the inclusion of handicapped individuals and families cannot be accurately termed as an afterthought, it is clear the enforcement provisions and the handicapped individual's provisions are separate and distinct. In fact, the only intersection between the enforcement provision and the provisions for handicapped individuals suggests that Congress intended the new administrative process to be unrelated to failures to make reasonable accommodation for handicapped individuals. Section 3610(g)(C) provides that "[i]f the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 814 [42 U.S.C. § 3614], instead of [commencing with the administrative process]."[93] Thus, Congress specifically provides in the statute that the administrative process is not to be used in instances where localities allegedly violate the FHA by failing to make a reasonable accommodation. This further supports the argument that the statement by the Committee regarding the primary, but not exclusive, nature of the administrative process does not refer to reasonable accommodation cases.

D. Implications of an Interactive Process Requirement

Additionally, a judicially-imposed exhaustion requirement may effectuate a proper interactive, iterative process with the individual requesting a reasonable accommodation. The FHAA's plain language does not include a requirement that an entity engage in an informal interactive process with an individual with a disability who requests an accommodation.[94] However, the Fair Housing Act Amendment of 1988, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 all evidence the common Congressional intent to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[95] Thus, some courts

92. *See* H.R. REP. 100-711, *supra* note 12.

93. 42 U.S.C. § 3610(g)(C) (1994). Under 3614, Congress gives the Attorney General the power to "commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice." 42 U.S.C. § 3614(b)(1)(A) (2006).

94. *See* 42 U.S.C. § 3603(f)(3)(B) (2000).

95. Gretchen M. Widmer, Note, *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing Amendment.* 2007 U. ILL. L. REV 761, 766 (internal quotation marks omitted) (citing 42 U.S.C.§ 12101(b)(1); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 782 (7th Cir. 2002)); Kellyann Everly, Comment, *A Reasonable Burden: The Need for a Uniform Burden of Proof Scheme in Reasonable Accommodation Claims*, 29 U. DAYTON L. REV. 37, 60–61 (2003).

have relied on the RA and ADA to impose an interactivity requirement[96] and some scholars have proposed that HUD and Congress should expressly implement such a requirement.[97]

Those courts that have rejected the interactivity requirement have done so in part because an informal interactive process may be improper.[98] In *Lapid-Laurel*, for example, a real estate developer sued a township for failure, under the FHA, to make a reasonable accommodation for variances to build a residential-care facility for the elderly.[99] The township held four public hearings with respect to the developer's variance requests, and as a result of these hearings, the developer's engineer made multiple changes to the plans.[100] However, while the changes adequately addressed some of the township's concerns, they failed to address crucial concerns, including those of the fire chief that emergency vehicles might not be able to access the facility, and the township finally denied the developer's request for accommodation.[101] In its civil suit for FHA violation, the developer argued, in part, that the township "failed to engage in an 'informal interactive process' with [the developer]."[102] In holding that the FHAA does not require localities to engage in an informal interactive process, the court reasoned that imposing such a requirement might "compromis[e] the important policies underlying state law limitation on off-the-record contacts between developers and board members, such as limiting the potential for corruption of local officials."[103]

The tension between the Third and Seventh Circuits[104] about whether there should be an informal interactive process[105] can be resolved and the benefits to an interactive process noted by scholars can be achieved through the use of a judicially-imposed exhaustion requirement. The locality-provided appeals process is on the record, thereby resolving the concerns of the Third Circuit in *Lapid-Laurel* that an informal process may lead to corruption. Additionally, the appeals process may allow litigants to amend their request in response to an official denial and have

96. *See, e.g.* Jankowski Lee & Assocs v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996) (holding there is no interactivity requirement).

97. *See* Widmer, *supra* note 95.

98. Lapid-Laurel v. Zoning Bd. of Adjustment, 284 F.3d 442, 456 n.7 (3d Cir. 2002).

99. *Id.* at 446–47.

100. *Id.* at 447.

101. *Id.* at 447-48.

102. *Id.* at 450.

103. *Id.* at 456 n.7.

104. *Id.* at 450; Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996).

105. Widmer, *supra* note 95, at 782. ("[I]t is in both the landlord's and the tenant's best interests to engage in an interactive process. . . . Informal discussions regarding reasonable accommodations are *inexpensive and are surely less costly than potential litigation* resulting from a landlord's failure to reasonably accommodate the tenant." (emphasis added)).

their request granted without the expense of litigation to either party. Therefore, room exists for courts to encourage entities to engage in a formal appeals process through the imposition of an exhaustion requirement, at least in some cases.

E. Pre-FHAA Cases

The Supreme Court in *Gladstone Realtors v. Bellwood* held that a party need not exhaust their administrative remedies under the Fair Housing Act of 1968 before bringing suit in federal court,[106] and post-FHAA cases have cited *Gladstone* for the proposition that the FHAA does not contain a requirement that a party must exhaust their administrative remedies prior to bringing suit for failure to make a reasonable accommodation under the FHAA.[107] In *Gladstone*, home buyers sued real estate brokerage firms for directing potential buyers to certain neighborhoods based on race.[108] The brokerage firms argued that the buyers lacked standing because they had failed to exhaust their administrative remedies.[109] The court rejected that argument and concluded that "[t]here is no evidence that Congress intended to condition access to the courts on a prior resort to the federal agency. To the contrary, the history suggests that all Title VIII complainants were to have available immediate judicial review."[110]

Post-FHAA cases such as *Lihosit v. San Diego Housing Commission* subsequently applied the *Gladstone* court's reasoning to reasonable accommodation requests before a local state-agency.[111] However, pre-FHAA cases such as *Gladstone* are inapposite to an analysis of whether a judicially-imposed exhaustion requirement is appropriate under the FHAA. For example, assume that the *Gladstone* court is correct and Congress did indeed intend that all Title VIII complainants were to have immediate judicial review. The only thing that can be accurately inferred from this is that Congress evaluated the remedies provided by the federal agency and the remedy provided by federal courts and concluded that imposing an exhaustion requirement in federal cases could not be justified. It did not, indeed could not, evaluate a local state agency's remedies for denial of a request for reasonable accommodation. And important differences exist between a remedy provided by HUD and a

106. 441 U.S. 91, 106 (1979).

107. *See, e.g.*, Lihosit v. San Diego Hous. Comm'n, 2006 U.S. Dist. LEXIS 94208 at *16 (S.D.C.A. 2006).

108. *Gladstone*, 441 U.S. at 93–94.

109. *Id*. at 104.

110. *Id.* at 106.

111. 2006 U.S. Dist. LEXIS 94208 at *15–16.

locality. First, separation-of-powers issues are raised where the judiciary gets involved in a HUD administrative proceeding before the issue is exhausted before a Congressionally-created administrative agency.[112] Likewise, proceedings before a state agency raise the same issues plus the issue that implementing zoning regulations (the subject of many reasonable-accommodation requests)[113] is one of the most essential functions of local government entities.[114]

Additionally, a locality-provided administrative remedy is fundamentally different from the HUD administrative remedy in what it offers to the handicapped individual. With a federal administrative remedy, the handicapped individual must contact HUD, file a complaint, and then wait while the Secretary does its own investigation and attempts to reconcile the parties. With a locality-provided remedy, the process is much more direct and has the potential to provide the handicapped individual with immediate relief. A judicially-imposed exhaustion requirement will promote judicial efficiency by mooting the controversy and allowing the Appeals Board to correct its errors and by allowing the parties to develop a more substantial factual record for review. As the district court noted in *Bryant Woods Inn*,[115] local appeals boards have the power to grant relief, and unless there is evidence to suggest the board has predetermined the issue, exhaustion may allow the aggrieved party to receive immediate resolution. Finally, prudential use of an exhaustion requirement properly recognizes that zoning is quintessentially a function of local government.

Therefore, because Congress failed to explicitly state whether a handicapped individual must exhaust their locality-provided administrative remedies, because the historical context of the FHAA does not logically indicate Congress would have eliminated an exhaustion requirement, and because judicial economy counsels in favor of imposing an exhaustion requirement, courts should not, as a matter of routine, hold that a party need not exhaust its locality-provided administrative remedies before bringing suit in court. Further, as

112. McCarthy v. Madigan, 503 U.S. 140, 145 (1992) ("[T]he exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer.").

113. *See, e.g.*, Bryant Woods Inn v. Howard County, 124 F.3d 597 (4th Cir. 1997); Groome Resources, Ltd. v. Parish of Jefferson, 234 F.3d 192 (5th Cir. 2000); Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996); Oxford House-A v. City of Univ. City, 87 F.3d 1022 (8th Cir. 1996); Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995).

114. *See, e.g.*, H.R. REP. NO. 100-711, at 51 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2224. ("[Z]oning is quintessentially a local government decision. It is one of the most important, jealously guarded powers of the local government. It goes to the very heart of a community's character, growth, development, commercialization, mix of housing, and so forth.").

115. 911 F. Supp. 918, 926–27 (D. Md. 1996).

discussed in the next section, the locality-provided appeals process should not be characterized as an administrative remedy. Rather, it should be considered part of the administrative process through which all litigants must proceed prior to having received a final decision.

V. RIPENESS AND THE MISAPPLICATION OF TAKINGS CASES IN *BRYANT WOODS INN* AND SUBSEQUENT CASES

In addition to *Bryant Woods Inn*'s improperly foreclosing a judicially imposed exhaustion requirement, takings cases such as *Williamson County*[116] suggest that rather than being a true "administrative remedy," a locality-provided administrative appeal from an adverse reasonable accommodation decision may be characterized as merely part of the administrative process through which a party must go before it can be said to have received a final decision. Also, *Bryant Woods Inn* considered only whether the dispute was constitutionally ripe, failing to address prudential ripeness. Finally, this section will address the confusion between the ripeness and administrative remedy exhaustion doctrines.

A. The Administrative Process Under Williamson County *and* County Concrete

In *Bryant Woods Inn*, the county, citing *Williamson County Regional Planning Commission v. Hamilton Bank*,[117] argued that the nursing home operator "must make a 'meaningful application' according to Howard County's standards so as to allow the County to take a 'final, definitive position' on that application, in order to satisfy the ripeness requirement."[118] Further, the County argued, that meaningful application necessarily included an appeal to the Howard County Board of Appeals.[119] The court rejected this argument, holding that "[w]hile the county must be afforded an opportunity to make a final decision, the issue is sufficiently concrete for judicial resolution once an accommodation is denied. Fair Housing Act claims are thus unlike takings claims, which do not ripen until post-decisional procedures are invoked without achieving a just compensation."[120] The court reasoned that the "difference is attributable to the fact constitutional injury under

116. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

117. *Id.* at 191.

118. Reply Brief of Appellees/Cross-Appellants, Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), 1996 WL 33453737 at 13.

119. Bryant Woods Inn v. Howard County, 124 F.3d 597, 601 (4th Cir. 1997).

120. *Id.* at 602.

the Just Compensation Clause does not arise 'unless or until the state fails to provide an adequate *postdeprivation* [sic] remedy for the property loss.'" [121] The court compared this to claims under the Fair Housing Act, and without citation to any authority, reasoned that "[u]nder the Fair Housing Act, however, a violation occurs when the disabled resident is first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings."[122] However, an analysis of *Williamson County* and its progeny reveals that the *Bryant Woods Inn* court may have mischaracterized the appeals process as an administrative remedy, rather than characterizing it as part of the administrative procedure necessary to receive a final decision.

In *Williamson County*, a bank sued a county, arguing that its zoning scheme constituted a taking without just compensation.[123] The Court held that the bank's claim was not yet ripe because it had failed to seek a variance, and thus had failed to receive a final decision as to how the scheme would be applied to its property.[124] Second, even if it had received a final decision, it had failed to go "through the procedures" the state had provided for seeking just compensation once a taking occurred.[125] The court reasoned that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Thus, the *Bryant Woods Inn* court was correct that under a takings analysis, there is a two-step analytical procedure—first, whether there has been a taking, and second, whether just compensation has been received—that is not present under the Fair Housing Act. However, the progeny of *Williamson County*, the case the court cites for this proposition, suggests that the court may have incorrectly characterized the appeals procedure as a "remedy" when it stated that "a violation occurs when the disabled resident is first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings."[126]

Over twenty years after *Williamson County*, the Third Circuit made explicit what the Supreme Court implied in *Williamson County*—that before a locality can be said to have denied just compensation, it must have exhausted the procedure for seeking just compensation before its claim would be ripe.[127] The court noted that while there is no exhaustion

121. *Id.* (Internal citations and quotation marks omitted) (quoting *Williamson County Reg'l Planning Comm'n*, 473 U.S. at 195)..

122. *Id.*

123. 473 U.S. at 175.

124. *Id.* at 190.

125. *Id.* at 195.

126. *Bryant Woods Inn*, 124 F.3d at 602.

127. County Concrete Corp v. Twp. of Roxbury, 442 F.3d 159 (3d Cir. 2006).

of administrative remedies requirement that an aggrieved party must meet before bringing a takings claim, the procedure through which an aggrieved party must go to receive just compensation for an alleged taking is not a "true exhaustion of state remedies requirement," but rather, it is merely part of the process through which a party must go before it can allege a taking without just compensation.[128] Thus, the court held that the district court correctly concluded that the aggrieved party had failed to satisfy the just compensation prong of the *Williamson County* test, where the party failed to appeal an adverse state court decision to the New Jersey Supreme Court.[129]

An appeal of an adverse decision regarding a request for a reasonable accommodation should not be termed an "administrative remedy." Just as a takings litigant must complete the process for receiving just compensation, including appealing final adverse lower-court decisions prior to their takings claim's ripening, so might a reasonable accommodation litigant need to complete the process for receiving a reasonable accommodation, including appealing an adverse decision to a board of appeals. The *Bryant Woods Inn* court's statement that FHA claims are different than a takings claims because "[u]nder the Fair Housing Act . . . a violation occurs when the disabled resident is first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings"[130] is unsupported by the text of the FHAA and the Fifth Amendment. Rather, the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation,"[131] while the FHA provides that unlawful discrimination includes "a refusal to make reasonable accommodations."[132] Just as an appeal in the takings just compensation process is not a "true" state remedy, neither is an appeal in the reasonable accommodation process a "true" administrative remedy. Therefore, courts should not excuse a reasonable accommodation plaintiff from exhausting a locality's

128. *Id.* at 168.

129. *Id.* Specifically, the court stated:

> [a]lthough the District Court correctly determined that the facial Just Compensation Takings claim failed to satisfy the second *Williamson* prong at the time of the motion to dismiss, the Supreme Court of New Jersey denied review of appellants' state court appeal while this appeal was pending before us. Accordingly, the second *Williamson* prong no longer prevents appellants from asserting that the mere enactment of the Ordinance deprived them of the economically viable use of their property, and, thus, we will reverse the District Court's conclusion that the claim was unripe.

Id. (Internal citations omitted.) Thus, by negative inference, had the party not exhausted the just compensation procedure through its appeal to the New Jersey Supreme Court, the court would have held the claim to be unripe.

130. *Bryant Woods Inn*, 124 F.3d at 602.

131. U.S. CONST., AMEND. 5.

132. 42 U.S.C. § 3604(f)(3)(B) (2006).

procedure on the erroneous ground,[133] that Congress intended there to be no exhaustion of locality-provided administrative remedies under the FHA.

B. Constitutional and Prudential Ripeness

Additionally, *Bryant Woods Inn* considered only whether the dispute was constitutionally ripe, failing to address prudential ripeness. The court concluded that a dispute between a group home operator and the county was ripe because the dispute was sufficiently concrete for judicial decision.[134] The court failed to distinguish whether it was evaluating constitutional or prudential ripeness, or both.[135] However, prudential ripeness counsels against a court's exercising jurisdiction not when a dispute is insufficiently concrete, but when it "will be better decided later."[136] And, while the court noted that the ripeness analysis included an evaluation of the hardship likely to be suffered by the individual, suggesting a prudential ripeness analysis,[137] the court failed to analyze the hardship to the group home operator.[138] Rather, the court stated that "[w]hile the county must be afforded an opportunity to make a final decision, the issue is sufficiently concrete for judicial resolution once an accommodation is [initially] denied."[139] This suggests the court was evaluating the dispute's ripeness from a constitutional and not a prudential standpoint. Because an administrative remedy may cause a dispute to never occur[140] and where the challenged action does not create an immediate dilemma for the handicapped individual,[141] the prudential ripeness doctrine counsels in favor of a judicially-imposed exhaustion requirement.

---

133. *See infra* Part IV, (arguing that there is nothing to suggest Congress intended to eliminate a requirement that reasonable accommodation plaintiffs exhaust locality-provided administrative remedies, assuming that appeals from initial decisions are truly administrative remedies and not merely part of the necessary procedure to obtain a final decision).

134. *Bryant Woods Inn*, 124 F.3d at 602.

135. *See id.* at 601–02.

136. New York Civil Liberties Union v. Grandeau, 528 F.3d 122, 131 (2d Cir. 2008).

137. *See* McInnis-Misenor v. Maine Med. Ctr., 319 F.3d 63, 70 (2003) ("The second prong-hardship-is entirely prudential.").

138. *See Bryant Woods Inn*, 124 F.3d at 601–03.

139. *Id.* at 602.

140. *See* Am. Sav. Bank, FSB v. UBS Fin. Servs., Inc., 347 F.3d 436, 440 (2d Cir. 2003).

141. Such as situation, where the action does not create an immediate dilemma, might arise in a situation very like *Bryant Woods Inn*, where a residential facility for persons with disabilities makes a request for accommodation to allow it to expand its operations in anticipation of an increase in demand, but cannot show that there is a lack of suitable housing for the handicapped individuals it wishes to serve. *See Bryant Woods Inn*, 124 F.3d at 601.

C. Confusion Between the Ripeness and Administrative Remedy Exhaustion Doctrines

The point at which a proceeding may become a remedy, and thus subject to exhaustion, bears some discussion. In his 1998 article, Robert L. Schonfeld argues that when the Seventh and Eighth Circuits denied FHA reasonable accommodation cases for lack of ripeness, they were, in effect, imposing an exhaustion of administrative remedies requirement.[142] While the doctrines of ripeness and exhaustion of administrative remedies are similar in some respects, and while the line between the two is unclear,[143] the two must not be conflated. For, if they were, localities' liability for failure to make a reasonable accommodation would skyrocket while handicapped individuals' ability to get a reasonable accommodation would be virtually unchanged. As the two cases[144] are very similar,[145] I will analyze *United States v. Village of Palatine*.

In *Palatine*, a non-profit group home organization, Oxford House, established a group home for recovering drug and alcohol addicts in the Village of Palatine in an area zoned for single family homes.[146] While the village's zoning ordinance included properly licensed group homes with eight or fewer residents, the group home was not licensed and had eleven residents.[147] After being cited by the village for zoning violations, but before making a request for reasonable accommodation, Oxford House sued the village for failure to make a reasonable accommodation as required under the FHA.[148] The court agreed with the village's argument that it should not be considered to have refused to make an accommodation because "Oxford House[] never invoked the procedures to make such an accommodation."[149] The court reasoned that until Oxford House makes an application for a reasonable accommodation, the village could not authorize a variance, and thus, the issue was not ripe. For, if the village had not had the chance to consider a reasonable accommodation request, it could hardly be said that "the initial

142. Robert L. Schonfeld, *"Reasonable Accommodation" Under the Federal Fair Housing Amendments Act*, 25 FORDHAM URB. L.J. 413, 427 (1998).

143. Wright, *supra* note 33, at 85.

144. United States v. Vill. of Palatine, 37 F.3d 1230 (7th Cir. 1994); Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996).

145. Schonfeld, *supra* note 142, at 427. The two cases involved nearly identical actions by the same entity, Oxford House, a non-profit drug and alcohol treatment organization. *See Palatine*, 37 F.3d at 1231; *Oxford House*, 77 F.3d at 250–51.

146. *Palatine*, 37 F.3d at 1231–32.

147. *Id.*

148. *Id.* at 1232.

149. *Id.* at 1233.

decisionmaker has arrived at a definite position on the issue that inflicts an actual, concrete injury."[150]

As the Supreme Court noted in *Williamson County*, the finality aspect of ripeness is separate from the administrative remedy exhaustion requirement; "an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."[151] To conflate the two would only serve to provide entities with a tool by which they could bring bad-faith suits against localities. It would allow entities to entirely ignore all zoning ordinances, and when localities tried to enforce the ordinance, the locality would find itself embroiled in a potentially expensive civil suit. In addition to being expensive for the locality, civil suits would likely be expensive for the handicapped individual. And, in those situations where the locality would have made an accommodation if the individual had just asked for it, the result of the suit is that the locality would likely make a reasonable accommodation. Thus, handicapped individuals' ability to get an accommodation would effectively be unchanged. In this context, the ripeness and exhaustion doctrines serve two different and important purposes, and it is dangerous to conflate them.

VI. CONCLUSION

In *Bryant Woods Inn*, the Fourth Circuit misinterpreted and misapplied the Judiciary Committee's statement that the newly-created administrative proceeding was not intended to be the exclusive remedy. The court also incorrectly interpreted the legislative intent behind the Judiciary Committee's statement to mean that an exhaustion requirement for locality-provided administrative remedies should be eliminated. While some subsequent cases may have correctly distinguished between HUD remedies and locality-provided remedies, the two are unrelated, and intent with respect to one does not reflect intent with respect to the other. Thus, a place exists for judicially-imposed exhaustion requirements in limited reasonable accommodation disputes under the FHAA. Additionally, the administrative process through which a litigant must go to determine whether it has been denied just compensation in a takings case is analogous to the administrative process in a reasonable accommodation case an appeal of an adverse reasonable accommodation request is merely part of the locality-provided process, not an

150. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (1985).

151. *Id.*

administrative remedy. Thus, a reasonable accommodation claim may not be ripe until a litigant has appealed an adverse decision.

Matt Hall[*]

[*] J.D. Candidate, 2011, Brigham Young University Law School. I would like to thank my wife for her unending love and support, Professor Janet Peterson for her legal writing assistance, and Dan McDonald for his helpful comments and encouragement.