

THE INTERSECTION OF HARM REDUCTION AND ZONING LAW: A GROWING DIVIDE BETWEEN NIMBYS AND PUBLIC HEALTH INITIATIVES

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I. INTRODUCTION

Walking into Fayette County’s courthouse in eastern Indiana, one would expect to find the normal sights and sounds of a courthouse—attorneys preparing for trial, clerks assisting individuals, and judges in their chambers. However, the Fayette County courthouse offers something found in only nine of Indiana’s ninety-two counties: a syringe exchange program (“SEP”).¹ Located in the courthouse’s basement, this program offers vital services to people fighting substance use disorder, such as clean needles, needle disposal, HIV and hepatitis C testing, naloxone to prevent overdose death, fentanyl test strips, immunizations and medical care, and referrals to drug treatment centers.²

Programs such as Fayette County’s SEP only became legal in Indiana in 2018, following the passage of Indiana House Bill 1438, which allows a county to create a SEP.³ Even with a legal path to the creation of SEPs, only nine counties in Indiana now operate such a program.⁴ Although considerable progress has been made in Indiana to reduce the harm of substance use disorder, there are still counties unwilling to provide individuals with these life-changing and life-saving services.

A. The Issue: Zoning Boards Bending to the Will of NIMBYS

NIMBYism is a powerful attitude within communities. Standing for “Not In My Back Yard,” NIMBY denotes a local effort to oppose changing the status quo within the locale.⁵ It often rears its ugly head in opposition to social justice initiatives such as public housing projects or drug treatment facilities.⁶ Too often, NIMBYS can influence a community’s decisions and sway public opinion, proving detrimental to initiatives aiming to better a community.

SEPs and other types of harm reduction sites have been the victims of

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1. Giles Bruce, *Conservative Indiana Adopted Needle Exchanges But Still Faces Local Resistance*, KAISER HEALTH NEWS (Feb. 12, 2020), <https://khn.org/news/conservative-indiana-adopted-needle-exchanges-but-still-faces-local-resistance> [<https://perma.cc/BZ4P-W2SV>].

2. *Id.*

3. H.B. 1438, 120th Gen. Assemb., First Reg. Sess. (Ind. 2017).

4. Bruce, *supra* note 1.

5. Peter D. Kinder, *Not in My Backyard Phenomenon*, BRITANNICA, <https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon> [<https://perma.cc/LJ7U-5SED>] (last visited Oct. 4, 2020).

6. *Id.*

decision making dominated by NIMBYs for too long. Harm reduction is a public health strategy aimed at reducing the harms associated with certain behaviors such as intravenous drug use.⁷ Often, the proposed creation of harm reduction sites carries a stigma, usually due to fears as to how crime rates and real estate prices will be affected.⁸ NIMBYs typically claim that a harm reduction site will actually encourage more drug use within the community.⁹ As has been proven numerous times, however, this claim is unfounded and without statistical support.¹⁰

As public health departments and local health officials continue to work at mitigating the effects of the opioid epidemic and other public health crises, NIMBYs are proving to be a formidable hurdle to harm reduction initiatives. Although NIMBYs may voice loud opposition to the creation of a harm reduction site within their community, the will of NIMBYs is often most evident at public zoning hearings when a harm reduction initiative has been proposed in a community.¹¹ Zoning boards hold a tremendous amount of power within a community and can often be the deciding factor in whether a harm reduction site, such as a syringe exchange program or safe consumption site, will come to fruition.¹² It is imperative that zoning boards not bend in the face of NIMBYism, as access to these public health programs must take precedence over fear.

B. Indiana Should Preempt Zoning Boards from Acting in This Manner

In order to facilitate public health initiatives and reduce the impact of the opioid crisis on Indiana, the state legislature should preempt local zoning boards from caving to public pressure. Specifically, zoning boards should not be allowed to create barriers to harm reduction sites such as requiring an arbitrary amount of community approval.¹³ Moreover, the Indiana legislature should pass a law designating spot zoning as illegal per se to ensure that it is not continuing behind closed doors.¹⁴ This will help express that Indiana will not tolerate discriminatory

7. See Karen Mary Leslie, *Harm Reduction: An Approach to Reducing Risky Health Behaviours in Adolescents*, 13 CAN. PAEDIATRIC SOC'Y 53 (2008).

8. Elana Gordon, *What's the Evidence That Supervised Drug Injection Sites Save Lives?*, NAT'L PUB. RADIO (Sept. 7, 2018, 2:40 PM), <https://www.npr.org/sections/health-shots/2018/09/07/645609248/whats-the-evidence-that-supervised-drug-injection-sites-save-lives> [<https://perma.cc/93BN-9A5E>].

9. *Id.*

10. See Jonathan Berr, *Philadelphia was Supposed to Open the First U.S. Safe Injection Site. Residents and Officials are Pushing Back*, BISNOW (Mar. 15, 2020), <https://www.bisnow.com/philadelphia/news/commercial-real-estate/future-of-philadelphia-safe-injection-site-in-doubt-103360> [<https://perma.cc/P5M9-DTZ4>]; see also Gordon, *supra* note 8.

11. *See id.*

12. *See id.*

13. *See* Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

14. *See* Scalabrino v. Town of Michiana Shores, 904 N.E.2d 673, 682 (Ind. Ct. App. 2009) (citing Hundt v. Costello, 480 N.E.2d 284, 285 (Ind. Ct. App. 1985)).

zoning practices that promote unfounded negative stereotypes and stigmas.

When the mission of a community initiative is to further the public health and general welfare, zoning ordinances should not be denied based on a false claim to better support public health. NIMBYs often argue that the implementation of harm reduction strategies or the creation of a harm reduction site will lead to a rise in crime within the area, a rise in drug use within the community, or a decline in real estate values.¹⁵ These claims are unsubstantiated and do not hold up under statistically rigorous scrutiny.¹⁶ A harm reduction facility, whether it be a syringe exchange program or safe consumption site, furthers public health and counters the effects of substance use disorder within a community. Therefore, it is irrational to declare a harm reduction facility invalid by law or deny a zoning ordinance on grounds that such a facility is a detriment to public health.

This Note discusses the impact of zoning law on public health initiatives involving harm reduction through the creation of SEPs and safe consumption sites. Section II of this Note provides background information on harm reduction and its importance, as well as explaining what SEPs and safe consumption sites are, and how they further public health initiatives and are affected through zoning law. Section III provides a brief history of zoning law and its intersection with public health. This includes an analysis of the Supreme Court case that declared zoning as a constitutional practice, an explanation of current Indiana zoning law, and an examination of how zoning law can affect public health outcomes. Section IV examines a case study of how zoning laws affected public health initiatives within Indiana and offer solutions to supplement the progress that has already been made. Finally, Section V analyzes the complications involving zoning that must be addressed to further harm reduction with regards to opioid use disorder.

II. BACKGROUND: A PUBLIC HEALTH ISSUE

A. Public Health Issue: Overdoses, Infectious Diseases, and Death

With the advent of new medical technologies and studies, it is now known that substance abuse harm goes beyond what was previously understood. For example, while infectious disease has long been linked to intravenous drug use, new research suggests that intravenous drug use can also cause damage to the vascular system and increase the likelihood of a pseudoaneurysm.¹⁷

Drug use, both licit and illicit, can affect the body in different ways, in both the short and long term.¹⁸ The harms resulting from drug use may be affected by

15. See Berr, *supra* note 10.

16. See Gordon, *supra* note 8.

17. See Ayse Nur Bardak et al., *Foot Drop with a Popliteal Artery Aneurysm Due to Heroin Use: A Case Report*, 64 *TURKISH J. PHYSICAL MED. & REHAB.* 284 (2018).

18. *Health Consequences of Drug Misuse*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drug-topics/health-consequences-drug-misuse/introduction> [https://perma.cc/JQ7L-37RV] (last visited Nov. 8, 2020).

the type and amount of drug used, the manner in which the drug is used, duration of usage, and the user's health and genetics.¹⁹ Short-term effects of drug use can cause irregular heartbeat, disruption of neurotransmitters, impaired cognitive ability, and in extreme cases, death.²⁰ Long-term effects can include heart disease, lung disease, and cancer, if the drug is inhaled.²¹ If the drug is consumed intravenously through the use of unclean needles, the user may be at risk of developing HIV, hepatitis, and other communicable diseases.²² Moreover, drug use can lead to substance use disorder.²³ Substance use disorder is a disorder of the brain and can change the way an individual acts or thinks due to alterations of brain structure and function. Substance use disorder can prove fatal as well, as drug overdose often leads to death.²⁴

Additionally, drug use can have indirect effects on the lives of the user, and on the lives of those close to them. Drug use can affect an individual's decision-making or impulsivity control.²⁵ Drug use and substance use disorder can also lead to more substantial negative outcomes such as damaging an individual's educational performance, employment status, and personal relationships. It can also, of course, expose the individual to the criminal justice system through enforcement of criminalizing substance and paraphernalia possession.²⁶

B. Solutions: Harm Reduction, Syringe Exchange Programs, and Safe Consumption Sites

1. Harm Reduction

In general, harm reduction is a public health strategy aimed at reducing the harms associated with certain behaviors.²⁷ Harm reduction approaches can be applied to a multitude of public health issues and can be simple or exceptionally complex. For example, harm reduction can be as simple as wearing a seat belt when riding in a vehicle.²⁸ Harm reduction can also be used to reduce the rates of

19. *Id.*

20. See *Methamphetamine Research Report: What are the Immediate (Short-Term) Effects of Methamphetamine Misuse?*, NAT'L INST. ON DRUG ABUSE (Oct. 2019), <https://www.drugabuse.gov/publications/research-reports/methamphetamine/what-are-immediate-short-term-effects-methamphetamine-misuse> [<https://perma.cc/7D4T-956S>]; see also *What are the Short-Term Effects of Drug Use?*, ABOVE THE INFLUENCE, <https://abovetheinfluence.com/faq/what-are-the-short-term-effects-of-drug-use/> [<https://perma.cc/JYL8-G4XG>] (last visited Feb. 17, 2021).

21. *Health Consequences of Drug Misuse*, *supra* note 18.

22. *See id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *See* Leslie, *supra* note 7.

28. *See Harm Reduction*, RECOVERY RSCH. INST., <https://www.recoveryanswers.org/resource/drug-and-alcohol-harm-reduction/> [<https://perma.cc/B9Y6-B3E9>] (last visited Feb. 17, 2021).

teenage pregnancy and the spread of sexually transmitted infection through a robust sex education program and access to birth control.²⁹

More specifically, harm reduction applied to substance use disorder seeks to reduce the adverse consequences involved with using harmful substances.³⁰ The National Harm Reduction Coalition has set forth numerous principles they consider to be central to the practice of harm reduction in communities.³¹ These principles focus primarily on accepting that drug use is part of society and that solving the problems associated with the use of substances is incredibly complex and will require a diverse array of solutions.³² Additionally, the Coalition asserts that providing non-judgmental and non-coercive services must be provided to people who use drugs in order to further reduce harms.³³ It is often the case that harm reduction facilities are the only place in a community where people who use drugs can be greeted with compassion instead of contempt.³⁴ Many of the individuals who visit these facilities are at the end of their rope, and the compassion provided to them at harm reduction sites can be the first step toward recovery.³⁵

Harm reduction positions itself in direct contrast to a disciplinary approach to substance use.³⁶ Advocates of harm reduction strategies may often find themselves in direct conflict with the criminal justice system, choosing a more compassionate strategy, focusing on human dignity, instead of a punitive one.³⁷ Despite the differences, harm reduction strategies have begun to permeate the criminal justice system. In November of 2020, voters in the state of Oregon approved a ballot measure to decriminalize possession of small amounts of narcotics including cocaine, heroin, oxycodone, and methamphetamines.³⁸ If found in possession of a small amount of these substances, the individual will instead be subject to a civil violation and fine instead of criminal charges.³⁹

29. See Leslie, *supra* note 7.

30. See *id.*

31. *Principles of Harm Reduction*, NAT'L HARM REDUCTION COAL., <https://harmreduction.org/about-us/principles-of-harm-reduction/> [<https://perma.cc/BPK3-BXZR>] (last visited Nov. 8, 2020).

32. *Id.*

33. *Id.*

34. See Bruce, *supra* note 1.

35. See *id.*

36. See *Harm Reduction*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/harm-reduction> [<https://perma.cc/9VYW-J4UY>] (last visited Feb. 17, 2021).

37. See *id.*

38. Cleve R. Wootson Jr. & Jaclyn Peiser, *Oregon Decriminalizes Possession of Hard Drugs, as Four Other States Legalize Recreational Marijuana*, WASH. POST (Nov. 4, 2020), <https://www.washingtonpost.com/nation/2020/11/04/election-drugs-oregon-new-jersey/> [<https://perma.cc/38WZ-6LUL>].

39. Amelia Templeton, *Measure 110 Would Make Oregon 1st State to Decriminalize Drug Use*, OR. PUB. BROAD. (Oct. 14, 2020), <https://www.opb.org/article/2020/10/15/measure-110->

Additionally, the individual can avoid the fine by participating in a health assessment aimed at incentivizing the individual to enter a substance use treatment facility.⁴⁰

2. Syringe Exchange Programs

Long used in Europe, syringe exchange programs are quickly catching on in the United States as a way to mitigate and even prevent the negative effects of intravenous drug use in the wake of the opioid epidemic.⁴¹ These programs allow individuals to exchange or dispose of used needles for clean ones without risking criminal liability.⁴² Use of clean needles helps deter the spread of communicable diseases such as HIV and hepatitis C.⁴³ Additionally, these programs provide much more than just clean needles. SEPs often offer testing for communicable diseases, overdose-reversal drugs, fentanyl test strips, immunizations, and referrals to drug treatment organizations.⁴⁴

It is in these expanded offerings that the importance of these programs can be seen. Although primarily focused on reducing the rate of communicable diseases transmitted by intravenous drug use, SEPs take a wider view of the many different health issues associated with substance use disorder. As a result, SEPs have recently found more support from state legislatures.⁴⁵ As of 2019, thirty-eight states including Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Maine, Michigan, Minnesota, Montana, North Carolina, North Dakota, New Hampshire, New Jersey, New Mexico, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Vermont, Washington, Wisconsin, West Virginia, and the District of Columbia allowed needle exchanges statewide or locally.⁴⁶

According to the Centers for Disease Control (“CDC”), nearly thirty years of research shows that “comprehensive SEPs are safe, effective, and cost-saving, do not increase illegal drug use or crime, and play an important role in reducing the transmission of viral hepatitis, HIV, and other infections.”⁴⁷ Additionally,

oeragon-politics-decriminalize-drugs/ [https://perma.cc/EX2Y-ECUH?type=image].

40. *Id.*

41. See Victoria Knight, *Needle Exchanges Find New Champions Among Republicans*, KAISER HEALTH NEWS (May 9, 2019), <https://khn.org/news/needle-exchanges-find-new-champions-among-republicans/> [https://perma.cc/BA38-YHVV].

42. Bruce, *supra* note 1.

43. *Id.*

44. *Id.*

45. See Knight, *supra* note 41; see also *Syringe Exchange Program Legality*, FOUND. AIDS RSCH., https://opioid.amfar.org/indicator/SSP_legality# [https://perma.cc/Z9CT-6HH2] (last visited Feb. 17, 2021).

46. See Knight, *supra* note 41.

47. *Syringe Services Programs (SSPs)*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ssp/index.html> [https://perma.cc/R8WJ-PV7E] (last updated May 23, 2019).

research shows that individuals who are new users of a SEP are five times more likely to enter a program for drug treatment and approximately three times more likely to stop using drugs than individuals who do not take advantage of SEP programs.⁴⁸

While a majority of these programs are funded at the state and local level, appropriations language from Congress for the years 2016 through 2018 permitted the use of funds from the Department of Health and Human Services to support local SEPs, with the caveat that the funds were not used to purchase syringes.⁴⁹ However, even with the federal funding from Congress, authority to create and decisions about the use of SEPs remain primarily at the state and local level.⁵⁰

3. *Safe Consumption Sites*

Unlike syringe exchange programs, safe consumption sites have only recently been considered as a harm reduction strategy within the United States, putting us far behind other countries. The first safe consumption site in North America opened in 2003 in Vancouver, Canada two decades ago.⁵¹ Approximately 120 legally sanctioned supervised consumption sites operate in eleven countries around the globe.⁵² Along with Canada, Australia, Germany and Switzerland also have safe consumption sites operating legally within their borders.⁵³

Safe consumption sites are locations where drug users can inject an illegal substance in a safe, clean, medically monitored environment.⁵⁴ This ensures that the individual will have proper medical attention in the event of an overdose, potentially saving a life,⁵⁵ and allows both the user and the public greater peace of mind.⁵⁶

Similar to syringe exchange programs, safe consumption sites are not only focused on preventing overdose deaths, but they also help reduce HIV and hepatitis risk, and provide individuals with information on and access to treatment facilities.⁵⁷ According to research cited by the American Medical Association:

48. *Summary of Information on the Safety and Effectiveness of Syringe Services Programs (SSPs)*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ssp/syringe-services-programs-summary.html> [<https://perma.cc/78CC-N3BX>] (last updated May 23, 2019).

49. *Id.*

50. *Id.*

51. Gordon, *supra* note 8.

52. Tanya Albert Henry, *Will the U.S. Get its First Supervised Drug Consumption Site?*, AMA (Dec. 15, 2020), <https://www.ama-assn.org/delivering-care/opioids/will-us-get-its-first-supervised-drug-consumption-site> [<https://perma.cc/A3V3-CKEM>].

53. *Id.*

54. Gordon, *supra* note 8.

55. *Id.*

56. *Id.*

57. Tom Beck, *The Safe Injection Site Fight is Shaping Up to Be a Battle Between Residents*

- 3,180 overdoses were reversed at a safe consumption site within Germany between 2000 and 2013.
- there has been a 68% drop in the number of opioid-related overdose calls in the area surrounding a supervised consumption site in Sydney, Australia.
- and nearly 200,000 individuals have visited a safe consumption site in Vancouver, Canada with a recorded 6,440 overdose interventions.⁵⁸

Safe consumption sites are clearly saving lives and helping to reduce the effects of substance use within the surrounding community they serve.

It is important to note that these safe consumption sites do not provide individuals with illicit substances, a caveat which has prompted numerous legal challenges within the United States in the form of governmental gridlock, lawsuits, and injunctions from the Department of Justice and state attorney-generals.⁵⁹ Although there have been legal challenges to safe consumption sites, public health interest in them continues to grow in California, Colorado, and Pennsylvania.⁶⁰ In 2019, a California bill awaiting the governor's signature would have approved the founding of a safe consumption site in San Francisco.⁶¹ However, the bill eventually stalled in the California State Assembly.⁶² Meanwhile, a proposed safe injection site in Philadelphia continues to fight against NIMBYism to achieve its mission of furthering public health.⁶³

a. The battle for safehouse

A more in-depth examination is needed to understand supervised consumption sites better and explore how legal hurdles have impacted harm

and Health Experts, SOUTH PHILLY REV. (Mar. 17, 2020), <https://southphillyreview.com/2020/03/17/the-safe-injection-site-fight-is-shaping-up-to-be-a-battle-between-residents-and-health-experts/> [<https://perma.cc/G3SJ-MZA4>].

58. Henry, *supra* note 52.

59. *United States v. Safehouse*, 408 F. Supp. 3d 583, 587 (E.D. Pa. 2019).

60. *See Supervised Injection Sites are Coming to the United States: Here's What You Should Know*, U.S. CAL. DEP'T NURSING (MAY 2, 2019), <https://nursing.usc.edu/blog/supervised-injection-sites/> [<https://perma.cc/BTK3-BB56>].

61. A.B. 362, 2019-20 Reg. Sess. (Cal. 2019); *see also* Gordon, *supra* note 8.

62. Press Release, San Francisco AIDS Foundation, Supervised Consumption Bill AB 362 Stalls; Critical Need for Overdose Prevention Services Continues (Aug. 27, 2020), <https://www.sfaf.org/collections/breaking-news/supervised-consumption-bill-ab-362-stalls-critical-need-for-overdose-prevention-services-continues/> [<https://perma.cc/LX99-3V2P>].

63. *See* Michaela Winberg, *Safehouse Drops South Philly Plans, Looks to Kensington After Judge Suspends Launch*, BILLYPENN (June 26, 2020, 3:45 PM), <https://billypenn.com/2020/06/26/safehouse-drops-south-philly-plans-looks-to-kensington-after-judge-suspends-launch/> [<https://perma.cc/K84M-LTSV>].

reduction in Philadelphia and at the federal level. First enacted by Congress in 1986, the federal “crack house” statute’s original draft criminalized certain drug crimes as part of the Controlled Substances Act.⁶⁴ It was further amended in 2003 to criminalize more modern drug crimes Congress deemed a threat to the public.⁶⁵ The statute provides that it shall be unlawful to “knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.”⁶⁶ Moreover, the statute dictates that it shall also be unlawful to “manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.”⁶⁷

The statute’s original draft in 1986 was concerned about “crack houses,” or places where crack cocaine and other drugs were manufactured and used, as well as other spaces or properties designed to facilitate drug use.⁶⁸ In 2003, amendments to the statute added events such as “drug-fueled raves” where promoters of the event encourage the use of “club drugs.”⁶⁹ With a shift towards public health approaches to substance use, the question is whether the crack house statute criminalizes safe consumption sites.⁷⁰ Some have used the statute to challenge the legality of safe consumption sites, particularly proposed safe consumption site facilities in San Francisco, California and Philadelphia, Pennsylvania.⁷¹

The 2019 challenge to a proposed site in Philadelphia is illustrative of the issues that arise under the federal “crack house” statute.⁷² In *United States v. Safehouse*, the District Court for the Eastern District of Pennsylvania held that safe consumption sites are not illegal under federal law as they are not being operated “for the purpose of” illegal drug use.⁷³ Although the presence of illegal drugs in Safehouse’s facilities is undisputed, the court held that a plain reading of the statute indicates that it is not meant to cover properties whose primary purpose is to reduce the use of illegal drugs:⁷⁴ “an action taken ‘for the purpose of’ unlawful drug use would therefore refer to a purpose of facilitating drug use,

64. *United States v. Safehouse*, 408 F. Supp. 3d 583, 591 (E.D. Pa. 2019).

65. *Id.* at 592.

66. 21 U.S.C. § 856(a)(1).

67. *Id.*; *see also* § 856(a)(2).

68. *Safehouse*, 408 F. Supp. 3d at 613.

69. *Id.* at 611.

70. *Id.* at 591.

71. *See generally Safehouse*, 408 F. Supp. 3d 583; *see also* Gordon, *supra* note 8.

72. *See generally Safehouse*, 408 F. Supp. 3d 583.

73. *Id.* at 587.

74. *Id.* at 608.

not an effort to reduce drug use.”⁷⁵ As the court so eloquently pointed out, it is Safehouse’s mission to reduce drug use and the harms associated with it.⁷⁶ As 21 U.S.C. § 856 was designed to criminalize the use of a facility for the manufacture, use of drugs, or encouragement of the use of drugs, the statute could not logically apply to Safehouse.⁷⁷

Furthermore, the court acknowledged that when § 856 was last amended in 2003, the question of safe consumption sites had not yet entered the realm of public debate in the United States.⁷⁸ At that time in 2003, Insite, Canada’s first safe consumption site, had just opened in Vancouver.⁷⁹ It would be odd for Congress to be including an amendment that had not become the subject of public debate within the United States. As the court reasoned further, it would be in derogation of Congress’s intent to apply the federal “crack house” statute to a medical facility that had not even been considered by Congress at the time of the statute’s drafting.⁸⁰

The *Safehouse* case did not simply end with the decision of the Eastern District Court. Following the decision by the court, a grotesque display of the NIMBYism that pervades throughout local government was on display for the nation in Philadelphia. Further analysis of NIMBYism and its effects will occur later in this Note. Further discussion on how NIMBYism affected Safehouse will take place in Section IV.

4. Harm Reduction in Indiana

In early 2015, the Indiana State Department of Health (“ISDH”) began an investigation into an outbreak of eleven cases of HIV in Scott County in southeast Indiana.⁸¹ This outbreak was anomalous as, historically, Scott County reported fewer than five HIV cases annually.⁸² It would later be discovered that this HIV outbreak was tied to needle sharing for the injection of intravenous drugs among members of the community.⁸³ By April 2015, the ISDH diagnosed 135 individuals, out of the 4,000-person community, with HIV. Of these 135 individuals, 80% reported injecting drugs.⁸⁴

Following the discovery of this HIV outbreak, a public health emergency was

75. *Id.* at 609.

76. *Id.*

77. *Id.* at 613.

78. *Id.* at 615-16.

79. Gordon, *supra* note 8.

80. *Safehouse*, 408 F. Supp. 3d at 616-17.

81. See Caitlin Conrad et al., *Community Outbreak of HIV Infection Linked to Injection Drug Use of Oxycodone — Indiana, 2015*, 64 CTR. DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. 443 (2015).

82. *See id.*

83. *See id.*

84. *See id.*

declared by executive order.⁸⁵ Then-Governor Mike Pence authorized a provisional needle exchange program in order to curb the spread of HIV throughout the state.⁸⁶ However, the initial needle exchange programs faced challenges throughout Indiana. Pence himself opposed such programs, defending his belief by asserting the age-old stigma that such programs further perpetuated drug use within a community.⁸⁷ Other individuals displayed biases about HIV, with one Scott County resident still clinging to the false notion that “[i]t was a homosexual disease.”⁸⁸

In the wake of the 2015 HIV outbreak, the Indiana state legislature passed Public Law 198-2017, allowing counties to establish syringe exchange programs.⁸⁹ Under the provisions of this law, a qualified entity may operate a program in a county or municipality when: (1) a public health emergency has been declared; (2) there is an epidemic of HIV or hepatitis C through intravenous drug use; and (3) the syringe exchange program is an appropriate medical response to the public health crisis.⁹⁰ After the declaration of a public health emergency, the county or municipality must either conduct a public hearing before approving the program or submit a request for approval to the state health commissioner.⁹¹

Even if a qualified program is approved by public hearing or the state health commissioner, the program must annually register with both the state and local health departments.⁹² In addition, the program must be overseen by a physician, registered nurse, or physician assistant.⁹³ The program must store and dispose of all syringes in a safe and legal manner, provide education and training on drug overdose, and provide substance use disorder treatment information and referrals to drug treatment programs.⁹⁴

As a result of the provisional SEPs created under Public Law 198-2017, substantial public health progress was made in Indiana. From 2016 to 2017, drug overdose deaths in Indiana rose by 22.5%.⁹⁵ In contrast, from 2017, when Public

85. *See id.*

86. Abby Goodnough, *Rural Indiana Struggles to Contend with H.I.V. Outbreak*, N.Y. TIMES (May 5, 2015), <https://www.nytimes.com/2015/05/06/us/rural-indiana-struggles-to-contend-with-hiv-outbreak.html> [<https://perma.cc/94LH-RVLM>].

87. *Id.*

88. *Id.*

89. Pub. L. 198-2017, 120th Gen. Assemb., Reg. Sess. (Ind. 2017).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *2016-2017 Drug Overdose Death Rate Increases*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/statedeaths/drug-overdose-death-rate-increase-2016-2017.html> [<https://perma.cc/T7CZ-AP3C>] (last visited Sept. 7, 2020).

Law 198-2017 was enacted, to 2018, drug overdose deaths dropped by 12.9%.⁹⁶ It seems likely that this is attributable, at least in part, to the distribution of overdose medications and education and training on drug overdose at syringe exchange programs made possible by Public Law 198-2017.⁹⁷

Despite its success, Public Law 198-2017 was set to automatically expire in July 2021.⁹⁸ Members of the General Assembly initially blocked a proposal that would have made authorization for the program permanent.⁹⁹ Instead, the General Assembly simply extended authorization for another year to 2022 and delayed the issue for the next legislative session.¹⁰⁰ Finally, during April 2021, the General Assembly finally found a temporary solution in the form of Public Law 130-2021, which extends authorization for SEPs in Indiana until 2026.¹⁰¹ Although Public Law 130-2021 extends the authorization for SEPs in Indiana more than the previous extensions, the solution is still only temporary.¹⁰² The General Assembly must choose if it will take a proactive step to protect public health and harm protection in Indiana, or if it will continue to simply kick the problem down the road to future legislative sessions.

5. *The Effectiveness of Indiana Harm Reduction*

It is irrefutable that the effects of the opioid epidemic have been felt across the state of Indiana. However, considerable progress has been made across the state combatting the effects of substance and opioid use disorder with the help of harm reduction strategies, particularly in Scott County. In the wake of the outbreak, Scott County created a community outreach center to promote harm reduction strategies.¹⁰³ The outreach center provided not only testing for infectious diseases and a syringe exchange program but also provided insurance enrollment and job training for members of the community.¹⁰⁴ These additional services provided solutions to issues that are linked to long term effects of substance and opioid use disorders, such as poverty.

Additionally, the SEP in Scott County has dispensed a staggering 613,534

96. *Id.*

97. *See* H.B. 1438, 120th Gen. Assemb., First Reg. Sess. (Ind. 2017); *see also* Bruce, *supra* note 1.

98. Pub. L. 198-2017, 120th Gen. Assemb., Reg. Sess. (Ind. 2017).

99. Eric Berman, *Indiana Extends Needle Exchange Authority to 2026*, WIBC (April 12, 2021), <https://www.wibc.com/news/local-indiana/indiana-extends-needle-exchange-authority-to-2026/> [<https://perma.cc/645X-PCST>].

100. Pub. L. 112-2020, 121st Gen. Assemb., Reg. Sess. (Ind. 2020).

101. Pub. L. 130-2021, 122nd Gen. Assemb., Reg. Sess. (Ind. 2021).

102. *See* Pub. L. 198-2017, 120th Gen. Assemb., Reg. Sess. (Ind. 2017); *see also* Pub. L. 112-2020; Pub. L. 130-2021 (incrementally moving the authorization date for SEPs from 2021 to 2026).

103. Joan Duwve, *Mitigating the Impact of Opioid Misuse and Addiction on Hoosiers, Communities, and Public Health*, IND. U. (Apr. 23, 2019), <https://scholarworks.iu.edu/dspace/handle/2022/22976> [<https://perma.cc/W244-E4V8>].

104. *Id.*

clean syringes from the period of 2015-2018.¹⁰⁵ The SEP has also had an astounding 566,630 syringes returned to the program.¹⁰⁶ A study conducted of the behaviors of 124 people who injected drugs before and after the public health response to the HIV outbreak in Scott County found that, of the 48 individuals who were HIV-positive, 47 (98%) used the SEP for sterile syringes.¹⁰⁷ In contrast, only 84%, or 53 out of 65 HIV-negative individuals observed, used the SEP for sterile syringes.¹⁰⁸ These numbers are staggering and illustrate how crucial harm reduction strategies can be for reducing the spread of infectious disease associated with intravenous drug use.

Moreover, another study conducted in Scott County revealed that the utilization of an SEP resulted in “an 88% reduction in syringe sharing, a 79% reduction in syringe sharing to divide drugs and an 81% reduction in sharing of other injection equipment.”¹⁰⁹ The study also concluded that these findings are consistent with SEPs implemented in non-outbreak settings, thus concluding that the results of creating an SEP in Scott County are not outliers in the data but are consistent with SEPs created in other areas.¹¹⁰

III. THE ROLE OF LAWS: ZONING

In order to understand how zoning law can impact harm reduction initiatives and public health, it is important to first understand the basics of zoning law.

A. *Village of Euclid v. Ambler Realty Co.*

The Supreme Court of the United States first declared zoning to be a constitutional practice with their decision in *Village of Euclid v. Ambler Realty Co.*¹¹¹ Decided in 1926, Justice Sutherland, writing for the majority, declared that zoning is a constitutional use of the state’s police powers, in order to ensure the public welfare for its citizens.¹¹² Specifically, the Court held that a zoning ordinance could not be held unconstitutional unless “such provisions are clearly arbitrary, and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹¹³

Additionally, the Court stated that different zoning ordinances may be

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Jenna Payesko, *Syringe Services Program Implemented During HIV Outbreak Led to Reduction of Injection-Related Risk Behaviors*, HCP LIVE (June 29, 2018), <https://www.hcplive.com/view/syringe-services-program-implemented-during-hiv-outbreak-led-to-reduction-of-injection-related-risk-behaviors> [<https://perma.cc/F3MK-X625>].

110. *Id.*

111. *See Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

112. *Id.* at 387.

113. *Id.* at 395.

appropriate under a certain set of facts or circumstances, while inappropriate in another scenario.¹¹⁴ Justice Sutherland further expounded that although a certain zoning ordinance may be appropriate in an urban environment, the same law may not be adequate in a rural community.¹¹⁵ Moreover, the Court reasoned that whether a certain property is a nuisance or detriment to that community must be determined by considering it in connection with the whole community.¹¹⁶ As the Court's opinion further stated, "A nuisance may be merely a right thing in the wrong place...[I]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgement must be allowed to control."¹¹⁷

The Court's decision in *Euclid* created the beginnings of NIMBYism within the United States. For the first time, the Supreme Court declared that it was acceptable for a municipality to reject a community project or initiative simply because some members of the community may not like it. Although the intentions of the court may have seemed benevolent, the decision nonetheless created malevolence within communities. Not only would NIMBYism be constitutionally permissible under this opinion, but racism too would find a strong foothold in zoning.¹¹⁸

B. *Olmstead v. L.C.*

The Supreme Court later ruled on housing discrimination in the landmark decision of *Olmstead v. L.C.* Decided at the turn of the century, the majority opinion written by the late Justice Ginsburg held that under the Americans with Disabilities Act, individuals with mental disabilities have the right to live in a community instead of institutions.¹¹⁹ Specifically, the Court held that such action is proper "when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated."¹²⁰

The Court in *Olmstead* analyzed the language passed by Congress authorizing the Attorney General to combat discrimination against the disabled under the ADA.¹²¹ This authorizing language concluded that "unjustified placement or retention of person in institutions, severely limiting their exposure to the outside community constitutes a form of discrimination based on disability

114. *Id.* at 387.

115. *Id.*

116. *Id.* at 388.

117. *Id.* (citing *Radice v. New York*, 264 U.S. 292, 294 (1924)).

118. See Christopher Silver, *The Racial Origins of Zoning in American Cities*, AM. PLAN. ASS'N (1997), [https://www.planning.org/knowledgebase/resource/9190263/\[https://perma.cc/H637-FC5A\]](https://www.planning.org/knowledgebase/resource/9190263/[https://perma.cc/H637-FC5A]).

119. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999).

120. *Id.* (citing 28 C.F.R. § 35.130 (1998)).

121. *Id.* at 592.

prohibited by Title II.”¹²² Justice Ginsburg reasoned that unjustified isolation reflects two judgements. First, it reflects that institutional placement of “individuals who can handle and benefit from community settings perpetuates unwarranted assumptions that person so isolated are incapable or unworthy of participating in community life.”¹²³ Second, Justice Ginsburg reasoned that “confinement in an institution severely diminished the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”¹²⁴

Although the *Olmstead* case was applied specifically to discrimination of disabled individuals under the Americans with Disabilities Act, the anti-NIMBYism sentiment permeates throughout the opinion. Justice Ginsburg reasoned that without the ability to live within a community and become a member of the community, the disabled individuals would face discrimination simply for existing.¹²⁵ As stated in the opinion, the unjustified isolation would create a stigma around disabled individuals that could create even more discrimination against them.¹²⁶ Moreover, the Court reasoned that without the ability to become a member of the community, disabled individuals would be discriminated not just through their unjustified isolation, but also through their ability to carry on familial relations, economic opportunities, educational advancement, and overall cultural enrichment.¹²⁷

C. Spot Zoning

Though the Supreme Court declared zoning in general to be a constitutional practice in 1926, there are still many issues that arise in modern zoning law. Instead, spot zoning, an unethical and technically illegal practice, has for many years operated behind the scenes in modern zoning law. Spot zoning is primarily used to help facilitate specific land deals a zoning board prefers or bring an end to specific deals that a zoning board does not favor.¹²⁸ In spot zoning, existing zoning rules are changed for the particular property. As a relevant example, a zoning board may impose a more stringent review process that specifically targets syringe exchange programs or safe consumption sites.¹²⁹

122. *Id.* at 596 (citing 28 C.F.R. § 35.130 (1998)).

123. *Id.* at 600.

124. *Id.* at 601.

125. *See id.* at 600.

126. *Id.*

127. *Id.* at 601.

128. Jake Blumgart, *Philly Councilman Mark Squilla Moves to Block Supervised Injection Site*, WHYY (Mar. 29, 2019), <https://whyy.org/articles/councilman-mark-squilla-moves-to-block-supervised-injection-site-2/> [https://perma.cc/E79H-PYHR].

129. *See* Jared Brey, *Why Spot Zoning is Probably Here to Stay*, WHYY (Nov. 14, 2014), <https://whyy.org/articles/why-spot-zoning-is-probably-here-to-stay/> [https://perma.cc/9GBU-YB92].

In Indiana, spot zoning has been defined by the Indiana Court of Appeals as “the singling out of one piece of property for a different treatment from that accorded to similar surrounding land which is indistinguishable from it in character, all for the economic benefit of the owner of the lot or area so singled out.”¹³⁰ Although there is no specific statute outlawing spot zoning within Indiana, any action arising from it must meet the standard of a rational relation to the public health, safety, morals, convenience, or general welfare.¹³¹ It is clear from the Indiana courts’ spot zoning test that the constitutionality of a zoning law or ordinance within Indiana is essentially the same test implemented from the Supreme Court’s decision in *Euclid*.¹³²

D. Indiana Zoning Law

Indiana zoning law is primarily concentrated at the local government level, with most of the power residing with planning commissions and boards of zoning appeals.¹³³ Additionally, the legislative body with jurisdiction over a geographical area has “exclusive authority to adopt a zoning ordinance.”¹³⁴ When the legislative body adopts a zoning ordinance, it shall be for the purposes of “promoting the public health, safety, comfort, morals, and general welfare” as required by *Euclid*.¹³⁵

Indiana zoning law lays out the specific procedure for new zoning ordinances. The planning commission must initiate the proposal and ensure that it complies with Indiana law.¹³⁶ Next, the planning commission must give notice and hold a public hearing on the ordinance.¹³⁷ The public hearing gives the general public and those who will be affected by the ordinance a chance to voice their opinion on the matter and state whether they believe the commission should approve or deny the ordinance, accordingly.¹³⁸ The planning commission certifies the ordinance to the legislative body for their adoption, denial, or amendment of the proposed ordinance.¹³⁹ If adopted, the ordinance will take effect; if rejected or amended, the ordinance will return to the planning commission for further consideration.¹⁴⁰ The decisions of the legislative body and the planning commission are subject to review by a board of zoning appeals.¹⁴¹ The board of

130. *Scalambrino v. Town of Michigan Shores*, 904 N.E.2d 673, 682 (Ind. Ct. App. 2009) (quoting *L & W Outdoor Adver. Co. v. State*, 593 N.E.2d 497, 499 (Ind. Ct. App. 1989)).

131. *Id.* (citing *Hundt v. Costello*, 480 N.E.2d 284, 285 (Ind. Ct. App. 1985)).

132. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926).

133. *See* IND. CODE § 36-7-4-602(a) (2016); *see also* IND. CODE 36-7-4-918.1 (2021).

134. IND. CODE § 36-7-4-601(a) (2021).

135. *Compare* IND. CODE § 36-7-4-601(c)(3) (2021), with *Village of Euclid*, 272 U.S. at 395.

136. IND. CODE § 36-7-4-602(a) (2016).

137. *Id.*

138. *See id.*

139. IND. CODE § 36-7-4-606(b)(1) (2021).

140. *Compare* IND. CODE § 36-7-4-602(a) (2016), with IND. CODE § 36-7-4-606(g) (2021).

141. IND. CODE § 36-7-4-918.1 (2021).

zoning appeals has authority to hear, review, and determine appeals under appealed zoning ordinances.¹⁴² The board of review's decisions are often determinative of whether a given ordinance will survive without a serious challenge in court.

E. The Effects of NIMBY Zoning in Philadelphia

The largest effect of the power of zoning law and NIMBYism is best demonstrated in the City of Philadelphia's debacle over *Safehouse*. Following the decision of the District Court in *Safehouse*, Safehouse went ahead with its plans to open the first safe consumption site in a residential area of southern Philadelphia.¹⁴³ After unveiling these plans, the Philadelphia City Council announced new restrictions on safe consumption sites, requiring them to get approval from 80% of residents and business within a one-mile radius.¹⁴⁴ Ironically, the Philadelphia City Council also threatened to reclassify the safe consumption site as a "nuisance health establishment."¹⁴⁵ "Nuisance health establishments" is a property classification that was created by the city in response to the opioid crisis to denote unsafe medical facilities that would prescribe opioids too freely.¹⁴⁶ The threats by the Philadelphia City Council can be plainly seen as NIMBYism run amuck, afraid of the changing status quo within their own city and defending their actions with baseless stigmas.

The fight over Safehouse's existence found its way to the state capitol, as members of the Pennsylvania state legislature had taken notice of this ongoing battle. Two companion bills were introduced that would apply specifically to safe consumption sites and require three public hearings plus authorization "via ordinance or resolution by the municipality in which the site is located."¹⁴⁷ This legislation specifically targeting safe consumption sites would be unconstitutional under the standard set forth in *Euclid*, as these standards are arbitrary and unreasonable by forcing additional standards on only one type of organization.¹⁴⁸ Furthermore, the practices threatened by the Philadelphia City Council and embraced by the Pennsylvania legislature would lead to spot zoning.¹⁴⁹ The

142. *Id.*

143. Berr, *supra* note 10.

144. *Id.*

145. Nina Feldman, *Bill to Prevent Supervised Injection Sites from Opening in Philly Advances*, WHYY (Mar. 9, 2020), <https://whyy.org/articles/bill-to-prevent-supervised-injection-sites-from-opening-in-philly-advances/> [<https://perma.cc/E3MS-LA5L>].

146. *Id.*

147. John L. Micek, *Philly Dem's Bill Would Give Local Residents a Say Over Safe Injection Sites*, PA. CAP. STAR (Mar. 4, 2020, 7:06 AM), <https://www.penncapital-star.com/commentary/philly-dems-bill-would-give-local-residents-a-say-over-safe-injection-sites-wednesday-morning-coffee/> [<https://perma.cc/EDS8-NM8T>].

148. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926).

149. Blumgart, *supra* note 128.

proposed actions would specifically target Safehouse and make the process of establishing safe consumption sites, now and in the future, more difficult.¹⁵⁰

Developments following the efforts by the Philadelphia City Council and the Pennsylvania legislature ultimately led the District Court to issue a stay on its ruling in *United States v. Safehouse*.¹⁵¹ In June 2020, the court cited national protests and the coronavirus pandemic as reasons to delay changing the status quo in Philadelphia so drastically.¹⁵² In addition, Safehouse decided to move the location of its proposed safe consumption site facility from south Philadelphia to the neighborhood of Kensington, an area considered to be the epicenter of the opioid epidemic in the city.¹⁵³

As illustrated through the fight against NIMBYism in Philadelphia, public health initiatives can face tremendous challenges. Even if harm reduction is legalized under state and federal law, these facilities most often face the additional challenge of convincing local residents that they are part of the solution, not an additional problem in the community. For example, even though Safehouse won their battle in District Court, it has faced challenge after challenge from local NIMBYs.

IV. A CASE STUDY IN ZONING: HARM REDUCTION IN INDIANA

A. NIMBYism in Indiana: Nothing New

The power of NIMBYism and its effect on zoning is not new in Indiana. In fact, it has recently been evident in debates over wind farms. In 2016, many small towns in rural Indiana became disgruntled over proposed construction of wind farms.¹⁵⁴ Residents of Rush County, Indiana claimed their views of the farmland would be permanently tarnished and that home values would plummet as a result of the construction of sixty-five wind turbines.¹⁵⁵ A group of residents even convinced county commissioners to back out of an agreement, which had been in place for over a decade already, allowing for the creation of these wind farms.¹⁵⁶

Following the pressure of residents, a complaint was filed in state court by

150. See Micek, *supra* note 147; see also Berr, *supra* note 10.

151. Jeremy Roebuck, *Facing Pandemic and Protests, Philly Too 'Frayed' for a Supervised Injection Site Right Now, Judge Rules*, PHILA. INQUIRER (June 24, 2020), <https://www.inquirer.com/health/opioid-addiction/safe-injection-site-legal-philly-safehouse-mcswain-mchugh-appeal-third-circuit-20200624.html> [<https://perma.cc/E28L-Q5MM>].

152. *Id.*

153. Winberg, *supra* note 63.

154. Maureen Hayden, *Wind Farms Whipping Up Opposition Across Rural Indiana*, GLASGOW DAILY TIMES (June 8, 2016), https://www.glasgowdailytimes.com/wind-farms-whipping-up-opposition-across-rural-indiana/article_2a9d244d-0737-5308-96e6-5a255af08e7e.html [<https://perma.cc/483W-QGKK>].

155. *Id.*

156. *Id.*

residents, with the Court upholding local zoning ordinances that would prohibit the proposed turbines from being within a half-mile of the neighboring property.¹⁵⁷ A similar complaint was filed by residents in Fayette County, Indiana against county commissioners and the developer of the wind farm.¹⁵⁸ A number of other counties, some of which already had wind farms, placed moratoriums on any future agreements with developers as a result of the upswell of NIMBYism and resulting zoning conflict.¹⁵⁹

However, just as with harm reduction organizations, as unpopular as these sites may be with local residents, the benefits often remain overlooked by NIMBYs. Typically, property owners can make an average of \$5,000 a year per turbine from wind farm leases.¹⁶⁰ These revenues can then be used to support the local economy through increased consumer spending. Additionally, the revenues can also be used to generate money for schools in rural counties through property taxes.¹⁶¹ Often overlooked, the benefits of these wind farms outweigh the potential loss in property values or aesthetics.

In a similar vein, activist group Solar Crisis has been fighting against the creation of an 850-acre solar panel farm in Madison County, Indiana.¹⁶² The project had already been approved by the Board of Zoning Appeals, and an injection of \$110 million into the local economy of Madison County was expected.¹⁶³ Although the project had already been approved by local leaders, residents of the county filed two lawsuits in order to delay the project.¹⁶⁴ Just as with the example of NIMBYism surrounding wind farms within Indiana, the solar farm would provide the county with clean, renewable energy, as well as an injection of funds into the local economy. The lawsuits concerning the Madison County solar panels remain pending. If NIMBYism was left unfettered, there is no telling what beneficial projects would be turned down next.

B. What to Expect for the Future of Harm Reduction in Indiana

Indiana has yet to experience a wave of NIMBYism as tumultuous as the battle over Philadelphia's Safehouse site, but there is certainly apprehension about harm reduction sites within the state. As was seen following the HIV outbreak in Scott County in 2015, people were concerned about the approval of

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Kelsey Brugger, *Meet the 'NIMBY People' Trying to Kill Solar*, POLITICOPRO (Oct. 3, 2019, 7:11 AM), <https://www.eenews.net/stories/1061185363> [<https://perma.cc/QV4E-W6H9>].

163. *Id.*

164. John P. Cleary, *No. 2: Local Residents Voice Opposition to Projects*, HERALD BULL. (Dec. 31, 2019), https://www.heraldbulletin.com/news/no-local-residents-voice-opposition-to-projects/article_e5a6d548-2b11-11ea-aa49-db844a24b0ad.html [<https://perma.cc/5QCV-26DF>].

syringe exchange programs.¹⁶⁵ Even then-Governor Mike Pence said he personally opposed such programs, but he allowed for the creation of provisional needle exchanges for the time being.¹⁶⁶ Pence claimed that needle exchange programs would lead to further drug use and disease in communities, contrary to evidence that these programs would help curb spread of disease and substance use disorder within the community.¹⁶⁷

Some residents diagnosed with HIV refused to receive antiretroviral treatment out of fear of being ostracized by members of the community, and the notion that HIV was a “homosexual disease” was prevalent in Scott County.¹⁶⁸ These negative stereotypes, outright refusal of medical treatment, and personal opposition to syringe exchange programs have only compounded the challenge of reducing the harm of intravenous drug use within Indiana.

Only nine of the ninety-two counties within the state of Indiana currently operate syringe exchange programs.¹⁶⁹ Madison County, in central Indiana, has also had difficulty with the viability of its syringe exchange program.¹⁷⁰ In 2015, Madison County became the second county in Indiana to create a syringe exchange program, after Scott County, the site of the original HIV outbreak.¹⁷¹ However, in August 2017, following the passage of Indiana Public Law 198-2017, five of the seven council members for Madison County voted to end the program.¹⁷² When asked why they voted to end the program, council members stated that constituents were worried about attracting drug users from surrounding counties and syringes being disposed of in public places.¹⁷³ The program was then placed in limbo after the council failed to take action.¹⁷⁴ The program continues to provide services for Hepatitis C testing plus community outreach and education, but the program must refer individuals to other facilities for needle disposal services.¹⁷⁵

While it is often claimed that these programs will adversely affect their communities, syringe exchange programs have been substantially successful in reducing the harms of drug use in Indiana. As stated previously, from the year

165. Conrad, *supra* note 81.

166. *Id.*

167. *Id.*

168. *Id.*

169. Bruce, *supra* note 1.

170. *Officials Halt Central Indiana County's Needle Exchange*, WFYI (June 22, 2020), <https://www.wfyi.org/news/articles/officials-halt-central-indiana-countys-needle-exchange> [<https://perma.cc/UD2M-WQLB>].

171. Sarah Fentem, *Residents' Fears Drive First Closure of an Indiana Needle Exchange*, WFYI (Aug. 10, 2017), <https://www.wfyi.org/news/articles/residents-fears-drive-first-closure-of-an-indiana-needle-exchange> [<https://perma.cc/9ATH-4T83>].

172. *Id.*

173. *Id.*

174. *Officials Halt Central Indiana County's Needle Exchange*, *supra* note 170.

175. *Id.*

2016 to 2017, drug overdose deaths in Indiana rose by 22.5%.¹⁷⁶ In the following period from 2017 to 2018, drug overdose deaths dropped by 12.9%.¹⁷⁷ Moreover, new studies have found that if a response to the HIV outbreak in Scott County had been initiated earlier, the number of HIV infections could have been drastically reduced.¹⁷⁸

Recently, Madison County commissioners have requested the county attorney draft a resolution to reinstate and extend the SEP.¹⁷⁹ Support for the reinstatement of the program came from local county officials, the Indiana State Department of Health, and Governor Eric Holcomb.¹⁸⁰ In addition to reestablishing the SEP within Madison County, the Indiana General Assembly extended the authorization for SEPs in Indiana through 2026 with Public Law 130-2021.¹⁸¹ Thus, the spirit of harm reduction and compassion for those suffering from substance use disorder is still alive and well within the Hoosier state.

V. ANALYSIS: OVERCOMING ZONING TO SUPPORT HARM REDUCTION

A. Zoning Boards Should Be Preempted from Using Arbitrary Community Standards for Harm Reduction Sites

Under Indiana law, there is no requirement that a property owner or organization must seek an arbitrary amount of approval from residents in order to have a zoning ordinance approved.¹⁸² The necessity of such a requirement would run contrary to the United States Supreme Court's ruling in *Euclid* as well as Indiana law.¹⁸³ In order to avoid the zoning and public relations fiasco seen in Philadelphia, Indiana should preempt local zoning regulations seeking to adopt arbitrary community approval standards for harm reduction sites.

The adoption of arbitrary standards for harm reduction sites would be in derogation of the Supreme Court's ruling in *Euclid* that a zoning ordinance cannot be held unconstitutional unless "such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals,

176. 2016-2017 Drug Overdose Death Rate Increases, *supra* note 95.

177. *Id.*

178. Michael Greenwood, *New Study Finds HIV Outbreak in Indiana Could Have Been Prevented*, YALE NEWS (Sept. 13, 2018), <https://news.yale.edu/2018/09/13/new-study-finds-hiv-outbreak-indiana-could-have-been-prevented> [<https://perma.cc/463X-WE38>].

179. Ken de la Bastide, *Commissioners to Consider Extending Needle Exchange Program*, HERALD BULL. (Jan. 19, 2021), https://www.heraldbulletin.com/news/local_news/commissioners-to-consider-extending-needle-exchange-program/article_15448690-5a75-11eb-ae62-df8b1bc1d659.html [<https://perma.cc/WUJ6-8EJV>].

180. *Id.*

181. *Id.*; see also Pub. L. 130-2021, 122nd Gen. Assemb., Reg. Sess. (Ind. 2021).

182. See IND. CODE § 36-7-4-606 (2020).

183. Compare IND. CODE § 36-7-4-601(c)(3) (2020), with *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926).

or general welfare.”¹⁸⁴ Forcing a harm reduction program to seek approval from 80% of residents or businesses in a one-mile radius, as was done with Safehouse, is arbitrary and arguably unreasonable, doing more to harm public health than to help it.¹⁸⁵

Does the approval of residents outside of the one-mile radius not matter? Why must 80% of residents and businesses approve? A resident may not approve of a pharmacy with a drive-through being built within their community, but the pharmacy would not be required to seek approval from the residents before beginning operations on their property. Moreover, specifically targeting harm reduction sites is, simply put, spot zoning by a community. It would be entirely unreasonable to create a set of rules for one specific variation of a medical facility, when all other medical facilities are not required to follow the same process or guidelines.

Additionally, although local zoning authorities consider the effect on a community and real estate prices when making decisions, research suggests that the presence of harm reduction sites does not lead to a rise in crime or hamper real estate prices.¹⁸⁶ For example, in Vancouver’s Downtown Eastside neighborhood, at the site of Canada’s first safe consumption site, property values have skyrocketed in recent years.¹⁸⁷ In fact, real estate prices in this Vancouver neighborhood have continued to rise despite the fact that eight safe consumption sites now operate within a two-mile radius.¹⁸⁸

On the other hand, there will be particular difficulty producing this type of legislation as Indiana has been a “home rule” state since 1980.¹⁸⁹ Under the 1980 Home Rule Act, “the policy of the state is to grant counties, municipalities, and townships all the powers that they need for the effective operation of government as to local affairs.”¹⁹⁰ Modeled on the principle of federalism, home rule allows a state to delegate more flexibility and freedom to a municipalities and govern themselves as they see fit.¹⁹¹ However the Indiana General Assembly has enacted numerous laws that walk back on the home rule. For example, legislation was proposed that would have preempted local rules surrounding Airbnb and banning of local regulation of antennas and utility poles.¹⁹² Additionally, the Home Rule Act has also been used to prevent locally established minimum wage rates from

184. *Village of Euclid*, 272 U.S. at 395.

185. Berr, *supra* note 10.

186. *See id.*

187. *Id.*

188. *Id.*

189. Joshua Claybourn, *Claybourn: In Defense of Hoosier Home Rule*, INDYSTAR. (May 7, 2017, 5:04 AM), <https://www.indystar.com/story/opinion/2017/05/07/claybourn-defense-hoosier-home-rule/101289696/> [<https://perma.cc/8BXS-PDW4>].

190. IND. CODE § 36-1-3-3 (2021); *see also* *Tippecanoe County v. Indiana Manufacturer’s Association*, 784 N.E.2d 463, 466 (Ind. 2003).

191. Claybourn, *supra* note 189.

192. IND. CODE § 36-1-3-3; *see also id.*

exceeding the minimum wage set by the state government.¹⁹³

If the Home Rule Act has been limited in the past, it seems reasonable to assume that the Indiana legislature could preempt local zoning boards from discriminating against harm reduction facilities in a similar way. If the Indiana state government can preempt municipalities from increasing the local minimum wage, why not do the same to bolster public health initiatives?¹⁹⁴ The Indiana General Assembly should pass legislation protecting harm reduction sites from being targeted by NIMBYs within a community.

Moreover, the importance of protecting individuals from the effects of substance use disorder and furthering public health initiatives seem to warrant the preemption of a locality's discrimination of harm reduction facilities. Unlike regulating local control of antennas or utility poles, preempting local zoning law in the furtherance of public health is particularly important within Indiana. Although the state has made considerable progress in the implementation of harm reduction strategies so far, it is clear that NIMBYism will not simply just roll over and die.

As can be seen in the case study of harm reduction sites struggling to find a foothold in Indiana communities, as well as the struggle for Safehouse to find a site of operation within Philadelphia, NIMBYism permeates throughout communities.¹⁹⁵ When individuals are simply seeking compassion and medical care, it seems superfluous to dismiss them just because some members of the community may not like the form in which they receive care.

B. When the Mission of a Property Is in the Furtherance of Public Health and General Welfare, Zoning Ordinances Should Not Be Denied

It is the mission of a harm reduction site to further public health and provide non-judgmental and compassionate access to treatment for people who use drugs.¹⁹⁶ These sites are sometimes the only access an individual has to the resources that can help them recover and mitigate the effects that using drugs has on their lives.¹⁹⁷ NIMBYs rely on a false narrative when they claim that the creation of these sites and programs will lead to a deterioration in public health through increased drug use in a community. Contrary to what is often claimed, the presence of harm reduction sites and programs within a community often lead to better public health outcomes.

As stated previously, from the year 2016 to 2017, drug overdose deaths in

193. Jon Davis, *From Minimum Wage to "Soda Tax," Local Policies Preempted by States*, COUNCIL ST. GOV'T (Nov. 28, 2017, 8:41 AM), <https://knowledgecenter.csg.org/kc/content/minimum-wage-soda-tax-local-policies-preempted-states> [<https://perma.cc/682W-97SV>].

194. *Id.*

195. *See Officials Halt Central Indiana County's Needle Exchange*, *supra* note 170; *see also* Fentem, *supra* note 171; *compare with* Berr, *supra* note 10.

196. *Principles of Harm Reduction*, *supra* note 31.

197. *See* Bruce, *supra* note 1.

Indiana rose by 22.5%.¹⁹⁸ In the following period from 2017 to 2018, drug overdose deaths dropped by 12.9%.¹⁹⁹ It is more likely than not, that the access to syringe exchange programs in Indiana led, at least in part, to the sharp decrease in overdose deaths recorded by the Center for Disease Control. This is supported by results from other safe consumption sites. For example, Insite, the first safe consumption site in Canada, was found to have averted approximately fifty deaths within its first three to four years of operation.²⁰⁰ These deaths were found to have been prevented because people were less likely to engage in harmful behaviors associated with drug use.²⁰¹ It was also discovered that although individuals would use drugs under medical supervision at Insite, there were no signs that it led to an increase or further encouragement of drug use within the area.²⁰²

It therefore would again be in derogation of the Supreme Court's reasoning in *Euclid* to deny zoning ordinances for harm reduction sites based on public health concerns. It is the express mission of a harm reduction site to further public health and provide non-judgmental and compassionate access to treatment for people who use drugs.²⁰³ As eloquently stated in *United States v. Safehouse*, “[a]n action taken ‘for the purpose of’ unlawful drug use would therefore refer to a purpose of facilitating drug use, not an effort to reduce drug use.”²⁰⁴ Furthermore, it is clear from research that harm reduction sites or programs do not lead to increased drug use within an area, but actually lead to better public health outcomes overall.²⁰⁵

Moreover, the reasoning of Justice Ginsburg in *Olmstead* could also be applied to individuals suffering from substance use disorder. Individuals with substance use disorder have a right to seek care within the community they live in, just as mentally disabled individuals have a right not to be unjustifiably institutionalized.²⁰⁶ Additionally, by allowing individuals battling substance use disorder to seek care through syringe exchange programs and safe consumption sites within their community, it would avoid the “unwarranted assumptions” about these individuals that Justice Ginsburg warned could lead to further discrimination of mentally disabled individuals in the *Olmstead* opinion.²⁰⁷ If members of a community could see that individuals battling substance use disorder are looking for proper medical care and compassion, it may help to alleviate the stigma that follows harm reduction sites and organizations.

Finally, the opinion by Justice Ginsburg in *Olmstead* also indicates a level of

198. 2016-2017 Drug Overdose Death Rate Increases, *supra* note 95.

199. *Id.*

200. Gordon, *supra* note 8.

201. *Id.*

202. *Id.*

203. *Principles of Harm Reduction*, *supra* note 31.

204. *United States v. Safehouse*, 408 F. Supp. 3d 583, 609 (E.D. Pa. 2019).

205. See 2016-2017 Drug Overdose Death Rate Increases, *supra* note 95; see also Gordon, *supra* note 8.

206. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

207. See *id.*

support for public health officials that too often seems to be missing in the debate surrounding harm reduction sites. In *Olmstead*, the Court held that individuals that are mentally disabled have a right to live in the community if “the State’s treatment professionals have determined that community placement is appropriate.”²⁰⁸ Similarly, one can clearly see how the same logic would apply to harm reduction sites. An astounding amount of research has exhibited the effectiveness of harm reduction sites in fighting substance use disorder. When so many public health officials are advocating for harm reduction sites to operate without impediment within a community, perhaps it’s time to allow public health officials to use harm reduction solutions that research has shown prove effective in battling substance use.

VI. CONCLUSION

The fight for harm reduction sites is far from over. There is no doubt that as new sites are proposed, NIMBYism will continue to obstruct these public health initiatives. As evidenced by the Safehouse fight in Philadelphia, winning a federal court case does not mean much if local pushback and NIMBYism prevent individuals with substance and opioid use disorder from getting the help that they so desperately need.

In order to ensure that public health does not take a back seat to the whims of NIMBYs in a community, the Indiana legislature must act to ensure that syringe exchange programs and even safe consumption sites are allowed and protected. Specifically, arbitrary and unreasonable zoning practices must be challenged. Furthermore, legislation must be passed outlawing spot zoning within Indiana. Although some individuals may claim it is beyond the purview of the General Assembly to pass legislation in such a manner, the preemption of the Indiana Home Rule Act in the past upholds the General Assembly’s power to do so.²⁰⁹

Moreover, it is the mission of a harm reduction site to further public health and provide non-judgmental and compassionate access to treatment for people who use drugs.²¹⁰ It would be in derogation of the Supreme Court’s reasoning in *Euclid* to claim the denial of zoning ordinances for harm reduction sites based on public health concerns. It is the express mission of a harm reduction site to further public health and provide non-judgmental and compassionate access to treatment for people who use drugs.²¹¹ Finally, the denial of zoning and property rights to harm reduction sites could lead to the exact “unwarranted assumptions” warned against by Justice Ginsburg in the *Olmstead* opinion.²¹²

Finally, it is imperative for local citizens and organizations to stand up

208. *Id.* at 587.

209. *See* Claybourn, *supra* note 189; *see also* Davis, *supra* note 193.

210. *Principles of Harm Reduction*, *supra* note 31.

211. *See id.*

212. *See generally* *Olmstead*, 527 U.S. at 581.

against unfair and prejudicial practices when public health initiatives are threatened. As stated previously, harm reduction sites are often some of the only places within a community that a person struggling with substance use disorder issues can receive non-judgmental and compassionate care.²¹³ Without access to these resources, more Hoosiers will continue to go without care and without the resources that will continue to support them on the road to recovery. It is the responsibility of individuals within these communities to act as stewards for those that have been dismissed or overlooked by society. Members of a community must have compassion for one another. Every member of a community is entitled to the same level of compassion no matter their experience with substance use disorder.

213. *See* Bruce, *supra* note 1.