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MEMORANDUM **Transportation & Development – PZ Memo No. 13-100**

DATE: NOVEMBER 6, 2013

TO: PLANNING AND ZONING COMMISSION

THRU: R.J. ZEDER, TRANSPORTATION & DEVELOPMENT DIRECTOR
JEFF KURTZ, PLANNING ADMINISTRATOR
KEVIN MAYO, PLANNING MANAGER

FROM: DAVID DE LA TORRE, AICP, PRINCIPAL PLANNER DDLT

SUBJECT: ZCA13-0002 GROUP HOMES ZONING CODE AMENDMENT

Request: Amend the City of Chandler Zoning Code relating to adult care homes, group homes and related residential use categories

Applicant: City initiative

RECOMMENDATION

Planning Staff recommends approval of the proposed Zoning Code amendments that seek to allow group homes in single family neighborhoods while continuing the goals and objectives of the General Plan to preserve the residential character of existing neighborhoods.

BACKGROUND

Within the last year, the City has become increasingly aware of group home clustering (using the term generally to include all types of group homes) in Chandler's neighborhoods. Initially, the issue was brought to the City's attention during the review of a Use Permit application for a group home. At that time, the City became aware that the subject group home is 1 of 3 group homes on the same street, which are located less than 200 feet apart. The clustering issue was exacerbated when a home that abuts one of the 3 existing group homes was sold to another group home provider with the intention of opening a fourth group home on the same block. The City has received numerous complaints from residents in the neighborhood regarding the clustering issue.

Currently, Chandler's Zoning Code requires a Use Permit and adherence to standards such as a minimum separation of 1,200 feet only when the group home has more than 5 residents. Group

homes with 5 or less residents are not currently regulated by the Zoning Code, and therefore, are not currently required to be separated a minimum of 1,200 feet. This absence of a separation requirement, together with low home prices experienced in recent years, may have accelerated the clustering issue.

The issue was brought before a Council Subcommittee on September 26, 2013. Council subsequently directed staff to amend the Zoning Code at their October 24, 2013 regular meeting with the intent of requiring a 1,200-foot minimum separation between all group homes, lowering the maximum number of residents permitted, and revising the definitions to facilitate these goals.

EXISTING GROUP HOMES

To analyze the issue, Planning Staff mapped out group homes that are licensed by the Arizona Department of Health Services (ADHS). The map (attached) revealed that the clustering issue is not limited to one neighborhood, but is prevalent citywide. According to ADHS, there are currently 152 licensed group homes in Chandler. This is not an enormous number considering that it constitutes 0.2% of the total number of single family detached dwelling units citywide (69,773 as of September 1, 2013). However, Planning Staff's analysis found that 99 (65%) are located within 1,200 feet of another group home. These group homes include assisted living and behavioral health homes. Assisted living homes are homes that provide continuous care services to its residents, and mostly serve elderly residents. Behavioral health homes are for residents that have been diagnosed by a qualified professional as having a mental issue or an addiction. Examples of mental health issues include depression, bipolar, and schizophrenia. Addictions may be related to substance abuse, but can also include other types of addictions such as gambling. The goal of behavioral health group homes is to provide treatment and assistance to help residents build the skills they need to live independently.

In addition to the 152 group homes, there are 24 licensed group homes for the developmentally disabled (residents with autism, cerebral palsy, epilepsy or cognitive disabilities) in Chandler. Arizona Revised Statutes (ARS) specifically prohibit cities from differentiating group homes that serve 6 or fewer developmentally disabled residents from any other single family dwelling. For this reason, group homes for the developmentally disabled are currently excluded in the Zoning Code, in the proposed amendments, and from the total number of group homes in this analysis.

There are also other types of group homes that are not licensed by the state or any other governmental authority. These include sober living homes and halfway houses. Sober living homes provide a structured sober living environment for recovering alcoholics and other recovering substance abusers. Their primary purpose is to provide housing for people who have come out of rehab and need a sober and supportive environment in which to live. Halfway houses may also act as transitional homes for people who have come out of rehab, but may also provide housing for people who have been released from incarceration or a mental health facility. Planning Staff is aware of 1 sober living home in Chandler, which the City issued a Notice of Violation for unlawfully operating a group home with more than 5 residents. After receiving notice, the sober living home provider submitted a Use Permit application which is currently in review. Planning Staff researched halfway houses and did not find any current locations in Chandler.

Other types of group homes include shelters for people at risk, dormitories, fraternities, and sororities. Planning Staff is aware of 1 shelter for people at risk for which location is protected by law. Planning Staff is not aware of any dormitories or other types of group homes located in single family homes.

CURRENT ZONING REGULATIONS

Chandler's Zoning Code categorizes group homes as either "adult care home" or "group home". The term adult care home was originally incorporated into the Zoning Code to be consistent with terminology that was utilized in the ARS. However, the ARS replaced this term with a new term, "assisted living home". The term group home in the Zoning Code is a broader term that includes all other types of group homes mentioned previously in this memo. In effect, both adult care homes and group homes are defined as having 6 to 10 unrelated residents. Both require Use Permit approval and compliance with standards, which, in practice, are essentially the same as the standards in the proposed amendments.

As previously stated, group homes with 5 or less unrelated residents meet the definition of "family", and do not meet the threshold of number of residents in an adult care home or a group home. Therefore, group homes with 5 or less residents do not require a Use Permit, are not required to comply with standards (including the minimum separation), and are allowed in a single family home as a matter of right. The table below summarizes the City's current zoning regulations.

Current Zoning Regulations			
	Family	Adult Care Home	Group Home
Definition	Related – no limit Unrelated ≤ 5	6 to 10 unrelated	≥ 6 unrelated
Approval Process	Allowed by right	Use Permit	Use Permit
Minimum Separation	No separation required	1,200 feet	1,200 feet
Time Period	No limit	1 year with potential renewal	1 year with potential renewal

PROPOSED AMENDMENTS

The focus of the proposed amendments is to require a minimum 1,200-foot separation between all group homes, regardless of the number of residents. To this end, the proposal revises the definition of family and introduces a new term for Chandler, "Single Housekeeping Unit", which is used by other municipalities to specify the characteristics of groups of unrelated persons living together that meet the functional equivalency of a traditional family household. In other words, the definition of single housekeeping unit will be used to determine whether a group of unrelated residents is a family or a type of group home. The distinction is made in several areas such as household responsibilities (e.g. meals, chores, maintenance, expenses, etc.), the lease structure if residents are paying rent, and where the authority lies to determine the makeup of the household. The definition maintains the ability to have an unlimited number of related residents and a limit of no more than 5 unrelated residents.

Group homes are redefined as being either a "Residential Care Home" or a "Group Home." Residential care homes are group homes for residents who have a disability. A "Group Home" is redefined as a group home for residents who do not have a disability. The distinction between group homes for the disabled versus non-disabled is made to comply with the federal Fair Housing Act (FHA) which prohibits discrimination against group homes serving the disabled and requires local jurisdictions to make reasonable accommodations for such group homes, when requested. The following table identifies examples of residential care homes and group homes:

Residential Care Homes	Group Homes
Assisted living home, or convalescent home	Halfway house (may be considered residential care home if it has residents with disability)
Behavioral health home	Fraternity / Sorority
Sober living home	Dormitory
	Shelter home for people at risk
	Boarding house

To be consistent with the definition of a single housekeeping unit, residential care homes and group homes are also defined as having no more than 5 unrelated residents. The ability to have more than 5 residents through Use Permit approval is removed. As proposed, only residential care homes will have the option to request more than 5 residents through a request for a "reasonable accommodation waiver". Residential care homes and group homes will be required to register with the City to ensure compliance with standards including a minimum separation of 1,200 feet. The table below summarizes the proposed amendments.

Proposed Zoning Code Regulations				
	Family	Single Housekeeping Unit	Residential Care Home	Group Home
Definition	1 or more persons living as a single housekeeping unit	Related – no limit, Unrelated ≤5, All adult residents under a single lease if rented, shared household responsibilities, make up is determined by residents	Up to 5 unrelated residents with a disability, not living as a single housekeeping unit	Up to 5 unrelated residents who don't have a disability, not living as a single housekeeping unit
Approval Process	Allowed by right	Allowed by right	Administrative review/clearance	Administrative review/clearance
Minimum Separation	No separation required	No separation required	1,200 feet	1,200 feet
Time Period	No limit	No limit	No limit	No limit
May request a reasonable accommodation waiver	N/A	N/A	Yes	No

REASONABLE ACCOMMODATIONS

To comply with FHA, residential care homes may request that strict compliance with one or more standards in Section 35-2211(3) be waived by the Zoning Administrator (ZA). The following findings must be made by the ZA to grant a reasonable accommodation waiver:

- The request will be in compliance with all applicable building and fire codes.
- The request will not create a substantial detriment injurious to neighboring properties by creating traffic impacts, parking impacts, impacts on water or sewer system, or other similar adverse impacts.

The proposed language also states, "Profitability or financial hardship of the owner/service provider shall not be considered by the ZA in determining to grant a reasonable accommodation waiver".

A request may have unique circumstances that may not apply to other properties. Given the potential for a wide variety of factors and circumstances, each request will be reviewed on a case-by-case basis. As part of the review process, the Zoning Administrator may meet with and interview the applicant and request more information such as a site plan, floor plan, information regarding number of residents able to drive, other transportation methods utilized, and description of daily activities. The review will also involve consultation with the Neighborhood Resources Division, Fire Marshall, and the City's Building Official.

LEGAL NONCONFORMING USES

All group homes that are legally operating under current Zoning Code regulations will be able to continue to operate as a legal nonconforming use, should the proposed amendments be adopted. According to the Zoning Code, a legal nonconforming use loses its "grandfathered" status after the use is discontinued for a period of 12 consecutive months or if a less restrictive use (meaning additional entitlement) is requested.

An application will be made available to existing group homes as a means of registering their status with the City. Planning Staff will contact group homes that are currently licensed with ADHS to ensure that they are all accounted for. The goal will be to create the most complete list of group homes possible in order to establish eligible locations for new group home applications.

DISCUSSION

Group homes, regardless of the specific type, are primarily residential in nature and provide a necessary service that can be effectively integrated into neighborhoods without any adverse impacts on the surrounding community. According to the American Planning Association's (APA) Policy Guide on Community Residences, more than 50 studies, using a variety of methodologies, have found that group homes do not adversely affect property values in a neighborhood. These studies have found that group home properties are often the best maintained properties on the block, and that most neighbors aren't aware that there is a group home nearby. Studies have also shown that group homes have no effect on neighborhood safety

and that group home residents are less likely to commit a crime of any sort than the average resident in a city.

Even so, research has also shown that neighborhoods have a limited absorption capacity for group homes that should not be exceeded. According to APA, a neighborhood can accommodate no more than one or two group homes on a single block. The APA's Policy Guide states:

> "For a group home to enable its residents to achieve normalization and integration into the community, it should be located in a normal residential neighborhood. If several group homes were to located next to one another, or be placed on the same block, the ability of the group homes to advance their residents' normalization would be compromised. Such clustering would create a de facto social service district in which many facets of an institutional atmosphere would be recreated and would change the character of the neighborhood.
>
> ...there is a legitimate government interest to assure that group homes do not cluster. While the research on the impact of group homes makes it abundantly clear that group homes a block or more apart produce no negative impacts, there is a concern that group homes located more closely together can generate adverse impacts on both the surrounding neighborhood and on the ability of the group homes to facilitate the normalization of their residents, which is, after all their raison d'être."

An excerpt from a joint statement of the Department of Justice and the Department of Housing and Urban Development states:

> "Density restrictions are generally inconsistent with the Fair Housing Act. We also believe, however, that if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community."

REGULATIONS IN OTHER MUNICIPALITIES

All municipalities that Planning Staff researched require a minimum separation (mostly 1,200 feet) between group homes (see attached comparison). Phoenix is the only other city that was researched that requires group homes (with non-disabled residents only) to obtain a Use Permit. All of the other cities review group home applications administratively. All cities allow up to 10 unrelated residents in group homes, except for Prescott, which allows up to 6. Again, the proposal would allow up to 5 as a matter of right and residential care homes would have the option to request to have more than 5 through a reasonable accommodation waiver.

PUBLIC / NEIGHBORHOOD NOTIFICATION/ INPUT

- As required by Arizona Revised Statutes, hearing dates for the Planning Commission and City Council, as well as the complete text of the draft Code amendments have been published in an eighth-page newspaper ad at least fifteen days prior to the first required public hearing.
- Notices containing a website link to view the proposed amendments were mailed to ADHS contacts as well as all group homes that are currently licensed by ADHS.
- Notice containing a website link to view the proposed amendments was distributed via email to Registered Neighborhood Organization contacts, and residents that have contacted Chandler regarding this issue, and to the public via Facebook and Twitter at least 30-days prior to the first public hearing.
- As of the time of this writing, 5 existing group home operators have contacted the City. They did not express any opposition to the proposed amendments and wanted to confirm that they would be considered legal nonconforming if the amendments are adopted.
- The operator of the aforementioned sober living home and a Chandler resident contacted the City expressing opposition to the proposed amendments (see attachment from Jeff Marsh). More specifically, the provider would like the maximum number of residents to be increased from 5 to 10 residents. Planning Staff believes that the provision to request a reasonable accommodation waiver to have more than 5 residents provides an appropriate review process to ensure that a group home of 10 unrelated people is located on a property that will not adversely impact neighboring properties.

RECOMMENDED ACTION

Planning Staff recommends approval of the proposed Zoning Code amendments that seek to allow group homes in single family neighborhoods while continuing the goals and objectives of the General Plan to preserve the residential character of existing neighborhoods.

PROPOSED MOTION

Motion to recommend approval of amending Zoning Code regulations for group homes as presented in case ZCA13-0002 GROUP HOMES ZONING CODE AMENDMENT as recommended by Planning Staff.

Attachments

1. Draft Zoning Code Amendments
2. Map of Group Homes licensed by ADHS
3. Comparison of Group Home Regulations with other Municipalities
4. Message and attachments from Jeff Marsh

ZCA13-0002 GROUP HOMES ZONING CODE AMENDMENT (DRAFT)

City initiative to amend Chapter 35-Land Use and Zoning as follows: *(Underlined text indicates proposed new text. Strikethrough text indicates proposed text deletions. Regular text indicates existing code.)*

Article II, 35-200 Definitions:

~~*Adult care home:* A residential care institution, licensed by the Arizona Department of Health Services, which provides supervisory care, personal care, or custodial care services to not more than ten (10), nor less than six (6), adults who are unrelated to the manager or owner of the home and who require the assistance of no more than one (1) person to walk or to transfer from a bed, chair, or toilet, but who are able to self-propel a wheelchair.~~

Disability: A physical or mental impairment that substantially limits one or more major life activities, a history or record of such an impairment, or the perception by others as having such an impairment.

Family: ~~An individual or two (2) or more persons related by blood or marriage or a group of not more than five (5) persons (excluding servants) at least one (1) of whom is an adult, who need not be related by blood or marriage living together in a dwelling unit.~~ One (1) or more persons living together as a single housekeeping unit in a dwelling unit.

Group home: ~~A facility which provides a living environment, sleeping rooms, and meals for any number or composition of residents that does not meet the definition of "family" as set forth in this section. In addition to a place of residence and providing meals, the facility may offer resident support services, counseling, guidance, and varying levels of medical care. This definition shall not include group homes for developmentally disabled, as specifically defined and provided for by the Arizona Revised Statutes.~~ A residential dwelling unit for a group of no more than five (5) unrelated non-transient persons, excluding staff, who do not have a disability, and are not living together as a single housekeeping unit. Group home facilities may or may not be licensed by the state or another governmental authority. This definition shall not include group homes for the developmentally disabled nor adult foster care homes as specifically defined and provided for by the Arizona Revised Statutes.

Residential Care Home: A residential dwelling unit for a group of no more than five (5) unrelated persons, excluding staff, who are not living together as a single housekeeping unit and in which every person residing in the facility (excluding the service provider, members of the service provider's family, or persons employed as facility staff) is an individual with a disability. Residential care home service providers may or may not be licensed by the state or another governmental authority. This definition shall not include group homes for developmentally disabled nor adult foster care homes as specifically defined and provided for by the Arizona Revised Statutes.

Single Housekeeping Unit: Any number of related, or up to five (5) unrelated, persons living as the functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit, including the joint use of and responsibility for common areas, and sharing household activities and responsibilities (e.g. meals, chores, household maintenance, expenses, etc.) and where, if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, under a single written lease with joint use and responsibility for the premises, and the makeup of the household is determined by the residents of the dwelling unit rather than the landlord or property manager.

Article III Districts Generally, 35-305 Use Permits

Sections 35-305.3 Adult care home use permits and 35-305.5 Group home are hereby repealed.

Article XXII. Additional Height and Area Regulations.

Sections 35-2211 Residential Care Homes and 35-2212 Group Homes are added to read as follows:

35-2211 Residential Care Homes

1) *Purpose.* Residential care homes are permitted in all single family districts subject to the requirements provided herein. The purpose of these regulations is to permit persons with disabilities to reside in single family residential neighborhoods in compliance with the Fair Housing Act, while preserving the residential character of the neighborhood.

2) *Registration.* Residential care homes shall submit a completed zoning clearance application and required supplemental materials to the Planning Division on a form established by the Zoning Administrator. For residential care homes that are licensed by the state, county or other governmental authority, tentative zoning clearance may be issued upon verifying the application complies with the standards below. Said residential care homes shall be considered to be registered with the city at the time they receive tentative zoning clearance and shall submit to the city a copy of the license issued by the state, county or other governmental authority within ninety (90) days, or said registration shall be withdrawn. For residential care homes that are not licensed by the state, county or other governmental authority, zoning clearance may be issued in place of tentative zoning clearance at which time the residential care home shall be considered to be registered with the city. In all cases, registration for residential care homes shall terminate when the residential care home use ceases.

3) *Standards.* Residential care homes shall be subject to the continued, full and complete compliance with the following standards:

    1. *Capacity.* The number of residents, excluding staff, shall not exceed five (5).

    2. *Location.* Residential care homes shall be separated a minimum of one-thousand and two hundred (1,200) feet from other registered residential care homes and group homes, except no separation is required when said facilities are separated by a freeway, arterial street, canal, or railroad. For the purposes of this subsection, all separation distances shall be measured from the property lines.

    3. *Signage.* The residential care home shall have no identification from a public street by signage, graphics, display, or other visual means, except for signage otherwise permitted under Chapter 39, section 39-14 of the Chandler Sign Code.

    4. *Code compliance.* The residential care home shall be in compliance with all applicable city codes, including building codes, fire safety regulations, zoning and subdivision codes.

    5. *Parking.* Any parking for the residential care home shall be on site and comply with requirements set forth in Article XVII Parking and Loading Regulations.

6. *Maintenance.* The exterior of the dwelling and yards shall be kept in a condition that is consistent with the neighborhood pursuant to Chapter 30, Neighborhood Preservation, of the City Code.

7. *Exclusive use.* All administrative activities, including staffing, counseling, and other visitations, shall serve only the residents of the group home.

4) Reasonable Accommodation Waiver. As a reasonable accommodation for persons with a disability, strict compliance with the standards set out in Sec. 35-2211(3) for residential care homes may be waived by the Zoning Administrator in accordance with the requirements stated herein. A request for such a reasonable accommodation waiver must be in writing and filed with the Zoning Administrator. In all cases, the Zoning Administrator, or his/her designee, shall make findings of fact in support of his/her determination and shall render his/her decision in writing. The Zoning Administrator may meet with and interview the person making the request in order to ascertain or clarify information sufficiently to make the required findings. To grant a reasonable accommodation waiver, the Zoning Administrator shall find affirmatively all of the following:

1. The request will be in compliance with all applicable building and fire codes.

2. The request will not create a substantial detriment injurious to neighboring properties by creating traffic impacts, parking impacts, impacts on water or sewer system, or other similar adverse impacts.

Profitability or financial hardship of the owner/service provider of a facility shall not be considered by the Zoning Administrator in determining to grant a reasonable accommodation waiver. An appeal of the decision of the Zoning Administrator may be made regarding reasonable accommodation to the Board of Adjustment pursuant to Article XXV of this Chapter 35.

35-2212 Group Homes

1) *Purpose.* Group homes are permitted in all single family districts subject to the requirements provided herein. The purpose of these regulations is to permit a group of unrelated persons who are not living together as a single housekeeping unit to reside in single family residential neighborhoods while preserving the residential character of the neighborhood.

2) *Registration.* Group homes shall submit a completed zoning clearance application and required supplemental materials to the Planning Division on a form established by the Zoning Administrator. For group homes that are licensed by the state, county or other governmental authority, tentative zoning clearance may be issued upon verifying the application complies with the standards below. Said group homes shall be considered to be registered with the city at the time they receive tentative zoning clearance and shall submit to the city a copy of the license issued by the state, county or other governmental authority within ninety (90) days, or said registration shall be withdrawn. For group homes that are not licensed by the state, county or other governmental authority, zoning clearance may be issued in place of tentative zoning clearance at which time the group home shall be considered to be registered with the city. In all cases, registration for group homes shall terminate when the group home use ceases.

3) *Standards.* Group homes shall be subject to the continued, full and complete compliance with the following standards:

1. *Capacity.* The number of residents, excluding staff, shall not exceed five (5).

2. *Location.* Group homes shall be separated a minimum of one-thousand and two hundred (1,200) feet from other registered group homes and residential care homes, except no separation is required when said facilities are separated by a freeway, arterial street, canal, or railroad. For the purposes of this subsection, all separation distances shall be measured from the property lines.

3. *Signage.* The group home shall have no identification from a public street by signage, graphics, display, or other visual means, except for signage otherwise permitted under Chapter 39, section 39-14 of the Chandler Sign Code.

4. *Code compliance.* The group home shall be in compliance with all applicable city codes, including building codes, fire safety regulations, zoning and subdivision codes.

5. *Parking.* Any parking for the group home shall be on site and comply with requirements set forth in Article XVII Parking and Loading Regulations.

6. *Maintenance.* The exterior of the dwelling and yards shall be kept in a condition that is consistent with the neighborhood pursuant to Chapter 30, Neighborhood Preservation, of the City Code.

7. *Exclusive use.* All administrative activities, including staffing, counseling, and other visitations, shall serve only the residents of the group home.

COMPARISON OF GROUP HOME REGULATIONS WITH OTHER MUNICIPALITIES

	CHANDLER	SCOTTSDALE	PHOENIX	TEMPE	MESA	GILBERT	PRESCOTT
DEFINITIONS							
"Family"	(1) Related - No limit	1 ≥ living as single	(1) Related - No limit	(1) Related - some limit	Not defined	(1) Related - No limit	(1) Related - No limit
	(2) Unrelated - ≤ 5	unit	(2) Unrelated - ≤ 5	(2) Unrelated - ≤ 3		(2) Unrelated ≤ 5	(2) Unrelated ≤ 6
"Adult care home"	6 to 10 unrelated	Max of 10	6 to 10	Max of 10	Max of 10	Max of 10	Max of 6
"Group home"	6 and up unrelated	No definition	6 and up unrelated	No definition	6 and up unrelated	No definition	Max of 6
SF ALLOWED (Permitted,Admin,UP)							
Family	P	P	P	P	P	P	P
Adult care	U	A	A	A	A	A	A
Group home	U	N/A	U (n.b. - nonhandicap)	N/A	N/A	N/A	A
DISTANCE REQ.							
Family	None	None	None	None	None	None	None
Adult care	1,200' frm another	750' -street; 500' if diff	1,325' frm another	1,200' frm another	1,200'/interv. feature	1,200' frm another	1,200' frm another
Group home	1,200 frm another	N/A	N/A	N/A	N/A	N/A	1,200' frm another
NOTICE/REGISTER							
Family	None	None	None	None	None	None	None
Adult care	Use Permit Hearing	None	Registered	Admin Review	Registered	Admin Review	Admin Review
Group home	Use Permit Hearing	N/A	N/A	N/A	N/A	N/A	Admin Review
TIME PERIOD							
Family	No limit	No limit	No limit	No limit	No limit	No Limit	No Limit
Adult care	1 yr w/renewal	No limit	No limit	No limit	No limit	No limit	No Limit
Group home	1 yr w/renewal	N/A	N/A	N/A	N/A	N/A	No Limit

Issue with ZCA13-0002 GROUP HOMES ZONING CODE AMENDMENT

Jeffrey B Marsh to: Erik Swanson City Of Chandler, David.delaTorre, Mayor&Council 10/16/2013 06:04 PM

2 attachments

CA FHAA FAQ Docs by Dee Dee 8.23.13.pdf Document-cvh letter.pdf

I apologize if you got this twice.

To Whom it may concern:

I am writing to you today about the proposed legislation of the **ZCA13-0002 GROUP HOMES ZONING CODE AMENDMENT** that is going to be presented to the planning and zoning commission on November 6th 2013 and at the City Council meeting on November 7th 2013.

I would like to express my concern with the way the ordinance is written and how it would adversely affect my business at the current location of 570 N. Mammoth Drive, Chandler AZ.

Currently I run a Sober Living Residence, which by the terms of the legislation that is being written, could possibly fall under the use category of your definition of a group home. At this location we have 9 residents and 2 house managers that occupies the home continuously. With the proposed changes in the code amendment being presented to the zoning commission and the City Council, I possibly would be unable to operate the Sober Living Residence at the home we currently operate at.

What I would like to ask for is if the planning and zoning commission would be able to meet with myself to come up with a better resolution to the issue that is at hand and not to rush through an amendment that would possibly cause repercussions with both my business and the city of Chandler.

I am also specifically asking that you delay both hearings with the the planning and zoning commission along with the City Council until we can better understand the ramifications of this proposal and also help educate the City of Chandler staff and residents.

I have attached a letter of recommendation from Chandler Valley Hope - an alcohol and drug rehabilitation center located in the City of Chandler - to help you better understand what we are trying to do.

Also, I have attached a FAQ document about Sober Living residences and their protection by federal law.

As you probably already know, the Americans with Disabilities Act 1990 and its additional legislation added on after 1990 bars any type of discrimination at a city, state,

or federal level with regards to employment, housing, etc. http://www.ada.gov/2010_regs.htm And the US Department of Housing and Urban Development specifically describes any time of discrimination based on disability, race, religion, etc as unlawful in the Federal court of law of the United States of America. http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination

We do not provide any services and or medical care to our residents. We don't provide any services to our residents and possibly do not fall under your definition of a "Group Home"

I can be reached at the following email and phone number.

jeff@jandjsoberliving.com

480-748-0356

VALLEY HOPE ASSOCIATION
Alcohol, Drug and Related Treatment Services
www.valleyhope.org recovery@valleyhope.org
A Not For Profit Organization

Chandler Valley Hope
Residential Treatment Services
501 N. Washington P.O. 1839
Chandler, AZ 85225
(480) 899-3335 • FAX (480) 899-6697

Valley Hope Outpatient
Treatment Services
2115 E. Southern
Tempe, AZ 85282
(480) 831-9533 • FAX (480) 831-9564

January 30, 2013

To whom it may concern:

Valley Hope is a nationally-acclaimed not-for-profit organization in business since 1968, dedicated to providing quality alcohol and drug addiction treatment services at an affordable price. Valley Hope Association is one of the largest residential treatment centers in the United States. Our facility here in Chandler opened in August of 1986 and provides residential, day or partial care, medically monitored detox and family services.

Our ongoing treatment efforts include many step-down options including Out-patient and Continuing Care Services at Valley Hope in Tempe, AZ, 12-Step programs and meeting resources, and a widely used listing of local sober living environments. Many of our recovering patients request and/or require a longer term sober environment to remain successful in fighting their addictions. Sober Living Homes play a vital role to the well-being of many of our patients after leaving our facility.

As a neighboring city and partners in fighting the many obstacles faced by untreated substance abuse, we thank you for understanding and for any support fighting a disease that knows no preference to age, race, gender, or financial status.

Sincerely,

Jeffery Howard, LPN
Community Services Clinician
Chandler Tempe Valley Hope

JH:mab

FAQ SHEET

Solutions for Treatment Expansion Project (STEP)

A Project of Futures Associates, Inc.

Fair housing laws, zoning and land use regulations and how they impact residential alcohol and drug treatment programs and sober living residences.

FREQUENTLY ASKED QUESTIONS (FAQ) • August 2008

Q 1. What is federal fair housing law?

A. Individuals in this country have the right to choose where they live. Therefore, fair housing issues have historically fallen under civil rights law. In fact, the formal name of the Fair Housing Act is Title VIII of the 1968 Civil Rights Act. It was the first major civil rights law that focused specifically on housing since the first Civil Rights Act passed in 1866 as part of Reconstruction legislation following the Civil War

The fair housing portion of the 1968 legislation prohibited housing discrimination based on color, national origin, and religion, and in 1974, added gender. Many types of housing related discrimination are covered under this act, such as mortgage lending, homeowner's insurance, and sales. This discussion, however, shall focus on those tenets of the law as they impact zoning and other land use considerations.

Further refinements to fair housing laws were made in the Fair Housing Amendments Act (FHAA) of 1988. In the late 1970s and early 1980s community resistance escalated against the establishment of residential treatment and other housing for substance abusers and the mentally ill. The tipping point for this social phenomenon was the new practice of deinstitutionalization of those populations who were previously treated and/or housed in large state funded and administered institutional facilities. The thinking of the day, still current, is that the mentally ill and substance abusers have better treatment outcomes and living experiences in smaller "family-like" homes and residences located in residential neighborhoods where they can be a part of the community, rather than in large impersonal institutions removed from the pulse of community life.

"Repeatedly, the courts have ruled that local governments denying CUPs based on stereotypical negative projections are discriminatory . . ."

Q 2. What parts of the Fair Housing Amendments Act (FHAA) of 1988 directly impact the siting of residential alcohol and drug treatment programs?

A. There are six key elements of the law that affect residential treatment programs and sober living.

1. Specific populations are designated as "handicapped" or "disabled" and are therefore protected from housing discrimination. Included in this classification are substance abusers and the mentally ill.[1] (Note: The exception to the classification of housing protections for substance abusers is for those that are currently active in their addictions to illegal drugs.[2])
2. Residential treatment programs and other types of group homes—where individuals reside for an extended period as opposed to an overnight or "hotel" situation—are housing situations protected by the FHAA.
3. The law establishes that local governments have an "affirmative duty" to provide "reasonable accommodation," or flexibility, when making decisions about zoning and land use regarding housing for persons with disabilities. (See Q 4 for further description.)[3]
4. Persons with disabilities, or their agents, have remedy within the law and can sue if they believe that they have been discriminated against.[4]
5. Any local regulations specifically designed to restrict residential alcohol and drug treatment programs or sober living residences that are not generally applicable to other comparable housing are also in violation

of fair housing laws.

6. A local government that uses community resistance as a basis for its decision to deny a conditional use permit (CUP) to a residential program for persons with disabilities is in violation of those laws.

Repeatedly, the courts have ruled that local governments denying CUPs based on stereotypical negative projections are discriminatory in that their effect is to restrict where persons with disabilities can live. Furthermore, courts have stated that such negative projections have no validity as they are not supported by data and in fact, are contradicted by data.[5] Making a determination as to whether a group home or residential treatment program is a threat to neighborhood health and safety must be made on an individualized basis using specific criteria applied only to the residence under consideration and not be made on stereotypical assumptions.

Q 3. If it has been a violation of fair housing laws since 1988 for a local government to base denial of a CUP for a residential alcohol and drug treatment program on community resistance to such programs, why does it remain today the most effective means communities have to prevent their local governments from issuing CUPs to these programs?

A. It is commonly known in local governments that fair housing laws make it illegal to discriminate in housing sales, rentals or lending practices on the basis of race, national origin, religion or gender. What is not as commonly known is how fair housing laws also apply to zoning and land use decisions regarding residential treatment programs that house persons with disabilities such as substance abusers. However, lack of knowledge by local governments is not an excuse for discrimination. The FHAA has been in existence since 1988 and has been widely publicized by the U.S. Department of Housing and Urban Development and by national and local disability and fair housing advocacy organizations.

One reason for this lack of attention is because residential programs for substance abusers and the mentally ill comprise a small percentage of the housing and building concerns that come before local governments. For instance, in San Diego County, compare the number of houses, apartment complexes and commercial buildings to that of only 77 licensed residential alcohol and drug treatment programs. In fact, some local governments have never had occasion to consider a CUP for such a program. Of the 19 local governments in San Diego County, only nine have a state licensed residential substance abuse program.

Q 4. Since zoning and land use issues depend upon local conditions, do local regulations automatically pre-empt fair housing laws?

A. No. Fair housing laws prohibit local governments from using zoning and other land use requirements to discriminate against the housing needs of persons with disabilities. Courts have further strengthened the intention of federal fair housing laws in a series of decisions that apply any one of three tests to local regulations: (1) discriminatory intent, (2) discriminatory impact, or (3) failure to provide reasonable accommodation.[6] An accommodation is considered reasonable as long as it does not place an undue administrative or financial burden on the local government. Former California Attorney General Bill Lockyer, put it this way:

"Thus, municipalities relying upon these alternative procedures have found themselves in the position of having refused to approve a project as a result of consideration which, while sufficient to justify the refusal under the criteria applicable to grant of a variance or conditional use permit, were insufficient to justify the denial when judged in light of the fair housing laws' reasonable accommodation mandate."[7]

Not all denials of CUPs are discriminatory against persons with disabilities. Sometimes it may be both legitimate and appropriate for a local government to turn down a residential alcohol and drug treatment provider for a use permit. That is why the application of reasonable accommodation criteria is critical. Reasonable accommodation is not a one way street. Providers are also obliged to be flexible in their responses to legitimate land use concerns that their facility might cause, such as increased parking, traffic, building size or design, or outdoor lighting.

There is good litmus test to apply as to whether or not a zoning or land use regulation or practice is discriminatory. It can be considered discriminatory if it focuses on persons with disabilities—in other words focuses on "WHO" is being served by the residence, not "WHAT" type of residence it is.

Q 5. How can residential alcohol and drug treatment providers ensure that they can get a CUP ?

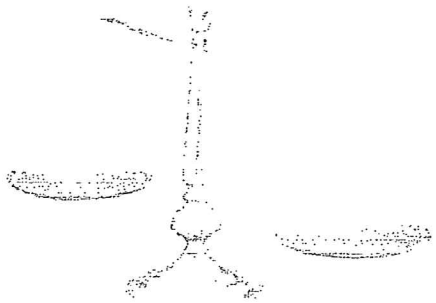
A. There are no guarantees that treatment providers will be granted a CUP, but fair housing laws definitely improve the odds for providers over what they have been in the past. When a residential provider submits a CUP application it is important to include a request for reasonable accommodation. Specifically it should include:

- Identifying the category of persons with disabili-

ties per fair housing law (substance abusers) that the proposed residential program will be serving.

- Specifying the accommodations in zoning land use that will be necessary to make this residential facility available to those with disabilities.
- Identifying the ways in which the requested accommodation will not impose an undue financial or administrative burden on the local government to which the provider is applying.

However, a provider proposing a treatment program in a facility no larger than other residences in the neighborhood, or a treatment program with six beds or fewer seeking a small increase its number of beds, may not need to apply for a CUP, but instead can apply for reasonable accommodation. There are many reasons to pursue this course of action. Any provider seeking to do this may want to consult with a fair housing professional who is knowledgeable in this area of land use. For more information on this subject see: http://www.mhas-la.org/DeveloperGuide3-9-05.pdf.



Q 6. Can local governments put special restrictions on sober living residences?

A. No. Sober living residences are housing where people abstinent from alcohol and drugs seek a clean and sober living environment. There are no treatment or counseling services given, although they may hire a house manager. They are considered the same as any other residential rental. Local governments cannot require restrictions or permits for one residence without requiring the same for all. They exist by right, just as any single family dwelling unit, whether it is a single family home, a unit in a duplex, a large apartment complex, or other types of dwelling units.

Single family dwellings are regulated under one of two different categories: "Occupancy limits" and "definition of family." "Occupancy" regulations limit the number of people allowed per square footage and is considered non-discriminatory because the standards apply equally to everyone and are, therefore, generally exempt from the application of fair housing laws. However, few local governments use this type of density limitation as it can impact large families.

The most commonly used regulation is how a local jurisdiction defines "family." In California no local government may limit the number of adults who choose to live together. This is due to a 1980 case, *City of Santa Barbara v. Adamson*, in which the California Supreme Court, based on California privacy laws, ruled that people that want to live together have the right to do so. Therefore, no California local government can restrict the number of unrelated adults choosing to live together. Many local governments still have a restrictive definition of family that limits the number of unrelated people that can live together, but such regulations are not in compliance with the law.

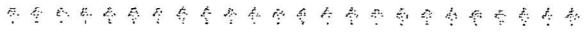
Q 7. If my state's fair housing laws are not equivalent to the protections specified in federal fair housing law, which one prevails?

A. Federal fair housing law will always be considered the "floor."[8] If state law provides fewer protections than federal law, then federal law prevails. Some states may have more protections in their fair housing laws than federal law, such as California. In that case, the law that provides the most protection prevails. (See California Fair Employment and Housing Act: http://www.dfeh.ca.gov/Statutes/feha.asp)

Q 8. What are the consequences for local governments that do not follow fair housing laws in zoning and land use decisions for residential alcohol and drug treatment programs?

A local government can be sued by a provider or potential residents of a residential facility if it is perceived that local government decision makers intentionally discriminated against them, or the effect of their acts was discriminatory, or they failed to provide reasonable accommodation. Similarly, the United States Department of Justice has authority to step in and enforce federal law when there is an allegation violation of the FHAA in a local government's zoning or land use decisions. If the courts find in favor of the residential provider or its potential residents, a local government would have to pay attorney fees. Additionally both federal and state fair housing laws provide for the added potential consequences of having to pay damages and be assessed penalties.

It should be noted that an actionable act by a local government in zoning and land use decisions against persons with disabilities can only be committed at the final step of the decision making process by elected officials who are the ones legally responsible for those decisions. For more information on this and other related subjects please see the Tool Kit and other publications at http://futuresassociates.org/step.html. To learn how to become involved locally in removing zoning and land use barriers for residential treatment providers and other housing for persons with disabilities, please see the STEP issue briefing on how to use Housing Element Plan updates which will be posted at this site in September, 2008.



References

[1] Federal Fair Housing Act, 42 U.S.C. Section 3602 (h)

[2] Federal Fair Housing Act, 42 U.S.C. Section 3602 (h) (3)

[3] Federal Fair Housing Act, 42 U.S.C. Section 3604 (f) (3) (B)

[4] Federal Fair Housing Act, 42 U.S.C. Section 3613 (c)

[5] Daniel Lauber, "Impacts on the Surrounding Neighborhood of Group Homes for Persons with Developmental Disabilities." Governor's Planning Council on Development Disabilities, Springfield, Illinois, Sept. 1986.
Council of Planning Librarians, "There Goes the Neighborhood. . . A Summary of Studies Addressing the Most Often Expressed Fears about the Effects of Group Homes on Neighborhoods in which They Are Placed," April 1990.

[6] Ted H. Gathe, City of Vancouver, WA, "Group Homes: Local Control and Regulation Versus Federal and State Fair Housing Laws," Municipal Research and Services Center of Washington.

[7] Bill Lockyer, California Attorney General, Letter to All California Mayors, "Adoption of a Reasonable Accommodation Procedures," page 3, paragraph 2, May 15, 2001.

[8] Federal Fair Housing Act, 42 U.S.C. Section 3615

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KEY PROVISIONS OF THE FEDERAL FAIR HOUSING AMENDMENTS ACT OF 1988

Sec. 802. [42 U.S.C. 3602] Definitions

(h) "Handicap" means, with respect to a person--

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

Sec. 804. [42 U.S.C. 3604] Discrimination in sale or rental of housing and other prohibited practices

As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful--

(f) (2) To discriminate against any person in the conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

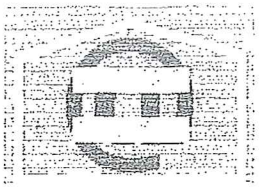
(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes

(B) 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;



A project of the Tennessee Fair Housing Council and the Fair Housing Council of Suburban Philadelphia

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City of Sedona Settles Housing Discrimination Complaint

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CITY OF SEDONA SETTLES HOUSING DISCRIMINATION COMPLAINT

(SEDONA, Ariz., July 14, 2003) -- Recently, the City of Sedona agreed to settle a housing discrimination complaint, brought by Recovery Alternatives, Inc. and Anne Cunningham, its Executive Director, both represented by the **Arizona Center for Disability Law** (the Center). The January 2003 administrative complaint, filed with the Arizona Attorney General's Office, alleged that the City violated the Arizona Fair Housing Act when its Land Development Code thwarted efforts of a group home for individuals with disabilities from operating in a Sedona residential neighborhood.

Recovery Alternatives and Ms. Cunningham sought to establish a group home designed to help individuals, who have ceased using controlled substances, recover from addiction and begin anew. After purchasing a house in Sedona's Kachina Subdivision, obtaining all necessary state licenses, and completing significant renovations on the property, the group home ran into a road block when the City of Sedona refused to permit operation until the City issued a Conditional Use Permit (CUP). "Under the federal and state Fair Housing Acts, people who are addicted to alcohol or controlled substances but who are not currently using are considered individuals with disabilities and are protected from discrimination," stated **Diana Chen**, one of two attorneys at the **Arizona Center for Disability Law** (the Center) representing Recovery Alternatives, Inc. and Ms. Cunningham. "This means municipalities like Sedona can't make it more burdensome for people with disabilities to live in the neighborhood of their choice," explained **Chen**.

In November 2002, the Center was contacted by Ms. Cunningham when the group home's administrators were experiencing problems with Sedona land use provisions that required group homes to obtain a CUP before operation. The City originally classified the home as a "group dwelling" subject to a public notification and a citizenship participation process. Therefore, according to the Sedona Land Development Code, Recovery Alternatives was required to notify all land owners within 300 feet of the property and endure a citizen participation process before the City would consider granting the CUP.

"Conditional Use Permits are commonly used by municipalities to deal with property usages that are out of character for their immediate surroundings," said **Andrew Mudryk**, Director of Litigation and Advocacy at the Center, also representing the complainants. **Mudryk** further explained, "But here, Recovery Alternatives wanted to open a home in a residentially zoned area where the residents would live as a family. So, the proposed use *was* consistent with the zoning. Attaching burdensome terms and conditions like the notification and public hearing requirements on group homes violates fair housing laws. Further, the City should have waived the CUP requirement as a reasonable accommodation under the FHA when asked to do so."

"Requiring a CUP for a group home only invites opposition from neighbors often fueled by irrational fear of people with disabilities. That's exactly what happened here. Neighbors in the Kachina Subdivision vehemently campaigned against granting the CUP," added **Chen**.

By November 2002, the City, buckling under pressure from angry neighbors, had tabled consideration of the CUP application, delaying operation of the group home and causing severe financial losses to Recovery Alternatives. With the Center's assistance, a charge of housing discrimination against the City of Sedona was filed with the Arizona Attorney General's Office in January 2003. The charge alleged that the City failed to offer a waiver of the CUP requirement as a reasonable accommodation for individuals with disabilities mandated under the state's Fair Housing Act. It further alleged that land use provisions requiring a CUP for group homes serving persons with disabilities is itself a violation of fair housing laws because it imposes more burdensome terms and conditions on persons with disabilities looking for housing.

In May, all parties entered settlement negotiations, with the Arizona Civil Rights Division of the Attorney General's Office. The parties successfully reached a settlement on June 26, 2003. In exchange for Recovery Alternatives and Ms. Cunningham agreeing to dismiss the complaint and relinquish their right to file a formal lawsuit, Sedona agreed to the following:

- permanently post a disclaimer in Sedona City Hall which states that discrimination on the basis of race, color, religion, sex, national origin, familial status, or disability is prohibited
- convene a study session of its Planning Commission in consultation with the Center within 120 days of the agreement to consider revisions and amendments to the Land Development Code and other City codes regarding placement of group homes and the City's obligation and duties under the federal and state Fair Housing Acts and other laws applicable to people with disabilities
- offer a Fair Housing training session to City staff working on housing issues
- purchase complainant's property intended for the group home for a sum of $382,000.00
- pay a settlement amount of $148,334.00, which included attorneys fees and costs to the Center

In exchange, Anne Cunningham and Recovery Alternatives will delay attempts to open a group home in a Sedona residential neighborhood for one year while the City works to revise its Code.

"We hope news of this case will incite other municipalities in Arizona to review their city or county ordinances regarding group homes for people with disabilities and make whatever changes are necessary to ensure that everyone gets an equal opportunity to housing," said **Chen**.

The Arizona Center for Disability Law provides free legal services to ensure people with a wide range of disabilities are free from discrimination, abuse and neglect, and have access to education, housing, jobs, health care, and other services. The Center assists individuals statewide through federal protection and advocacy funding along with other grants and donations. The

Center does not charge clients for its services.

For further information or a copy of the Complaint or Conciliation and Settlement Agreements, contact Diana Chen at (520) 327-9547 or Andrew Mudryk at (602) 274-6287.

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Section V

Identification of Land Use and Zoning Impediments To Housing for Individuals With Disabilities

Introduction

This section of the Study identifies land use and zoning impediments to the development, siting and use of housing for individuals with disabilities and proposes possible approaches to remedying those impediments that violate fair housing and other laws. These impediments have been identified through a review of the Code, documents provided by the City related to land use and zoning decision making procedures, and interviews with City staff and non-profit developers of housing for individuals with disabilities.

In discussing the impediments, inter-related barriers have been grouped together for a better understanding of how they impact housing for individuals with disabilities. Additionally, the basis of each impediment is identified as either a "zoning regulation impediment" or "practice impediment." Regulatory impediments are the result of specific Code provisions that discriminate against the development, siting and use of housing for individuals with disabilities either intentionally or because the application of the provision has a discriminatory effect on housing for individuals with disabilities. "Practice impediments" describe practices by the City that impede fair housing for individuals with disabilities. The following impediments have been identified:

Impediments Related to the Code Definition of "Family"

1. Zoning Regulation Impediment: The Code definition of "family" has the effect of discriminating against unrelated individuals with disabilities who reside together in a congregate or group living arrangement.
2. Practice Impediment: Consideration of the personal characteristics of the residents in land use and zoning decision-making violates fair housing laws.
3. Practice Impediment: Restrictions are imposed on households of more than six individuals with disabilities based on an erroneous presumption that the Community Care Facilities Act authorizes this regulation.
4. Practice Impediment: Mischaracterization of housing for individuals with disabilities as a "boarding or rooming house" or "hotel" use restricts housing opportunities in violation of fair housing laws.
5. Practice Impediment: Mischaracterization of housing with supportive services on site for its residents with disabilities as a commercial use denies housing opportunities in violation of fair housing laws.

Impediments Related to the Lack of a Fair Housing Reasonable Accommodation Procedure and the Variance Process

6. Zoning Regulation Impediment: Lack of a fair housing reasonable accommodation procedure to provide relief from a restrictive Code denies housing opportunities to individuals with disabilities.

7. Zoning Regulation Impediment: The variance process is overused for siting housing for individuals with disabilities and applies the wrong standard for these determinations, resulting in the denial of housing opportunities.

Impediments Related to the Siting of Treatment Programs for Individuals with Disabilities

8. Zoning Regulation Impediment: Distinguishing, for purposes of siting restrictions, between types of treatment facilities based on service to individuals with disabilities, violates state law.
9. Zoning Regulation Impediment: The Code's prohibition against locating treatment programs for those with disabilities within 600 feet of schools violates federal and state law.

Impediment Related to Political Influences

10. Practice Impediment: In land use and zoning decision-making and funding approval for housing for individuals with disabilities, political concerns are given too much weight.

Impediments Related to the Code Definition of "Family"

#1. Zoning Regulation Impediment: The Code definition of "family" has the effect of discriminating against unrelated individuals with disabilities who reside together in a congregate or group living arrangement.

Historically, for land use and zoning purposes, a zoning code definition of "family" has been used to limit single family residential zones to traditional family households to maintain the residential character of a neighborhood. The definition of family determines the type of household that may reside in single family, R-1 and, in most instances, R-2 zones. The current Code definition of "family" has the effect of denying housing opportunities to individuals with disabilities:

> ". . .[a]n individual or two or more persons related by blood or marriage, or a group of not more than 5 persons (excluding servants) who need not be related by blood or marriage, living together in a dwelling unit. . ."[92]

This definition of "family" infringes on the privacy rights of unrelated individuals to reside together and it violates federal and state fair housing laws by denying housing opportunities to individuals with disabilities. While many cities and counties have revised this common definition in accordance with the law, the City of Los Angeles has not done so. See Appendix pages A-19 through A-24 for legal definitions of family used by other California cities.

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[92] L.A.M.C. § 12.03.

In 1980, the California Supreme Court in City of Santa Barbara v. Adamson struck down a municipal ordinance that permitted any number of related people to live in a house in an R1 zone but limited the number of unrelated people who were allowed to do so to five.[93] The City had sought to exclude a group of 12 unrelated people living in a large single family dwelling in a single family zone because they were unrelated and thus did not meet the City's definition of "family." The Court held that the residents of the Adamson household were a single housekeeping unit that could be termed an alternative family because they shared expenses, rotated chores, ate evening meals together, participated in recreational activities together, and became a close group with social, economic, and psychological commitments to each other. As a single housekeeping unit or alternative family, the Adamson household could not be excluded from the single family zone nor made to apply for a conditional use permit.

Both state and federal fair housing laws also prohibit restrictive definitions of family that either intentionally discriminate against people with disabilities or have the effect of excluding such individuals from housing. Restrictive definitions of family illegally limit the development and siting of group homes for individuals with disabilities but not families similarly sized and situated, and effectively deny housing opportunities to those who because of their disability live in a group home setting.[94] A restrictive definition of family not only discriminates against people with disabilities in violation of the Act, but the failure to modify the definition of family or make an exception for group homes for people with disabilities may also constitute a refusal to make a reasonable accommodation under the Act.[95]

The California Land Use and Zoning Campaign Report, in identifying land use and zoning barriers, found that approximately one-third of the jurisdictions audited, including the City of Los Angeles, had illegal definitions of "family" with numerical limits on unrelated persons but that few enforced it.[96] City staff interviewed in conjunction with the California Land Use and Zoning Campaign Report stated that although the definition of family was still in the Code, it was not being enforced based on the Adamson case.[97] However, some Building and Safety and Planning Department staff interviewed for this Study stated that the restrictive Code definition of "family" is enforced, indicating a potential inconsistency in the application of the Code. Some Department staff interviewed stated that, based on state law, the City treated any group of six individuals or less as a family, but a group home for seven or more individuals with

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[93] City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 164 Cal. Rptr. 539 (1980).

[94] Oxford House Inc. v. Babylon, 819 F.Supp. 1179 (E.D. N.Y. 1993); Oxford House v. Township of Cherry Hill, 799 F.Supp 450 (D.N.J. 1992); United States v. Schuylkill Township, 1991 WL 117394 (E.D. Pa. 1990), reconsideration denied (E.D. Pa. 1991).

[95] Groome Resources, Ltd., L.L.C. v. Parish of Jefferson, 52 F.Supp 2d 721 (E.D.La. 1999); affirmed, Groome Resources, Ltd. v. Parish of Jefferson, 234 F. 3d 192 (5th Cir. 2000), United States v. City of Taylor, 872 F.Supp.423 (E.D. Mich. 1995), modified in part, 102 F. 3d 781 (6th Cir. 1996); Oxford House v. Babylon, 819 F.Supp. 1179 (E.D.N.Y. 1993); Oxford House-Evergreen v. City of Plainfield, 769 F.Supp. 1329 (D.N.J. 1991).

[96] *California Land Use and Zoning Campaign Report*, *supra* note 20, at 27-28.

[97] Interviews with Los Angeles Planning Department staff, circa March 1997.

disabilities that functions like a family would be excluded from an R1 zone solely because the residents are unrelated by blood, marriage or adoption.[98]

The discriminatory effect of the restrictive definition of family is twofold: first, a group living arrangement for more than six unrelated individuals with disabilities is permitted by right only in R3 and higher density multi-family zones, and second, the entitlement process is imposed for the siting of housing for individuals with disabilities in lower density residential zones even though this process is not imposed on similarly situated families.[99]

Even assuming that the illegal definition of "family" is not enforced, retention of an illegal definition in a zoning ordinance is both misleading and confusing to the public. Additionally, a restrictive definition in the Code has a chilling effect on developers of housing for people with disabilities who, based on that definition, determine that it will not be possible to obtain approval for a development. Non-profit developers of special needs housing indicated that they purposely limit the number of residents in their developments to six to avoid the delays, cost and public animosity associated with seeking an entitlement.[100]

#7. Practice Impediment: **Consideration of the personal characteristics of the residents violates fair housing laws.**

Zoning regulations based on the type of housing are permissible, but fair housing laws prohibit land use and zoning decisions based on certain personal characteristics of the residents, including that they are individuals with disabilities.[101] For example, a city that permits the siting of fraternities and sororities in residential districts but not congregate living arrangements for people with disabilities imposes restrictions based on the personal characteristics of the residents and in doing so violates fair housing laws.

While the Code does not categorize housing for individuals with disabilities, in practice the personal characteristics of the residents are considered in determining legal use of a residence. For example, in one recent instance, the City found that the use of a single family dwelling for individuals with disabilities in recovery was different from the dwelling's long standing conditionally permitted use for a rest home for 20 elderly individuals, many of whom had disabilities, in a multi-family residential zone. While both uses are congregate living arrangements for individuals with disabilities, the City refused to apply the CUP to the new use. The City looked at the personal characteristics of those residing in the large home, individuals with disabilities in recovery who are

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[98] *See* note 45, *supra*.

[99] See single and multi-family uses classifications tables at pp. 24-25.

[100] Interviews with non-profit developers of special needs housing, March 2002.

[101] United States v. Village of Palatine, 37 F. 3d 1230 (7th Cir. 1994); Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth, 876 F.Supp. 614 (D.N.J. 1994); Stewart McKinney Foundation Inc., v. Town Plan & Zone Comm'n of the Town of Fairfield, 790 F.Supp. 1197 (D. Conn. 1992).

protected by fair housing laws, and illegally distinguished them from the elderly residents.

#3. Practice Impediment: Restrictions are imposed on households of more than six individuals with disabilities based on an erroneous presumption that the Community Care Facilities Act Authorizes this regulation.

California law does not require a conditional use permit for housing for individuals with disabilities. The Community Care Facilities Act requires that cities and counties in their zoning regulations treat residential care facilities for six or fewer individuals with disabilities as a single family for purposes of siting. Homes of this size are permitted by right in single family residential zones and are not subject to an entitlement process.[102] However, like other cities and counties throughout the state, the City of Los Angeles imposes restrictions on housing for individuals with disabilities with more than six residents. The California Land Use and Zone Campaign Report found that two-thirds of the 90 jurisdictions audited throughout the state were misinterpreting the state law which pre-empts regulation of licensed residential care facilities of this size as well as state and federal fair housing laws.[103]

Those staff of the Departments of Building and Safety and Planning interviewed for this Study indicated an understanding of the Community Care Facilities Act, often referred to by them as the "six and under rule." Some staff explained that this state pre-emptive law probably superceded the City's definition of "family" which includes only five unrelated individuals. However, there was a general presumption among those interviewed that the "six and under rule" meant that the City could impose restrictions on households of seven or more individuals with disabilities.

While under the Fair Housing Act jurisdictions may have reasonable restrictions on the maximum number of occupants permitted to occupy a dwelling, the restrictions cannot be based on the characteristics of the occupants; the restrictions must apply to all citizens, and are based upon health and safety standards.[104] Similarly, a conditional use permit or variance requirement triggered by the number of people with certain characteristics – in this case disability – who will be living in a particular dwelling, is illegal. Because licensed residential care facilities serve people with disabilities, imposing a variance requirement on family-like facilities of a certain size and not on similarly sized housing for people without disabilities, violates fair housing laws.

#4. Practice Impediment: Mischaracterization of housing for individuals with disabilities as a "boarding or rooming house" or "hotel" use restricts housing opportunities in violation of fair housing laws.

The City has a practice of determining that housing for more than six individuals with disabilities is a boarding or rooming house or hotel use that is permitted by right

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[102] Health & Safety § 1566.3, *supra* note 45.
[103] *California Land Use and Zoning Campaign Report*, *supra* note 20 at 23.
[104] City of Edmonds v. Oxford House, 115 S.Ct. 1776 (1995).

only in high density multi-family residential zones. This practice was identified through interviews with the staff and from actual case studies. While in some instances these use determinations may be correct, the practice of generally identifying housing for individuals with disabilities with more than six residents as a rooming or boarding house or hotel often mischaracterizes the use at the dwelling and results in siting restrictions that have the effect of denying housing opportunities for individuals with disabilities in violation of fair housing laws.

The most common use determination applied to housing for more than six individuals is "boarding or rooming house" which is defined in the Code as [a] dwelling containing a single dwelling unit and not more than five guest rooms . . . where lodging is provided with or without meals for compensation."[105] This use is permitted by right in R3 and higher multi-family residential zones. Under certain limited circumstances, boarding or rooming houses, when sided by commercial or industrial zones, may be permitted in R2 zones. It is unclear how often this Code provision is applied to siting determinations. In order for a boarding or rooming house to be permitted in any lower density residential zone, a variance must be obtained from the City.

The boarding or rooming house use determination, in most instances, should not be applied to group or congregate living arrangements for individuals with disabilities. In a group living arrangement for individuals with disabilities, the household purposefully functions like a family or single housekeeping unit, sharing household responsibilities and providing emotional and psychological support to each other, which furthers the residents' functioning and rehabilitation. Each resident has access to the entire premises including his or her own room as well as all common areas of the home.[106] Several characteristics distinguish this family-like functioning from that of the typical boarding or rooming house. In a boarding or rooming house, a resident is entitled to occupy his or her single room, the bedroom doors have padlocks or deadbolts to establish this exclusive use, and access to other parts of the dwelling is restricted. [107] Additionally, boarding and rooming houses have traditionally been characterized as a more transient residences which is why the use has been considered incompatible in low density residential zones.

A "hotel" is a residential use with six or more guest rooms, which are distinguished from dwelling units, and this hotel use is not permitted in any residential zones.[108] Hotel uses are permitted by right in commercial zones. A "hotel" use, also applied by the City to group living arrangements of more than six individuals with disabilities, is characterized as a commercial use with guest rooms, not residential dwelling units. While it appears that the hotel use designation is applied less frequently to group living arrangements for individuals with disabilities, the effect is same: these mischaracterizations restrict the housing opportunities of persons protected by fair housing laws.

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[105] L.A.M.C. § 12.03.

[106] Tsombandis v. City of West Haven, 180 F.Supp. 2d 262 (D.Conn. 2001); Oxford House –Evergreen v. City of Plainfield, 769 F.Supp. 1329 (D.N.J. 1991)

[107] *Id.*

[108] L.A.M.C. § 12.03.

#5. Practice Impediment: Mischaracterization of housing with supportive services on site for residents with disabilities as a commercial use denies housing opportunities in violation of fair housing law.

Some jurisdictions have a misperception that housing for individuals with disabilities is a commercial use and this interpretation has the effect of denying housing opportunities in violation of fair housing laws. First, some local governments assume that if any management functions take place at a dwelling, it is a business and subject to commercial zoning restrictions. Second, some jurisdictions also take the position that where housing for individuals provides supportive services on site for its residents, the home loses its residential character and is subject to commercial land use and zoning regulations.

There is an all too common view that, because residents with disabilities in a group living arrangement pay money to live at a home, the dwelling is a commercial use, subject to commercial siting restrictions and, often, a business license.[109] In Study interviews, some Department staff suggested a distinction between residential and commercial uses for congregate or group living arrangement for individuals with disabilities and that those with large number of residents where staff provides assistance with medical care are more likely to be considered "institution-like" and a commercial use.

Courts have found that simply because operation of a dwelling may entail some management functions, such activities do not change the essential character of a single family or multi-family dwelling from a residence to a "business" or commercial use.

> [M]aintaining records, filing accounting reports, managing supervising, and providing care for individuals in exchange for monetary compensation are collateral to the prime purpose and function of a family housekeeping unit. Hence, these activities do not, in and of themselves, change the character of a residence from private to commercial.[110]

A practice or regulation that treats housing for individuals with disabilities as a commercial use when the same determination is not applied to similarly situated and functioning families singles out individuals with disabilities in a discriminatory manner. A single family engages in comparable management functions when it employs and pays a housekeeper or gardener and there is an exchange of money. Or, parents may charge rent to an adult child living at home. These activities do not change the residential use of the home, nor do comparable activities that assist with the sound functioning of a home for individuals with disabilities.

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[109] *California Land Use and Zoning Campaign Report*, *supra* note 20, at 30-31.

[110] Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E. 2d 484 (S.C. 1991) citing Gregory v. State Dept. of Mental Health Retardation and Hospitals and JT Hobby & Sons v. Family Home.

Housing for individuals with disabilities, either single family or multi-family dwellings, where supportive services are provided on site to the residents is increasing because of its success in providing counseling, vocational training and other assistance that is necessary for individuals with disabilities to reside successfully in the community.[111] In interviews with non-profit developers of housing for individuals with disabilities, it was reported that in a number of instances the City questioned the residential nature of the multi-family dwelling because the floor plan drawings designated space for several case managers' offices and a recreation room for the residents. While the City finally concluded that the use remained residential, the reported experience reflects a perception that has been noted among some jurisdictions that the residential use of a dwelling is transformed to a commercial use if on site services are provided to the residents.[112]

A jurisdiction that regulates a dwelling based on the provision of supportive services provided to individuals with disabilities is imposing restrictions based on the residents' personal characteristics in violation of fair housing laws. This type of regulation is discriminatory because it treats housing for individuals with disabilities with supportive services differently than similarly situated families. For example, a single family home remains a residential use despite the fact that the family employs a tutor to come to the home to assist children with their school work or, hires a babysitter at the home. There is no basis under fair housing laws for distinguishing between the activities and services at a traditional family home and a group living arrangement for individuals with disabilities that provides supports for its residents.

Recommended Approach to Impediments Related to the Definition of Family: Impediments #1, 2, 3, 4 and 5

The first five impediments identified are related to the Code definition of family and can be remedied with a common approach. These impediments are:

1. An illegal Code definition of "family;"
2. Consideration of the personal characteristics of the residents in land use and zoning decision-making:
3. Restrictions on households of more than six individuals with disabilities;
4. Mischaracterization of housing for individuals with disabilities as "boarding or rooming houses" or "hotels;" and
5. Mischaracterization of housing with supportive services for individuals with disabilities as a commercial use.

The restrictive definition of family which limits the number of unrelated individuals that may reside together has the effect of denying housing opportunities to people with disabilities who choose to live together in a family-like manner or consistent with the

[111] The State of California funds the AB 2034 intensive case management program for individuals with mental disabilities that is a highly successful model being replicated worldwide.
[112] *See*, note 109, *supra*.

Adamson single housekeeping unit concept. Impediments 2 through 5 identify mischaracterization practices and are the result of the illegal definition of family and also have the effect of discriminating against individuals with disabilities.

Recommendation #1: The City must adopt a legal definition of "family" to comply with fair housing and other laws.

A definition of family should look to whether the household functions as a cohesive unit instead of distinguishing between related and unrelated persons.[113] To comply with Adamson and federal and state fair housing laws, the City should revise its current Code definition of family by eliminating both (1) the distinction between related and unrelated persons, and (2) the numerical limitations on the number of persons that may constitute a family. A legal definition of family must emphasize the functioning of the members as a cohesive household.

The adoption of a legal definition of family will go a long way toward eliminating the identified practice impediments. A new definition will provide additional guidance in making use determinations for group living arrangements for individuals with disabilities and will focus the determination on the functioning of the household, both of which will likely eliminate the practice of looking at the personal characteristics of the residents.

Next, the presumption, based on the Community Care Facilities Act, that restrictions are to be applied to housing for more than six residents with disabilities will also be negated by a definition of family that requires looking at the functioning of the household and eliminates numerical restrictions on the number of individuals that may reside together for a "family" use. For this same reason, a legal definition will also prevent the mischaracterization of group or congregate living arrangements that function as a single house-keeping unit as "boarding or rooming houses" or "hotels" and permit greater flexibility in the siting of group living arrangements for individuals with disabilities that function as a single housekeeping unit. Mischaracterization of housing with supportive services will also be addressed by adoption of a legal definition of family. In some instances, providing supportive services at housing for individuals with disabilities may increase density of use at the site so as to require a fair housing reasonable accommodation. The recommendation that the City adopt a fair housing reasonable accommodation procedure is discussed later in this section.

Examples of Legal Definitions of "Family"

Example #1: One or more persons living together as a single housekeeping unit in a dwelling unit.

This definition complies with the Adamson decision, fair housing laws and case law interpreting fair housing laws as to definitions of family. A city or county that uses this

[113] United States v. Schuylkill Township, *supra* note 94.

definition must also include a definition of "single housekeeping unit" and "dwelling unit" in their ordinance.

Single housekeeping unit: One person or two or more individuals living together sharing household responsibilities and activities including, for example, sharing expenses, chores, eating evening meals together and participating in recreational activities and having close social, economic and psychological commitments to each other.

Dwelling unit: A group of two or more rooms, one of which is a kitchen, designed for occupancy by one family for living and sleeping purposes."[114]

Example #2: Any group of individuals living together as the functional equivalent of a family where the residents share living expenses and chores, eat meals together and are a close group with social, economic and psychological commitments to each other. A family includes, for example, the residents of residential care facilities and group homes for people with disabilities. A family does not include larger institutional group living situations such as dormitories, fraternities, sororities, monasteries or nunneries.

This definition is in itself a description of a single housekeeping unit and it is unlikely that any other terms within would need further explanation.

Additionally, see Appendix pages A-19 through A-24 for examples of legal definitions of family used by other California jurisdictions.

Recommendation #2: Training and written guidance should be provided to the Departments of Planning and Building and Safety on how fair housing laws impact land use and zoning regulations and practices related to housing for individuals with disabilities.

In addition to revising the definition of "family," it is recommended that the Building and Safety and Planning Departments be provided with both written guidance and training for making use determinations and siting decisions that are consistent with fair housing laws that protect the rights of individuals with disabilities who choose to live in a group arrangement and California's Adamson decision. There is no indication that specific training in how fair housing laws impact land use and zoning decision-making has been provided to these two Departments' staff, nor did this Study find any instructional documents or memos addressing fair housing for individuals with disabilities.

During interviews with staff of both Departments, it was apparent that there is a range of approaches for those who are evaluating whether a group living arrangement functions like a family. As indicated earlier, there is currently an inconsistency as to

[114] L.A.M.C. § 12.03.

whether the Code definition of family is enforced, has been unofficially modified by the state Community Care Facilities Act "six and under rule," or is not enforced based on Adamson. Staff interviewed from both departments expressed interest in learning more about fair housing laws and, in particular, having guidance for distinguishing between group living arrangements that are boarding or rooming houses and family-like households for individuals with disabilities. Although it was recognized that the City's use determinations must be made on a case by case basis, staff interviewed was very interested in having some practical examples for making use distinctions.

Impediments Related to the Lack of a Fair Housing Reasonable Accommodation Procedure and the Variance Process.

#6. Zoning Regulation Impediment: Lack of a fair housing reasonable accommodation procedure to provide relief from a restrictive Code denies housing opportunities to individuals with disabilities.

Los Angeles has an affirmative duty to provide reasonable accommodation in land use and zoning regulations and practices to individuals with disabilities. However, like many other California jurisdictions, the City lacks a fair housing procedure to comply with this statutory mandate.[115] The failure to provide a fair housing reasonable accommodation procedure for individuals with disabilities and developers of housing for individuals with disabilities results in the denial of housing opportunities and violates fair housing laws.

A request for fair housing reasonable accommodation considers the following factors:

- Is the housing, which is the subject of the request for reasonable accommodation, to be used by an individual protected under fair housing laws?
- Is the request for reasonable accommodation necessary to make specific housing available to an individual protected under fair housing laws?
- Will the requested accommodation impose an undue financial or administrative burden on the jurisdiction? [116]
- Will the requested accommodation require a fundamental alteration in the Zoning Code?[117]

The first step in determining whether a request for reasonable accommodation should be granted is determining whether the individual seeking an accommodation is protected by fair housing laws. Second, it must be determined that the accommodation requested is necessary for the individual to use and enjoy the subject property. Whether an

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[115] *California Land Use and Zoning Campaign Report, supra* note 20, at 31.
[116] Southeastern Community College v. Davis, 442 U.S. 397 (1979); H.R. Rep. No. 711, 100th Cong., 2d Sess. 25 (1988).
[117] City of Edmonds v. Washington State, 18 F. 3d 802 (9th Cir.1984).

accommodation is necessary because of the disability requires a "fact specific inquiry regarding each such request."[118]

If the applicant establishes protection under the law and that the requested accommodation is necessary, then the accommodation must be provided unless the City can present evidence that doing so would either create an undue burden or result in a fundamental alteration of the Code. As for "undue burden," in the land use and zoning context many requests for accommodation will be requests to modify or waive a regulation or procedure. It costs a jurisdiction nothing to a waive a rule, meaning that ". . . the accommodation amounts to nothing more than a request for non-enforcement of a rule." In those instances, the City would not be likely to demonstrate undue burden.[119]

In addition to not imposing an undue financial or administrative burden, a reasonable accommodation must also not result in the fundamental alteration in the nature of a program.[120] In the land use and zoning context, "fundamental alteration in the nature of the program" means an alteration so far reaching that it would change the essential zoning scheme of a municipality. The case law indicates that in most instances granting a request to modify or waive a zoning policy or procedure does not result in a fundamental alteration in the nature of a program.[121]

This statutorily based fair housing analysis gives great weight to furthering the housing needs of individuals with disabilities and also considers the impact or effect of providing the requested accommodation on the City and its overall zoning scheme.

Examples of Reasonable Accommodation:

The following two examples of requests for reasonable accommodation should be granted because the requests for relief are related to the individual's disability, necessary for use of the property and will not burden a jurisdiction or undermine the zoning scheme.

Example #1: An individual with a disability residing in a small single family dwelling in an R1 zone wants to make her detached garage a habitable dwelling for her caregiver's occupancy.

Example #2: A family wants relief from a fence height restriction so their son, who because of his mental disability fears unprotected spaces, may use the backyard.[122]

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[118] U.S. v. California Mobile Home Park Management Co., 29 F.3d 1413 (9th Cir. 1994); Department of Justice Memorandum to National League of Cities, March 4, 1996.
[119] Proviso Ass'n v. Village of Westchester, 914 F. Supp. 1555 (N.D. Ill. 1996).
[120] Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361 (1979).
[121] U.S. v. Taylor, 872 F.Supp. 423 (E.D. Mich 1995) (and related cases); Martin v. Constance, 843 F.Supp. 1321 (E.D. Mo. 1994); Oxford House v. Babylon, 819 F.Supp. 1179 (E.D.N.Y. 1993).
[122] While the Code permits relief from fence height restrictions, L.A.M.C. § 12.24X7, it does not consider the needs of the individual with disabilities but only the impact of the increased fence height on the surrounding properties.

The lack of a fair housing reasonable accommodation procedure subjects an individual with disabilities or a developer of housing for individuals with disabilities to seek relief from restrictive siting regulations through a variance process with a public notice and hearing process. A number of courts have held that a fair housing reasonable accommodation is not provided by requiring a housing provider or developer to submit to the conditional use permit or variance process because compliance would have a discriminatory effect and the process, which requires a public hearing and notice, stigmatizes prospective residents, and evidence shows that any attempt to obtain a variance would be futile.[123] The courts have also recognized that the variance process is lengthy, costly and burdensome.[124]

Under the Code, the variance procedure requires notice to neighbors and a public hearing process which is often a catalyst for opposition to much needed housing for individuals with disabilities. In Los Angeles, the potential for public opposition to influence decision-making and defeat a development for individuals with disabilities is compounded by the use of Area Planning Commissions, which act as the first level of appeal in the variance process, and the Neighborhood Councils, which have rapid electronic access to information about developments in their neighborhood and the ability to coalesce against housing for individuals with disabilities. Non-profit developers of housing for individuals with disabilities interviewed for this Study expressed concern about the impact of the Neighborhood Councils and unanimously agreed that whenever possible they and other developers limit the size of their projects to six person residences in order to avoid the public hearing process.[125]

While several other procedures, in addition to the variance and CUP processes, are available for seeking relief from strict compliance with the Code, none of them remedy the lack of a fair housing reasonable accommodation procedure. First, the "Further Authority of the Zoning Administrator" Code provision permits certain enumerated uses and activities in any zone if approved by the Zoning Administrator but the procedure is not available for relief from the Code restrictions for residential dwellings applied to housing for individuals with disabilities.[126] Second, through the "Adjustments and Slight Modifications" application process, an individual can seek relief from the Zoning Administrator for yard, area, building and height requirements, but not siting restrictions.[127] Third, a "Public Benefits Projects" exception provides that certain uses not permitted by right or CUP may be permitted in any zone and are required to meet specific performance standards or alternate compliance measures.[128] While this latter regulation applies to a wide range of uses, including homeless shelters, affordable housing development projects and community centers, the provision is not available for relief from the restrictive siting provisions imposed for housing for individuals with disabilities.

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[123] Stewart McKinney Foundation v. Town of Fairfield,790 F.Supp. 1197 (D. Conn. 1992) Horizon House Development Services v. Township of Upper Southampton, 804 F. Supp. 683 (E.D. Penn. 1992).
[124] *Id.*
[125] Interview with non-profit developers of housing for individuals with disabilities, March 2002.
[126] L.A.M.C. § 12.24x.
[127] L.A.M.C. § 12.28.
[128] L.A.M.C. § 14.00.

The urgent need for cities, including Los Angeles, to adopt fair housing reasonable accommodation procedures for land use and zoning regulations, practices and procedures has received statewide attention. In May 2001, the State Attorney General Bill Lockyer sent a letter to the mayor of every California city and the president of every county board of supervisors, encouraging cities and counties to amend their zoning ordinances to add a procedure for handling requests for reasonable accommodations made pursuant to state and federal fair housing laws. The Attorney General counsels against exclusive reliance on existing variance or conditional use permit procedures for handling requests for reasonable accommodation by individuals with disabilities, which is the practice of most jurisdictions including the City of Los Angeles.[129] This advice is based on a recognition of differing legal standards and the affirmative duty imposed on local jurisdictions to provide reasonable accommodation but also the community opposition invited through a conditional use permit process. The Attorney General also notes the opposition to such housing is often grounded in stereotypical assumptions about people with disabilities and equally unfounded concerns about the impact of such homes on surrounding property values.

The Attorney General's letter has encouraged many California cities, including Los Angeles, to take a more careful look at their ability to provide reasonable accommodation procedures as mandated by state and federal fair housing laws. And, it has focused more attention on the need for local governments to consider generally how municipal zoning and land use regulations, practices and procedures impact the development of housing for individuals with disabilities in the community.

#7. Zoning Regulation Impediment: The variance process is overused for siting housing for individuals with disabilities and applies the wrong standard for these determinations, resulting in the denial of housing opportunities.

The City's use of the variance process raises two impediments to the development, siting and use of housing for individuals with disabilities. First, the variance process, which is generally reserved for entitlement cases related to hardships based on the physical characteristics of property, is used for almost all siting determinations involving housing for individuals with disabilities and, second, the variance process applies the wrong standard for making determinations concerning housing for individuals with disabilities.

The restrictive nature of the Code, which permits housing for individuals with disabilities for more than six residents by right only in R3 and higher density multi-family residential zones, results in the imposition of the variance process for siting housing for individuals with disabilities in all lower density residential zones. This prohibition is a significant barrier to the development and siting of any housing for more than six residents with disabilities throughout the City of Los Angeles.

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[129] Letter from Attorney General Bill Lockyer to California cities and counties, Appendix A-3.

Not only does the prohibitive nature of the Code impose an entitlement process all too often, but the problem is further compounded by the imposition of a variance process which is unnecessarily burdensome when applied to housing for individuals with disabilities. To obtain a variance, an applicant must make a showing of "hardship" based on certain unique physical characteristics of the subject property. While all cities and counties impose entitlement requirements for certain uses to ensure that a zone retains it original character, the great majority of jurisdictions require a conditional use permit (CUP) for a siting not permitted by right and impose a variance only in limited circumstances. In contrast to a variance process, a CUP process requires a showing, in essence, that the proposed use of the property will not be detrimental to the surrounding properties in the zone. Overuse of either the variance or CUP process is an impediment to providing housing for individuals with disabilities; however, in those instances in which an entitlement is a reasonable procedural requirement, a CUP is the more appropriate process to use.

The second problem with the Code's reliance on the variance process is that it subjects individuals with disabilities and developers or providers of housing for individuals with disabilities to the wrong standard for obtaining relief from the restrictive regulations of the Code. The variance determination procedure is not a substitute for a fair housing reasonable accommodation procedure.

A fair housing reasonable accommodation procedure must use statutorily based factors, first determining whether relief from the Code is necessary for individuals with disabilities to have equal access to use and enjoy housing based on the disabilities of the residents. A jurisdiction cannot comply with its duty to provide reasonable accommodation if it applies a standard that looks at the physical characteristics of the property for granting an exception to or waiver of a regulation instead of considering need based on the disabilities of the residents of the housing.

In a fair housing reasonable accommodation procedure, once an applicant establishes that the accommodation is necessary to overcome barriers related to disability, the request should be granted unless a jurisdiction can demonstrate that the accommodation will impose an undue financial or administrative burden on the jurisdiction or that the accommodation will result in the fundamental alteration of the Zoning Code. These two factors require that the City demonstrate that the requested accommodation is "unreasonable." The most comparable factor in the variance procedure to this fair housing analysis, whether granting the variance will be "materially detrimental to the public welfare, or injurious to the property or improvements in the same zone or vicinity in which the property is located," shifts the required focus away from the needs of the individual with disabilities. The needs of the individual with disabilities to have access to housing are not defeated by possible adverse impacts in the surrounding areas that are often speculative.

While the variance, and not the CUP process, is imposed on housing for individuals with disabilities, it is important to note that the CUP standard is also not a substitute for a fair housing procedure. Issuance of a CUP requires a determination that

the proposed use will not be materially detrimental to the character of the immediate neighborhood and that it will be in harmony with the various elements and objectives of the General Plan. This standard is essentially the same as the variance factor discussed above and fails for the same reason. Equally important, the Zoning Administrator may impose any conditions on the use of the property that he deems necessary to ensure this compatibility.[130] Fair housing reasonable accommodations cannot be conditionally granted.

Recommended Approach to Impediments Related to the Lack of a Fair Housing Reasonable Accommodation Procedure and the Variance Process: Impediments #6 and 7

Recommendation #1: The City must adopt a reasonable accommodation procedure to comply with fair housing laws and provide relief to Code regulations and land use and zoning practices that have a discriminatory effect on housing for individuals with disabilities.

In recommending that the City adopt a fair housing reasonable accommodation procedure for land use and zoning decision-making concerning the development, siting and use of housing for individuals with disabilities, it must be understood that this is one of several necessary components for complying with fair housing laws. Local jurisdictions must repeal or revise zoning code provisions that intentionally discriminate against housing for individuals with disabilities. Adopting a reasonable accommodation ordinance will not cure a zoning code that on its face discriminates against individuals with disabilities. Nor will an offer of reasonable accommodation ever excuse a city or county from liability for intentional discrimination.

Zoning code provisions that have been identified as having a discriminatory effect on housing for individuals with disabilities must also be cured. First, the City must not enforce or apply those land use and zoning regulations that have a discriminatory effect on the development, siting and use of housing for individuals with disabilities. Second, the City should adopt a fair housing reasonable accommodation procedure to request relief from the application of a discriminatory land use or zoning regulation.

A fair housing reasonable accommodation procedure must contain, at a minimum:

- ✓ A written application procedure for individuals with disabilities, their representatives, and developers or providers of housing for individuals with disabilities to make a request for relief from strict compliance with Code regulations and procedures;
- ✓ A Zoning Administrator's review of the request for reasonable accommodation based on the four statutorily based factors discussed in this Study;
- ✓ A written determination based on the four factors for reviewing requests for accommodation;

[130] L.A.M.C. § 12.24 E.

- ✓ An opportunity for the applicant to appeal the Zoning Administrator's determination;
- ✓ Written timelines for decisions on the application and any appeals to be made within a reasonable time (30 days); and
- ✓ Notice to the public of the availability of a fair housing reasonable accommodation procedure through public signage.

While any fair housing reasonable accommodation procedure will contain greater detail than the above list, the foregoing provides the basic framework for a procedure.

The City's use of a fair housing reasonable accommodation procedure will provide a process for seeking relief from restrictive Code provisions that have a discriminatory effect on housing for individuals with disabilities. This procedure, in conjunction with the use of a legal definition of family that focuses on the functioning of the household, will increase the housing opportunities for individuals with disabilities. Although the City does not currently have a written reasonable accommodation procedure, this does not excuse it from providing reasonable accommodation when it is requested.

Recommendation #2: The City should use a conditional use permit process instead of a variance process in those instances where it is determined that a use is not permitted by right.

While a new definition of family will result in more housing for individuals with disabilities being permitted by right in residential zones, there will still be use determinations requiring that a developer or provider obtain an entitlement. The City should replace the variance requirement with a conditional use permit requirement but not as a substitute for a fair housing reasonable accommodation procedure.

Recommendation #3: Training and guidance should be provided to the staff of the Departments of Planning and Building and Safety on fair housing reasonable accommodation.

In interviews with staff of the Departments of Planning and Building and Safety, it was apparent that staff have little, if any, understanding of fair housing reasonable accommodation concepts. Staff understanding of this aspect of fair housing laws is essential for implementing a procedure; staff should be provided training and written guidance on providing reasonable accommodation in land use and zoning regulations and procedures.

Impediments Related to the Siting of Treatment Programs for Individuals with Disabilities

#8. Zoning Regulation Impediment: Distinguishing, for purposes of siting restrictions, between types of treatment facilities based on service to individuals with disabilities violates state law.

The Code discriminates against individuals with disabilities by differentiating between two types of treatment facilities based on who is served: "[h]ospitals or sanitariums (except animal hospitals, clinics and hospitals or sanitariums for contagious, mental, or drug or liquor-addict cases"), and hospitals or sanitariums, generally, which do not specify who is served by the facility.[131] The Code's siting restriction for treatment facilities on its face discriminates against individuals with disabilities in violation of both state and federal law.

California Welfare & Institutions Code § 5120 provides that in any zone in which hospitals or nursing homes are permitted either by right or conditional use permit, mental health treatment programs, both inpatient and outpatient, are permitted. The Legislature was so concerned with addressing local discriminatory land use and zoning regulations restricting the siting of treatment programs and the need to make such programs accessible in the community that it codified its intention in the statute.[132] Section 5120 is a state pre-emption statute which means that local jurisdictions may not have regulations that distinguish between the siting of general hospitals and mental health treatment facilities.

The Code distinction in treatment facilities based on service to individuals with disabilities and the resulting siting restrictions violates Section 5120. Treatment facilities that serve individuals with contagious diseases, mental disabilities or drug or alcohol substance abuse problems are prohibited from locating in any residential zone unless a variance is obtained from the City. They are permitted by right in C2 zones.[133] In contrast, treatment facilities that do not serve those with contagious diseases, mental disabilities or drug or alcohol substance abuse problems, are permitted by right in R5 multi-family zones and, may be located in R2, RD, R3 and R4 zones with a conditional use permit.[134] This use is also permitted by right in C1, CR1.5 and C2.[135]

Furthermore, the Code imposes different entitlement processes on the two types of treatment facilities where the use is not permitted by right. Treatment facilities serving individuals with mental disabilities and substance abuse problems are required to seek a variance, which means establishing a "hardship" based on unique physical attributes of the subject property to locate in any residential zone. In contrast, those facilities that do not serve individuals with mental disabilities or substance abuse problems must obtain a conditional use permit where a siting is not permitted by right. A CUP applicant must establish that the proposed use will not be detrimental to surrounding properties and this test is generally considered less difficult to meet than that required for a variance.

Section 5120 applies to both residential and non-residential treatment facilities or programs which means that because the Code permits general hospitals by right in R5

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[131] L.A.M.C. §§ 12.12A 5 and 12.14A 17
[132] Welfare & Institutions Code § 5120.
[133] See Table 3 at p. 26.
[134] See Table 2 at p. 25.
[135] See Table 3 at p. 26.

zones and by conditional use permit in all other multi-family zones, the law requires that residential mental health treatment programs also be permitted in these locations.[136]

In addition to violating Section 5120, the Code distinction between treatment facilities violates both federal and state fair housing laws and the ADA. The Fair Housing Act and FEHA are violated when the siting restriction is applied to residential treatment programs for individuals with mental disabilities or substance abuse problems. Code siting restrictions imposed in a discriminatory manner on nonresidential treatment facilities that serve individuals with certain disabilities violate Title II of the ADA.[137]

#9. Zoning Regulation Impediment: The Code's prohibition against locating treatment programs for those with disabilities within 600 feet of schools violates federal and state law.

Jurisdictions on a statewide and local basis have enacted various spacing restrictions ostensibly to avoid an "overconcentration" of facilities in any particular area. The state has imposed a 300-foot spacing requirement between licensed residential care facilities, but a local jurisdiction has the option to waive the requirement.[138]

The City's Code currently contains the following siting prohibition:

> No hospital, sanitarium or clinic for mental, or drug or liquor addict cases shall be established or maintained on any property within 600 feet of the property on which an elementary or high school is being maintained.[139]
>
> (Emphasis added.)

This prohibition blatantly singles out individuals with disabilities, those with mental disabilities and those in recovery for substance abuse, in violation of both federal and state fair housing laws, when applied to residential clinics, and the ADA when applied to non-residential uses. Additionally, this prohibition violates the state pre-emption statute, Welfare & Institutions Code § 5120, that requires that mental health treatment programs be permitted in any zone in which hospitals or nursing homes are permitted.

This siting restriction creates a presumption against siting treatment programs for those with mental disabilities and substance abuse problems that cannot be supported in view of fair housing laws and state law. The Code regulation also reflects an all too pervasive stereotype that individuals with disabilities, particularly those with mental disabilities and substance abuse problems, are a danger and should be isolated from the community. Fair housing laws and the ADA are intended to address the unfounded

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[136] City of Torrance v. Transitional Living Centers For Los Angeles, 30 Cal. 3d 515 (1982); Centinela Hospital Assoc. v. City of Inglewood 275 Cal Rptr. 901 (App. 2 Dist. 1990), 225 Cal. App 3d 1586, review denied.
[137] *See* Section III, *supra*, discussion of law.
[138] Health & Safety Code § 1520.5.
[139] L.A.M.C. §12.21D.

stereotypes that individuals with disabilities historically have had to combat and further integration into the community.

Recommended Approach to Impediments Related to the Siting of Treatment Programs for Individuals with Disabilities: Impediments #8 and 9

Recommendation #1: The City must eliminate the Code distinction between treatment facilities based on services to individuals with disabilities and replace it with a non-discriminatory use regulation that does not consider the personal characteristics of those served.

To comply with Welfare & Institutions Code §5120 the City must eliminate the Code distinction between hospital uses and adopt one general hospital definition that does not look at the personal characteristics of those served by the facilities. As for siting determinations, where a use is not permitted by right, the City should employ the conditional use permit process and a fair housing reasonable accommodation procedure should be made available for making determinations involving residential programs serving individuals with disabilities to further housing opportunities in the community. While this Study does not address the ADA in depth, it is recommended that the City also provide a reasonable accommodation procedure pursuant to Title II of the ADA for those facilities and dwellings for individuals with disabilities that are covered under this law.

Recommendation #2: The regulation restricting the proximity of treatment programs serving individuals with disabilities to schools should be repealed.

To comply with federal and state fair housing laws and the ADA, the City must eliminate the Code regulation restricting the location of treatment facilities or programs that serve individuals with disabilities.

Recommendation #3: The staff of the Departments of Planning and Building and Safety should be provided training on California Welfare & Institutions Code § 5120 and information to dispel negative stereotypes about individuals with disabilities.

Local governments are generally unaware of Welfare & Institutions Code § 5120. It is important that staff of the Departments of Planning and Building and Safety understand that, like the Community Care Facilities Act, state law pre-empts local regulation that distinguishes between hospitals and mental health treatment facilities. Both impediments discussed also reflect a negative stereotype about individuals with disabilities that has been perpetuated over the years and must be addressed both within the City and with the public at large so that critically needed housing for individuals with disabilities is developed in the community. The City will be better able to address the "Not In My Backyard" (NIMBY) opposition to housing developments if it understands the myths and unfounded stereotypes which fuel community opposition.

Impediment Related to Political Influences.

#10. Practice Impediment: In land use and zoning decision-making and funding approval for housing for individuals with disabilities, political concerns are given too much weight.

There are several ways in which political perspectives are inserted into the decision-making process and interfere with the City's fair housing obligations. While the new Area Planning Commissions (APCs) and Neighborhood Councils are intended to make government more localized and increase neighborhood involvement in decision-making, both systems have the potential for cultivating "Not In My Backyard" (NIMBY) opposition to the development, siting and use of housing for individuals with disabilities.

APC members are political appointees with substantial authority in that they act as the first appellate body where a variance has been denied. Given the restrictive nature of the Code, which imposes the variance process on essentially all housing for individuals with disabilities, the influence of the APCs on the development, siting and use of housing for individuals with disabilities is tremendous. If the City were to implement changes to the Code as this Study suggests, the APCs might continue to have authority in land use and zoning decision-making concerning housing for individuals with disabilities where a conditional use permit would be required for certain sitings.

While the Neighborhood Councils do not have the decision-making authority of APCs, these groups are potentially a lightning rod for NIMBYism with the use of the early notification system to communicate and cultivate community opposition to much needed housing. Every citizen has the right to participate in the established public process and free speech is safeguarded, even in many instances where it expresses discriminatory animus that is offensive to others. However, the Neighborhood Councils have the potential of providing and, supporting with technology, a "built-in" NIMBYism.

Even without the newly created APCs and Neighborhood Councils, Los Angeles, like other cities, has been subject to land use and zoning decision-making that is heavily influenced by politics to the detriment of compliance with the law. In Los Angeles, City Council offices have a significant role in whether a housing development or program will be permitted within their council district. Non-profit developers articulated their frustration with this influence when they stated, "It doesn't matter what the Code says, it matters whose district you are in and whether they want you." [140] Housing developers expressed concern that this influence not only impacts siting determinations but also

[140] See note 125.

extends to funding approvals and, without financing, housing developments are jeopardized, delayed or even abandoned.

Both private citizens and a city may be held liable under fair housing laws, and there need be no showing that a city intended to discriminate. "It is sufficient for plaintiffs to show that the City acted for the sole purpose of effectuating the desires of its private citizens, that racial or other improper considerations were a motivating factor behind those desires, and that the City's decision makers were aware of the motivations of the private citizens." [141] While there are complex demands on elected officials and competing interests of constituents that must be balanced, compliance with the law is essential.

Recommended Approach to Impediment Related to Political Influences.

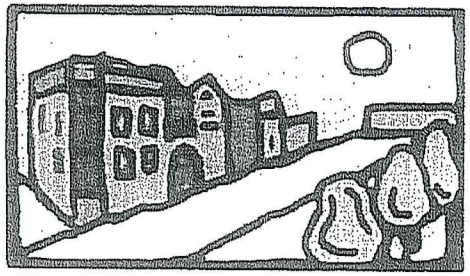
Fair housing training and written guidance should be provided to the Area Planning Commissions, Neighborhood Councils and City Council offices to ensure that land use and zoning decision-making and actions comply with the law.

The City should provide training to the APCs, Neighborhood Councils and City Council offices on fair housing laws and also address the stereotypes and misconceptions about individuals with disabilities that lead to opposition against siting housing for individuals with disabilities in the community and their neighborhoods. APCs, having significant authority in entitlement determinations, should be provided guidance in reviewing and making land use and zoning determinations that comply with fair housing and other laws that protect the rights of individuals with disabilities to live in housing of their choice free from discrimination. Neighborhood Councils must also be educated as to how fair housing law protections affect their activities. As many Neighborhood Councils are now forming and being certified, the time is right to begin training and educational sessions for these groups. City Council offices should be provided with fair housing information so that their involvement in land use and zoning decision-making does not violate the law.

[141] United States v. City of Birmingham, 538 F. Supp. 819 (E.D. Mich. 1982); 42 U.S.C. § 3617; Gov't Code § 12955.7

Fair Housing Reasonable Accommodation:

A Guide to Assist Developers and Providers of Housing for People with Disabilities in California



Mental Health Advocacy Services, Inc.

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Mental Health Advocacy Services, Inc.

Mental Health Advocacy Services, Inc. (MHAS) is a private, non-profit public interest law office that has provided legal services to people with mental and developmental disabilities since 1977. In addition to assisting individual clients, MHAS serves as a resource to the community by providing training and technical assistance to consumers, advocates, and attorneys, as well as public and private agencies.

One of MHAS' priorities is to increase access to housing for people with disabilities. A primary focus of MHAS' fair housing advocacy is helping non-profit developers overcome barriers to the development of critically needed affordable housing. MHAS has worked with affordable housing developers in almost every phase of the project approval process, from attending meetings with planning officials to developing fair housing educational materials to address neighborhood opposition.

This guide was developed as part of MHAS' 2004-05 "Getting It Built" project, which was funded by a grant from the U.S. Department of Housing & Urban Development's Fair Housing Initiatives Program. The project has provided fair housing training and technical assistance to affordable housing developers and other organizations involved in the development of housing for people with disabilities in seven southern California counties: Los Angeles, Orange, Riverside, San Diego, Santa Barbara, Ventura and Fresno Counties.

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INTRODUCTION

Despite over a decade of progress in fighting unlawful discrimination, today affordable housing developers face many challenges in getting housing for people with disabilities built. All too often, one of the most significant challenges is overcoming local land use and zoning regulations and practices that restrict or even prohibit the development and siting of housing for people with disabilities. Likewise, housing providers who wish to use existing housing in residential zones that is appropriate for people with disabilities are also frequently restricted by local regulations that impede such a use.

This guide has been prepared for those who develop or provide affordable housing for people with disabilities to explain how fair housing laws can be used to overcome restrictive local land use and zoning regulations. Fair housing laws, particularly the reasonable accommodation provisions, have often been overlooked by developers and providers as a way of remedying obstacles in the provision of housing. First, the guide provides an overview of fair housing laws, explaining how these civil rights laws protect people with disabilities in housing and, more specifically, how housing developers and providers can use the reasonable accommodation provisions of the law in getting their housing built. Next, the guide explains how housing developers and providers should make requests for reasonable accommodations and the legal basis by which local governments should evaluate those requests. Lastly, the guide offers some examples of the reasonable accommodations that housing developers and providers may need and, based on case law, have a likelihood of obtaining from local government.

FAIR HOUSING LAWS PROTECT THE DEVELOPMENT AND USE OF HOUSING FOR PEOPLE WITH DISABILITIES

The Law Prohibits Discriminatory Land Use and Zoning Regulations that Deny Housing Opportunities to People with Disabilities

The federal **Fair Housing Amendments Act of 1988** (the Act) makes it illegal to discriminate in housing against individuals based on their race, color, religion, gender, national origin, familial status (families with children) or disability.[1] The Act prohibits local governments from making housing opportunities unavailable to people with disabilities through discriminatory land use and zoning rules, polices, practices and procedures. The legislative history of the Act recognizes that zoning code provisions have discriminated against people with disabilities by limiting opportunities to live in the community in congregate or group living arrangements.

> While state and local governments have authority to protect safety and health and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals to live in communities. This has been accomplished by such means as the enactment or imposition of . . . land use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against people with disabilities.[2]

(Emphasis added.)

> ***A person with a disability** is someone who has a physical or mental impairment that limits a major life activity; has a record of such impairment; or is regarded as having such an impairment.[3] People in recovery for substance abuse are also protected by fair housing laws; however, current users of illegal controlled substances are not protected by fair housing laws unless they have a separate disability.[4]*

California's own fair housing statute, the **Fair Employment and Housing Act** (FEHA), prohibits discrimination on the same bases as federal law and also four additional bases: marital status, ancestry, sexual orientation and source of income.[5] The FEHA explicitly prohibits discriminatory "public or private land use practices, decisions and authorizations" including, but not limited to, "zoning laws, denials of permits, and other [land use] actions . . . that make housing opportunities unavailable" to people with disabilities.[6] In enacting state fair housing laws, the California Legislature made the following findings, which recognized that land use practices have discriminated against group living arrangements for individuals with disabilities:

a. That public and private land use practices, decisions, and authorizations have restricted, in residentially zoned areas, the establishment and operation of group housing, and other uses.

b. That people with disabilities . . . are significantly more likely than other people to live with unrelated people in group housing.

c. That this act covers unlawful discriminatory restrictions against group housing for these people.[7]

The protections afforded people with disabilities also extend to those associated with them. Providers and developers of housing for people with disabilities have "standing" to file a court action alleging a violation under either federal or state fair housing laws or seek administrative relief from a federal agency (U.S. Department of Housing and Urban Development) or state agency (California Department of Fair Employment and Housing). The federal Fair Housing Amendments Act is much broader than other civil rights laws in that anyone suffering a "distinct and palpable injury" as the result of another's discriminatory act may sue. The injured party does not need to be the target of discrimination.[8] Thus, persons prevented from providing housing for individuals with disabilities because of a municipality's discriminatory acts have standing to sue under the Act or FEHA.[9]

Proving Discrimination Under Fair Housing Laws

The federal Act and California's FEHA prohibit both intentional discrimination and zoning rules and regulations that have the effect of discriminating against housing for people with disabilities. This two-pronged basis is particularly important in relation to the development and use of housing for people with disabilities. In many instances, zoning regulations that are facially neutral have an adverse impact that results in the denial of housing opportunities to people with disabilities.

Intentional Discrimination - When a local government's land use or zoning code illegally singles out and treats housing for people with disabilities in an adverse manner, it is intentionally discriminating.

When a local government's land use or zoning code illegally singles out and treats housing for people with disabilities in an adverse manner, it is intentionally discriminating. For example, a zoning provision that specifically prohibits the development of group homes for people with disabilities in single family residential zones is discriminatory on its face. To prove discriminatory intent, an individual need only show that disability was one of the factors considered by the city or county in making a land use or zoning decision.[10] Intentional discrimination may include actions or decision-making that is motivated by stereotypes, prejudices, unfounded fears or misperceptions about people with disabilities. Elected officials that adopt the discriminatory animus of neighborhoods or communities may face liability under fair housing laws.[11]

Discriminatory Effect - Discrimination may also be established by proving that a particular practice has a disparate impact on people with disabilities. Discriminatory intent need not be proven.

Discrimination may also be established by proving that a particular practice has a disparate impact on people with disabilities. Discriminatory intent need not be proven. Effect, not motivation, is the touchstone.[12] For example, a zoning ordinance limiting the number of unrelated persons that may reside together in a single family residential zone through a restrictive definition of "family," without singling out any particular group, has the effect of discriminating against people with disabilities who frequently live together in congregate living arrangements.

Both of the foregoing examples of zoning regulations are illegal under fair housing laws because, either intentionally, or in effect, the restrictions deny housing opportunities to people with disabilities. While case law has established that a federal fair housing law violation may be proven through disparate impact, California law has codified that a victim may establish liability solely on the basis of discriminatory effect.[13] Land use and zoning regulations that are intentionally discriminatory must be eliminated from a local zoning code; a city or county may be liable if it continues to rely on provisions that violate fair housing laws. Local governments should also remove from their zoning code regulations that have an adverse or disparate impact on housing for people with disabilities. However, for developers and providers of housing for people with disabilities who need to move forward on a particular project, often the most expedient method is to seek a reasonable accommodation. Nevertheless, an offer of reasonable accommodation will not cure an intentionally discriminatory zoning regulation.[14]

DEVELOPERS AND PROVIDERS OF HOUSING FOR PEOPLE WITH DISABILITIES MAY SEEK REASONABLE ACCOMMODATIONS TO OVERCOME LAND USE AND ZONING RESTRICTIONS

Local Governments Must Make Reasonable Accommodations in Their Land Use and Zoning Regulations for Housing for People with Disabilities

In addition to not discriminating against people with disabilities, under both federal and state fair housing laws cities and counties have an affirmative duty to provide **reasonable accommodation** in land use and zoning rules, policies, practices and procedures where it may be necessary to provide individuals with disabilities equal opportunity in housing.[15] While fair housing laws intend that all people have equal access to housing, the law also recognizes that people with disabilities may need extra tools to achieve equality. Reasonable accommodation is one of the tools that is intended to further housing opportunities for people with disabilities.

For developers and providers of housing for people with disabilities who are often confronted with siting or use restrictions, reasonable accommodation provides a means of requesting from the local government flexibility in the application of land use and zoning regulations or, in some instances, even a waiver of certain restrictions or requirements because it is necessary to achieve equal access to housing.[16] Cities and counties are required to consider requests for accommodations related to housing for people with disabilities and provide the accommodation when it is determined to be "reasonable" based on fair housing laws and the case law interpreting the statutes.

Examples of reasonable accommodations involving land use, zoning and building requirements:

- *A special needs housing developer wishes to develop a 12-unit multi-family building in a low density commercial zone, bordered by a residential district, because the property is within close proximity to the mental health services which will be used by the residents with disabilities. The developer seeks a waiver of the prohibition against residential uses in commercial zones.*
- *A housing provider or developer seeks from its local government waiver of a residential fence height restriction so that many of the residents of the home, who because of their mental disabilities fear unprotected spaces, may use the backyard.*
- *A housing provider requests deviation from the code for installation of a wheelchair ramp at an existing home that will be used by people with disabilities.*

The Reasonable Accommodation Analysis: How Requests Will Be Evaluated

A statutorily based four-part analysis is used in evaluating requests for reasonable accommodation related to land use and zoning matters and is incorporated in those reasonable accommodation procedures which have been adopted thus far by California jurisdictions. This analysis gives great weight to furthering the housing needs of people with disabilities and also considers the impact or effect of providing the requested accommodation on the City and its overall zoning scheme. Developers and providers of housing for people with disabilities must be ready to address each element of the following four-part analysis.

- The housing that is the subject of the request for reasonable accommodation is for people with disabilities as defined in federal or state fair housing laws;
- The reasonable accommodation requested is necessary to make specific housing available to people with disabilities who are protected under fair housing laws;
- The requested accommodation will not impose an undue financial or administrative burden on the local government; and
- The requested accommodation will not result in a fundamental alteration in the local zoning code.

Initially, developers and providers of housing for people with disabilities must establish that the housing is specifically for people with disabilities. In most instances, this threshold requirement can be met by describing generally the use of the dwelling, such as licensed residential care facility, home for transitional age youth with disabilities, or sober living home for those in recovery. An applicant seeking a reasonable accommodation is not required to identify the nature or severity of the disabilities of the residents.[17] In California, housing developers and providers should rely on the FEHA definition of "disability" because it is more inclusive than the federal Act definition.[18]

Second, the accommodation sought must be <u>necessary</u> to make the specific housing available to people with disabilities. To establish that the accommodation is necessary, it must be shown that, without the accommodation, people with disabilities will be denied the equal opportunity to live in a residential neighborhood.[19] In other words, "but for the accommodation," the housing would not be available and a housing opportunity for people with disabilities would be denied. Determining whether an accommodation is necessary entails a "fact specific inquiry regarding each such request," meaning that

Housing developers and providers have obtained accommodations to increase the number of residents based on economic necessity, but a court would require very specific evidence that the number of residents proposed for the housing was necessary to make the project economically viable.

each request is evaluated based on the particular set of facts.[20] For example, housing developers and providers have obtained accommodations to increase the number of residents based on economic necessity but, as discussed in the Examples section (see page 11), a court would require very specific evidence that the number of residents proposed for the housing was necessary to make the project economically viable.

Once a developer or housing provider establishes protection under the law and that the requested accommodation is necessary, then the accommodation must be provided unless the local government presents persuasive evidence that doing so would either create an undue burden or result in a fundamental alteration of the zoning code. Establishing either of these burdens makes the accommodation "unreasonable" and is the basis for denying the requested accommodation. As for "undue burden," in the land use and zoning context many requests for accommodation will be requests to modify or waive a regulation or procedure. It costs a jurisdiction nothing to a waive a rule, meaning that " . . . the accommodation amounts to nothing more than a request for non-enforcement of a rule." In those instances, a city would not be likely to demonstrate undue burden.[21]

In addition to not imposing an undue financial or administrative burden, a reasonable accommodation must also not result in the fundamental alteration in the nature of a program.[22] In the land use and zoning context, "fundamental alteration in the nature of the program" means an alteration so far-reaching that it would change the essential zoning scheme of a municipality. The courts have generally held that the granting of an exception for one dwelling that provides housing for people with disabilities does not change the residential character of a neighborhood and therefore does not result in a fundamental alteration in the nature of a program.[23]

In those instances in which a local government intends to deny a requested accommodation because it would be a burden or result in a fundamental alteration, it is appropriate for the jurisdiction to engage in an "interactive process" (a requisite in employment discrimination cases) and propose an alternative accommodation that could achieve a comparable result. While the case law is unclear as to whether a local government is required to do so, in practice local governments often negotiate an alternative accommodation.[24]

Developers and Providers Should Seek Reasonable Accommodations Instead of Using Existing Entitlement Procedures

Today, many local governments have yet to adopt fair housing reasonable accommodation procedures, and they continue to instruct developers and housing providers that exceptions to land use or zoning regulations are provided through a conditional use permit or variance process. There are a number of reasons why developers and providers of housing for people with disabilities should not use existing entitlement procedures when they need to deviate from land use and zoning regulations.

The first reason that existing entitlement procedures should be rejected is that both the conditional use permit and variance processes involve a public notice and hearing which often creates a forum for neighborhood opposition that may unduly influence decision-makers. And, a number of courts have held that a fair housing reasonable accommodation is not provided by requiring a developer or provider of housing for people with disabilities to submit to a conditional use permit or variance process. Going through such a process has a discriminatory effect because it requires a public notice and hearing that can stigmatize prospective residents with disabilities.[25] The courts have also recognized that the variance process is lengthy, costly and burdensome.[26]

Developers and providers of housing for people with disabilities know well that the public nature of the conditional use permit and variance process can be a catalyst for organizing opposition, and NIMBY sentiments can delay or even stop the development or siting of housing for people with disabilities. Strong opposition can persuade an elected official to vote against a housing project or lead a developer or housing provider to abandon a project because of the hostility that future residents with disabilities will have to face in the neighborhood. A reasonable accommodation procedure is unlikely to have the degree of public notification and hearing process that is found in virtually all entitlement procedures.

The second reason that existing conditional use permit and variance processes should be avoided is that both entitlement procedures apply the wrong standard in determining whether to grant or deny the requested relief. Issuance of a conditional use permit requires a determination that the proposed use will not be materially detrimental to the character of the immediate neighborhood and that it will be in harmony with the various elements and objectives of the local government's General Plan. Equally problematic from a fair housing perspective is that a local government may impose any conditions on the use of the property that are deemed necessary to ensure this compatibility.

To obtain a variance, an applicant must make a showing of "hardship" based on certain unique physical characteristics of the subject property. In contrast, a request for reasonable accommodation must establish that relief from the zoning code is necessary for individuals with disabilities to have equal access to use and enjoy housing. A jurisdiction cannot comply with its duty to provide reasonable accommodation if it applies a standard that looks at the physical characteristics of the property instead of considering need based on the disabilities of the residents of the housing.

In a fair housing reasonable accommodation procedure, once an applicant establishes that the accommodation is necessary to overcome barriers related to disability, the request should be granted unless a jurisdiction can demonstrate that the accommodation will impose an undue financial or administrative burden on the jurisdiction or that the accommodation will result in a fundamental alteration of the local zoning code. These two factors require that the city or county demonstrate that the requested accommodation is "unreasonable." In the variance process, the focus is shifted away from the needs of people with disabilities. The local government will determine whether granting the variance will be "materially detrimental to the public welfare, or injurious to the property or improvements in the same zone or vicinity in which the property is located." In a reasonable accommodation procedure, the possible adverse impacts in the surrounding areas cannot defeat the needs of the people with disabilities to have access to housing.

In May 2001, California's Attorney General, Bill Lockyer, sent a letter to every California city and county, encouraging them to amend their zoning ordinances to add a procedure for handling requests for reasonable accommodations made pursuant to state and federal fair housing laws.

The importance of local governments adopting reasonable accommodation procedures for local land use and zoning regulations received statewide attention in May 2001 from California's Attorney General, Bill Lockyer. Mr. Lockyer sent a letter to the mayor of every California city and the president of every county board of supervisors, encouraging them to amend their zoning ordinances to add a procedure for handling requests for reasonable accommodations made pursuant to state and federal fair housing laws. The Attorney General counsels against exclusive reliance on existing variance or conditional use permit procedures for handling requests for reasonable accommodations because they do not use fair housing legal standards, and, furthermore, local jurisdictions have an affirmative duty to provide reasonable accommodation. The Attorney General also recognizes that community opposition is invited through a conditional use permit process, and such opposition is often grounded in stereotypical assumptions about people with disabilities and unfounded concerns about the impact of such housing on surrounding property values. A copy of the Attorney General's letter is included at the end of this guide (see page 17).

How to Make a Request for Reasonable Accommodation if the Local Government Does Not Have a Written Procedure for Doing So

Local governments have an affirmative duty to consider requests for reasonable accommodation regardless of whether they have a written procedure in place for making such a request. Initially, an inquiry should be made to the local government's planning department to determine whether there is an established procedure for seeking an accommodation. If there is not a written procedure, then the request for reasonable accommodation should be made in writing. A developer or provider of housing for people with disabilities requesting a reasonable accommodation must be prepared to address each of the points of analysis set forth above.

> *It is highly recommended that, should a local government assert that a developer or provider must make a request for reasonable accommodation within an entitlement process, an attorney knowledgeable about fair housing laws should be consulted to protect both the developer's and residents' rights.*

While directly requesting a reasonable accommodation is the recommended approach, some local governments may assert that the request for reasonable accommodation will be considered only within the established entitlement procedure or only after a determination has been made on the variance or conditional use permit. Although fair housing advocates and attorneys do not believe this is the legally correct position to take, the case law is unsettled in this area. Therefore, it is highly recommended that, should a local government assert that a developer or provider must make a request for reasonable accommodation within an entitlement process, an attorney knowledgeable about fair housing laws should be consulted to protect both the developer's and residents' rights.

EXAMPLES OF REASONABLE ACCOMMODATIONS IN LAND USE AND ZONING

Many developers and providers of housing for people with disabilities will want to request an accommodation to overcome local zoning code provisions that restrict the siting and use of housing for people with disabilities in low density residential zones based on the number of residents in the home. There are also many other accommodations that may be appropriate including, for example, a reduction in the number of parking spaces required for a development, or waiver of regulations related to the physical structure of a dwelling or yard area.

The following examples represent some of the more likely accommodations that developers and providers may need for housing for people with disabilities. This is not an exhaustive list; many other exceptions to land use and zoning regulations may be needed depending on the particular housing. The case authority provided for many of the examples involves variances or conditional use permits because no reasonable accommodation procedure existed in the jurisdiction at the time the matter was litigated. In some instances, housing providers requested a reasonable accommodation within a variance process.

Increasing the Number of Residents in Housing for People with Disabilities

Both developers and providers of housing for people with disabilities may need a reasonable accommodation from a local government to site or use housing for people with disabilities in a single family or other low density residential zone. Despite federal and state fair housing laws and California case law, some local governments continue to use an illegal definition of "family" that distinguishes between related and unrelated individuals and limits the number of unrelated persons that may reside together to constitute a "family." While not singling out people with disabilities on its face, such a definition may have a disparate impact on housing for people with disabilities because it effectively restricts the number of unrelated persons with disabilities who may reside together in single family and other low density residential zones.[27]

The case law supports granting reasonable accommodation to overcome a restrictive definition of "family" so that people with disabilities can live together in a group home setting in a single family or other low density residential zone.[28] A developer or provider must establish that, without the accommodation, people with disabilities will be denied equal opportunity to live in a residential neighborhood.[29] The courts have held that a reasonable accommodation that results in an increase in the number of residents at a home does not result in an undue burden on the local government, nor does it undermine the residential character of the neighborhood or the local zoning scheme.[30]

The courts have granted increases in the number of residents at a home or permitted a home to exceed the number of unrelated persons living together in single family residential zones based on "economic necessity." [31] A housing provider must establish through budgets, including income and expense accountings, that his or her home must have a certain number of residents to be financially sound; "conclusory allegations without evidence are insufficient to support an increase in the number of residents based on economic viability."[32] The financial necessity argument has been unsuccessful where the increase requested is great (i.e., a doubling in the number of residents) or the housing already has a large number of residents.[33]

The courts have recognized that an increased number of people residing in a home may be necessary for therapeutic purposes.

A housing developer or provider may also seek a reasonable accommodation to increase the number of residents for therapeutic purposes. The courts have recognized that, for therapeutic purposes, an increased number of people residing in a home may be necessary for a congregate or group living arrangement to effectively assist people with disabilities.[34]

Extending the Footprint of the Housing

A reasonable accommodation request may seek waiver of land use or zoning restrictions that, for aesthetic reasons or to preserve homeowners' views, impose a limit on the footprint of a dwelling in relation to lot size. A housing developer or provider may need to increase the footprint of a dwelling to make the interior accessible to wheelchair users who will reside at the premises. Whether the accommodation will be granted depends on the particular facts of the case analyzed under the factors set forth above.

Relief From Side Yard Requirements

A developer may seek changes related to side yard and backyard zoning code requirements or substitution of side yard footage for rear yard footage, and it is unlikely to be considered either an undue burden or fundamental alteration.[35] This type of accommodation may be necessary to install ramps to meet the needs of persons with disabilities who use wheelchairs.

Fence Height Restrictions

Housing providers have been granted exceptions to fence height restrictions when greater privacy was necessary for a person with a disability to use and enjoy the outdoors at a residence. In reviewing a request for reasonable accommodation related to a height restriction, the local government must consider the need of the applicant but

will also likely compare the requested fence height to other fences within the same block, as well as emergency access to the premises. A housing provider should be prepared to address these concerns when seeking a waiver of a fence height requirement.

Reduction in Parking Requirements

Housing developers and providers may seek a reduction in the number of parking spaces required at housing for people with disabilities based on the number of residents who drive or have cars.[36] While some local governments have standardized a procedure for seeking a parking reduction, it is recommended that those developing or providing housing for people with disabilities seek an exception through a reasonable accommodation request. Local governments have a statutory duty to provide a reasonable accommodation, and the applicant should not be required to submit to a public process.

Waiver of Concentration and Dispersal Rules

The concerns of neighbors based on stereotypes about people with disabilities are not a legal basis for defeating a request for accommodation of this type or any other.

Many local governments continue to have regulations that seek to disperse group homes to avoid "overconcentration" of housing for people with disabilities in particular neighborhoods. The State of California requires that licensed residential care facilities be separated by a distance of 300 feet. However, local governments may waive this distance requirement and permit these licensed homes to be in closer proximity.[37] While some states' spacing requirement rules have been struck down as illegal under fair housing laws because they imposed too great a separation (i.e., 1,500 feet), California's restriction has not been challenged. The courts have waived dispersal requirements as an accommodation where it was determined to be reasonable and not burdensome to a municipality. The concerns of neighbors based on stereotypes about people with disabilities are not a legal basis for defeating a request for accommodation of this type or any other.[30]

Reasonable Accommodation Under the Americans with Disabilities Act

Developers and providers of non-residential services, including mental health treatment programs or multi-service centers for people with disabilities, may obtain reasonable accommodations under the Americans with Disabilities Act. Fair housing laws provide protections to residential dwellings and generally do not cover non-residential programs.

Title II of the Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities by state and local governments, including the programs and services offered by a jurisdiction's housing development, planning and zoning agencies.[39] The ADA has a broad scope and complements the federal Fair Housing Amendments Act in covering certain non-traditional housing such as government-operated homeless shelters as well as social services offices and treatment programs serving people with disabilities.[40] Title II protects against discriminatory land use and zoning decisions made by local governments against development of these uses. In addition, entities associated with people with disabilities are protected from discrimination under the ADA.

Title II of the ADA, like the Fair Housing Amendments Act, requires that local governments make reasonable modifications in "policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making modifications would fundamentally alter the nature of the service, program or activity."[41] The ADA term "reasonable modification" is essentially synonymous with the fair housing phrase "reasonable accommodation." The requirement that cities and counties make reasonable modification under Title II of the ADA means that those who develop and provide non-residential treatment programs to people with disabilities, either associated with or independent of housing, may seek modifications under Title II of the ADA to ensure equal opportunity for participation in programs and activities.

Final Thoughts

This guide has been prepared to inform developers and providers of the fair housing laws that protect housing for people with disabilities and to encourage them to seek reasonable accommodations from their local governments when such accommodations are necessary to ensure equal access to housing. While this general guide provides an overview of the law, it is not a substitute for specific legal advice, which is often necessary when faced with obstacles to developing or providing housing for people with disabilities. We encourage those faced with housing development challenges to seek legal counsel knowledgeable of fair housing laws early on so that they may most effectively use the law to overcome obstacles to developing or providing housing to people with disabilities.

Endnotes

[1] 42 U.S.C. §§ 3601 et seq.
[2] H.R. Rep. No 711, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2185.
[3] Cal. Gov't. Code §§ 12955.3. While the federal Act requires a "substantial impairment," California's more inclusive definition of disability is controlling in this state because federal law provides that nothing in the Act "shall be construed to invalidate or limit any law of the State that grants, guarantees, or protects the same rights as are granted by [the Fair Housing Act]." 42 U.S.C.§ 3615.
[4] 42 U.S.C. § 3602(h); United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992); Oxford House v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993).
[5] Cal. Gov't. Code §§12900 et seq.
[6] Cal. Gov't. Code § 12955(l).
[7] Stats. 1993 ch. 1277, § 18.
[8] San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470 (9th Cir. 1998) (citing to Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)).
[9] Epicenter of Steubenville v. City of Steubenville, 924 F. Supp. 845 (S.D. Ohio 1996); Judy B. v. Borough of Tioga, 889 F. Supp. 792 (M.D. Pa 1995).
[10] Oxford House-C v. City of St. Louis, 843 F. Supp. 1566 (E.D. Mo. 1994); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285 (D.Md. 1993).
[11] People Helpers Foundation, Inc. v. City of Richmond, 789 F. Supp. 725 (E.D. Va. 1992), 12 F.3d 1321 (4th Cir. 1993) (appeal as to damages); Assoc. Of Relatives & Friends of AIDS Patients v. Regs. & Permits Admin., 740 F. Supp. 95 (D.P.R. 1990).
[12] Seivert v. Mill Valley, 1992 U.S. Dist. LEXIS 14727, (N.D. Cal.) (citing to Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977)); See also Martin v. Constance, 843 F. Supp. 1321 (E.D. Mo. 1994).
[13] Cal. Gov't. Code § 12955.8(b); Broadmoor San Clement Homeowners v. Nelson, 25 Cal. App. 4th 1 (4th Dist. 1994).
[14] The Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997); Hovsons Inc. v. Township of Brick, 89 F. 3d 1096 (3rd Cir. 1996); Bangerter v. Orem City Corp., 46 F. 3d 1491 (10th Cir. 1995).
[15] 42 U.S.C. § 3604(f)(3)(B); Cal. Gov't. Code § 12927(c)(1).
[16] Turning Point, Inc. v. Caldwell, 74 F.3d 941 (9th Cir. 1996).
[17] Under both federal and state fair housing laws it is unlawful to make an inquiry of a person with a disability or one associated with him as to the nature or severity of the disability. 24 C.F.R.§ 100.202; Cal. Gov't. Code § 12955 (b).
[18] See Note 3, advising that the more inclusive definition of "disability" under FEHA should be relied upon.
[19] City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002).
[20] U.S. v. California Mobile Home Park Management Co. (California Mobile Home I), 29 F.3d 1413 (9th Cir. 1994); Department of Justice Memorandum to National League of Cities (March 4, 1996).
[21] Geibler v. M&B Assocs., 343 F. Supp. 1143 (9th Cir. 2003) (rejecting the reasoning in Hemisphere Building Co. v. Village or Richton Park, 171 F.3d 437 (7th Cir. 1999) and Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2nd Cir. 1998)).

[22] Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361 (1979).
[23] Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781 (6th Cir. 1996) (and related cases); Martin v. Constance, 843 F. Supp. 1321 (E.D. Mo. 1994); Oxford House v. Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993).
[24] Joint Statement of Department of Housing and Urban Development and Department of Justice: Reasonable Accommodation Under Fair Housing Laws (May 17, 2004) (available at www.hud.gov). At least one case, outside of the 9th Circuit, has held that the interactive process is not required in reasonable accommodation determinations. Lapid-Laurel v. Zoning Board of Adjustment of Town of Scotch Plains, 284 F.3d 442 (3rd Cir. 2002).
[25] Stewart McKinney Foundation v. Town of Fairfield, 790 F. Supp. 1197 (D.Conn. 1992); Horizon House Development Svcs. v. Township of Upper South Hampton, 804 F. Supp. 683 (E.D. Penn. 1992).
[26] *Id.*
[27] In City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 164 Cal. Rptr. 539 (1980), which preceded the enactment of federal and state fair housing laws, the California Supreme Court held that based on constitutionally guaranteed privacy rights, zoning code definitions of "family" cannot distinguish between related and unrelated individuals nor limit the number of unrelated persons that may reside together to constitute a "family." Fair housing laws also hold that restrictive definitions of "family" have an adverse impact on housing for people with disabilities. See Oxford House Inc. v. Babylon, 819 F. Supp. 1179 (E.D. N.Y. 1993); Oxford House v. Township of Cherry Hill, 799 F. Supp 450 (D.N.J. 1992); United States v. Schuylkill Township, 1991 WL 117394 (E.D. Pa. 1990), reconsideration denied (E.D. Pa. 1991).
[28] Dr. Gertrude A. Barber Center v. Peters Township, 273 F. Supp. 2d 643 (W.D. Penn. 2003).
[29] Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002).
[30] U.S. v. Village of Marshall, 787 F. Supp. 872 (W.D. Wis. 1992); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991).
[31] Geibeler v. M&B Assocs., *supra*, note 21, at 1152 (approving of Smith & Lee Assocs.v. City of Taylor, 102 F.3d 781 (6th Cir. 1996)); See also Edmonds, *supra*, note 19, at 803-806.
[32] Advocacy and Resource Center v. Town of Chazy, 62 F. Supp. 2d 686 (NYND 1999).
[33] Town & Country Adult Living v. Village/Town of Mt. Kisko, 2003 WL 21219794 (SDNY).
[34] Dr. Gertrude A. Barber Ctr., Inc. v. Peters Twp., 273 F. Supp. 2d 643 (W.D. Penn 2003); Lapid-Laurel v. Zoning Bd. Of Adjustments, 284 F.3d 442 (3rd Cir. 2002); Brandt v. Village of Chebanse, 82 F.3d 172 (7th Cir. 1996).
[35] U.S. v. City of Philadelphia, 838 F. Supp. 223 (E.D. Penn. 1993).
[36] U.S. v. Commonwealth of Puerto Rico, 764 F. Supp. 220 (D.P.R. 1991).
[37] California Community Care Facilities Act, Health & Safety Code § 1520.5.
[38] Citizens for a Balanced City v. Plymouth Congregational Church, 672 N.W. 2d 13 (Minn. 2003); United States v. Marshall, 787 F. Supp. 872 (W.D. Wis. 1992).
[39] 42 U.S.C. § 12101 et seq.
[40] Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999).
[41] 28 C.F.R. § 35.130(b)(7)

LETTER OF CALIFORNIA ATTORNEY GENERAL BILL LOCKYER SUPPORTING REASONABLE ACCOMMODATION PROCEDURES

COPY

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
ATTORNEY GENERAL

May 15, 2001

The Honorable William Ted Hartz
Mayor of Adelanto
P.O. Box 10
Adelanto, CA 92301

RE: Adoption of A Reasonable Accommodation Procedure

Dear Mayor Hartz:

Both the federal Fair Housing Act ("FHA") and the California Fair Employment and Housing Act ("FEHA") impose an affirmative duty on local governments to make reasonable accommodations (*i.e.*, modifications or exceptions) in their zoning laws and other land use regulations and practices when such accommodations "may be necessary to afford" disabled persons "an equal opportunity to use and enjoy a dwelling." (42 U.S.C. § 3604(f)(3)(B); see also Gov. Code, §§ 12927(c)(1), 12955(l).) [1] Although this mandate has been in existence for some years now, it is our understanding that only two or three local jurisdictions in California provide a process specifically designed for people with disabilities and other eligible persons to utilize in making such requests. In my capacity as Attorney General of the State of California, I share responsibility for the enforcement of the FEHA's reasonable accommodations requirement with the Department of Fair Employment and Housing. Accordingly, I am writing to encourage your jurisdiction to adopt a procedure for handling such requests and to make its availability known within your community. [2]

[1] Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12131-65) and section 504 of the Rehabilitation Act (29 U.S.C. § 794) have also been found to apply to zoning ordinances and to require local jurisdictions to make reasonable accommodations in their requirements in certain circumstances. (See *Bay Area Addiction Research v. City of Antioch* (9th Cir. 1999) 179 F.3d 725; see also 28 C.F.R. § 35.130(b)(7) (1997).)

[2] A similar appeal has been issued by the agencies responsible for enforcement of the FHA. (See Joint Statement of the Department of Justice and the Department of Housing and Urban Development, *Group Homes, Local Land Use and the Fair Housing Act* (Aug. 18, 1999), p. 4, at < http://www.bazelon.org/cpfha/cpfha.html> [as of February 27, 2001].)

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It is becoming increasingly important that a process be made available for handling such requests that operates promptly and efficiently. A report issued in 1999 by the California Independent Living Council makes it abundantly clear that the need for accessible and affordable housing for Californians with disabilities will increase significantly over the course of the present decade.[3] The report's major findings include the following:

- Between 1999 and 2010, the number of Californians with some form of physical or psychological disability is expected to increase by at least 19 percent, from approximately 6.6 million to 7.8 million, and may rise as high as 11.2 million. The number with severe disabilities is expected to increase at approximately the same rate, from 3.1 million to 3.7 million, and may reach 6.3 million.[4] Further, most of this increase will likely be concentrated in California's nine largest counties.[5]

- If the percentages of this population who live in community settings—that is, in private homes or apartments (roughly 66.4 percent) and group homes (approximately 10.8 percent)—is to be maintained, there will have to be a substantial expansion in the stock of suitable housing in the next decade. The projected growth of this population translates into a need to accommodate an additional 800,000 to 3.1 million people with disabilities in affordable and accessible private residences or apartments and an additional 100,000 to 500,000 in group homes.

I recognize that many jurisdictions currently handle requests by people with disabilities for relief from the strict terms of their zoning ordinances pursuant to existing variance or conditional use permit procedures. I also recognize that several courts called upon to address the matter have concluded that requiring people with disabilities to utilize existing, non-

[3] See Tootelian & Gaedeke, *The Impact of Housing Availability, Accessibility, and Affordability On People With Disabilities* (April 1999) at <http://www.calsilc.org/housing.html> [as of February 27, 2001].

[4] The lower projections are based on the assumption that the percentage of California residents with disabilities will remain constant over time, at approximately 19 percent (*i.e.*, one in every five) overall, with about 9.2 percent having severe disabilities. The higher figures, reflecting adjustments for the aging of the state's population and the higher proportion of the elderly who are disabled, assume that these percentages will increase to around 28 percent (*i.e.*, one in every four) overall, with 16 percent having severe disabilities. (*Ibid.*)

[5] These are: Alameda, Contra Costa, Los Angeles, Orange, Riverside, Sacramento, San Bernardino, San Diego, and Santa Clara. (*Ibid.*)

discriminatory procedures such as these is not of itself a violation of the FHA.[6] Several considerations counsel against exclusive reliance on these alternative procedures, however.

Chief among these is the increased risk of wrongfully denying a disabled applicant's request for relief and incurring the consequent liability for monetary damages, penalties, attorneys' fees, and costs which violations of the state and federal fair housing laws often entail.[7] This risk exists because the criteria for determining whether to grant a variance or conditional use permit typically differ from those which govern the determination whether a requested accommodation is reasonable within the meaning of the fair housing laws.[8]

Thus, municipalities relying upon these alternative procedures have found themselves in the position of having refused to approve a project as a result of considerations which, while sufficient to justify the refusal under the criteria applicable to grant of a variance or conditional use permit, were insufficient to justify the denial when judged in light of the fair housing laws' reasonable accommodations mandate. (See, e.g., *Hovson's Inc. v. Township of Brick* (3rd Cir. 1996) 89 F.3d 1096 (township found to have violated the FHA's reasonable accommodation mandate in refusing to grant a conditional use permit to allow construction of a nursing home in a "Rural Residential—Adult Community Zone" despite the fact that the denial was sustained by the state courts under applicable zoning criteria); *Trovato v. City of Manchester, N.H.* (D.N.H. 1997) 992 F.Supp. 493 (city which denied disabled applicants permission to build a paved parking space in front of their home because of their failure to meet state law requirements for a variance found to have violated the FHA's reasonable accommodation mandate).

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[6]See, *U.S. v. Village of Palatine, Ill.* (7th Cir. 1994) 37 F.3d 1230, 1234; *Oxford House, Inc. v. City of Virginia Beach* (E.D.Va. 1993) 825 F.Supp. 1251, 1262; see generally Annot. (1998) 148 A.L.R. Fed. 1, 115-121, and later cases (2000 pocket supp.) p. 4.)

[7] See 42 U.S.C. § 3604(f)(3)(B); Gov. Code, §§ 12987(a), 12989.3(f).

[8] Under the FHA, an accommodation is deemed "reasonable" so long as it does not impose "undue financial and administrative burdens" on the municipality or require a "fundamental alteration in the nature" of its zoning scheme. (See, e.g., *City of Edmonds v. Washington State Bldg. Code Council* (9th Cir. 1994) 18 F.3d 802, 806; *Turning Point, Inc. v. City of Caldwell* (9th Cir. 1996) 74 F.3d 941; *Hovsons, Inc. v. Township of Brick* (3rd Cir. 1996) 89 F.3d 1096, 1104; *Smith & Lee Associates, Inc. v. City of Taylor, Michigan* (6th Cir. 1996) 102 F.3d 781, 795; *Erdman v. City of Fort Atkinson* (7th Cir. 1996) 84 F.3d 960; *Shapiro v. Cadman Towers, Inc.* (2d Cir. 1995) 51 F.3d 328, 334; see also Gov. Code, § 12955.6 [explicitly declaring that the FEHA's housing discrimination provisions shall be construed to afford people with disabilities, among others, no lesser rights or remedies than the FHA].)

Further, and perhaps even more importantly, it may well be that reliance on these alternative procedures, with their different governing criteria, serves at least in some circumstances to encourage community opposition to projects involving desperately needed housing for the disabled. As you are well aware, opposition to such housing is often grounded on stereotypical assumptions about people with disabilities and apparently equally unfounded concerns about the impact of such homes on surrounding property values.[9] Moreover, once triggered, it is difficult to quell. Yet this is the very type of opposition that, for example, the typical conditional use permit procedure, with its general health, safety, and welfare standard, would seem rather predictably to invite, whereas a procedure conducted pursuant to the more focused criteria applicable to the reasonable accommodation determination would not.

For these reasons, I urge your jurisdiction to amend your zoning ordinances to include a procedure for handling requests for reasonable accommodation made pursuant to the fair housing laws. This task is not a burdensome one. Examples of reasonable accommodation ordinances are easily attainable from jurisdictions which have already taken this step[10] and from various nonprofit groups which provide services to people with disabilities, among others.[11] It is, however, an important one. By taking this one, relatively simple step, you can help to ensure the inclusion in our communities of those among us who are disabled.

Sincerely,

BILL LOCKYER
Attorney General

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[9]Numerous studies support the conclusion that such concerns about property values are misplaced. (See Lauber, *A Real LULU: Zoning for Group Homes and Halfway Houses Under The Fair Housing Amendments Act of 1988* (Winter 1996) 29 J. Marshall L. Rev. 369, 384-385 & fn. 50 (reporting that there are more than fifty such studies, all of which found no effect on property values, even for the homes immediately adjacent).) A compendium of these studies, many of which also document the lack of any foundation for other commonly expressed fears about housing for people with disabilities, is available. (See Council of Planning Librarians, *There Goes the Neighborhood . . . A Summary of Studies Addressing the Most Often Expressed Fears about the Effects Of Group Homes on Neighborhoods in which They Are Placed* (Bibliography No. 259) (Apr. 1990).)

[10] Within California, these include the cities of Long Beach and San Jose.

[11] Mental Health Advocacy Services, Inc., of Los Angeles for example, maintains a collection of reasonable accommodations ordinances, copies of which are available upon request.