

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.

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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, policies, 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.

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.

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

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

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

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 necessary 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 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.³⁸

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 of 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-

³See 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].

⁴The 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.*)

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

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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).

⁶See, *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].)

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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 step¹⁰ 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

⁹Numerous 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.