



PLANNING COMMISSION

Thursday, March 29, 2018

1. Roll Call – 5:30 P.M. – Community Room
2. New Business
 - (a) Introduction and scheduling of a public hearing on proposed amendments to Article XIX of the Zoning Ordinance to create a new Section 1912 Fair Housing Accommodation Policy
3. Adjournment



BOARD: Planning Commission

MEETING DATE: March 29, 2018 **DATE PREPARED:** March 22, 2018

AGENDA SUBJECT: Zoning Ordinance Amendments to include a Fair Housing Accommodation Policy

RECOMMENDATION: Discussion and Schedule a Public Hearing

Background

At its February 19 meeting, City Council received a report and proposed ordinance from the City Attorney regarding the adoption of a Fair Housing Accommodation Policy (information and ordinance enclosed). City Council then passed a motion to send the Zoning Ordinance amendment to the Planning Commission to schedule and hold a public hearing, pursuant to MCL 125.3306. As the International Property Maintenance Code is included in Chapter 13 of the Code of Ordinances, Nuisances, a hearing by the Planning Commission is not required.

As requested at the March 15 regular meeting, addition information on fair housing accommodation and why it is included in zoning ordinances is included.

Ordinance Changes

The amendment to Section XIX of the Zoning Ordinance would place the responsibility to hear requests for accommodation under the federal Fair Housing Act by individuals with disabilities with the Zoning Board of Appeals.

Action

Staff recommends that the Commission discuss the ordinance amendment and schedule a public hearing for its April 19 meeting. The City Attorney will be available at the March 29 meeting.



BOARD: City Council

MEETING DATE: February 19, 2018

DATE PREPARED: February 1, 2018

AGENDA SUBJECT: Discussion of an accommodation policy under the Federal Fair Housing Amendments Act (FFHA) in the Americans with Disabilities Act (ADA)

RECOMMENDATION: That City Council discuss with a possible motion to direct the Planning Commission to review and set a public hearing regarding amendments to the City's Zoning Ordinance for federal housing accommodation provisions

Background City staff, along with the City Attorney, have been reviewing the City's Code of Ordinances as applied to the Federal Fair Housing Amendments Act ("FFHA") and the Americans with Disabilities Act ("ADA"). For the reasons stated below, it is the recommendation of the City Attorney, as supported by staff, that the City adopt an accommodation policy as part of the City's Zoning Ordinance as well as the City's International Property Maintenance Code ("IPMC").

The FFHA, under provisions of 42 U.S.C. § 3601, *et seq.*, forbids discrimination against disabled people in the sale or rental of housing. It also requires such: "*Reasonable accommodations and rules, policies, practices, or services,*" as may be "*necessary to afford (disabled) persons equal opportunity to use and enjoy a dwelling.*" According to the City Attorney, this creates an affirmative duty on the City to provide its disabled citizens reasonable accommodation in its municipal zoning practices if necessary to afford such persons equal opportunity in the use and enjoyment of their property. Under the Fair Housing Act, Congress clearly contemplated providing municipalities such as the City of Petoskey the opportunity to adjust their generally applicable rules to allow persons with disabilities equal access to housing.

The City Attorney has advised that courts have given examples of requests for accommodation under the Fair Housing Act. For example, a City that forbade builders to build showers that were flush with the bathroom floor because it wanted to reduce the risk of flooding an apartment below was still found to be hurting to only disabled people. The development could, therefore, seek an accommodation in the form of a waiver of the rule for housing intended for disabled people. Another example is a resident that could request a set-back accommodation in order to install a ramp on a house that would otherwise violate the City's set-back requirements. The City Attorney has recommended that the City seek to avoid treating a request for an accommodation as arbitrary. As such, a formal accommodation policy would address accommodation requests.

When analyzing whether an accommodation is required under the Fair Housing Act, the Supreme Court rules that there are three elements that the City must follow:

1. The accommodation must be reasonable;
2. The City's policy must give handicapped individuals equal opportunity;
3. The accommodation must be necessary.

Southwestern Community College v Davis; 442 US 397 (1979).

Having such a formal policy in place will avoid the confusion of who will make decisions on a particular case and the criteria used in making the decision. Both City Attorney and City staff recommend adopting a formal policy whereby requests for accommodations are referred to the Zoning Board of Appeals ("ZBA"). This is consistent with other cities, such as the City of Holland. While other cities refer requests for accommodations to staff or the Planning Commission, it is the consensus of staff and the City Attorney that the ZBA is best suited for the City of Petoskey's accommodation policy.

Enclosed is a draft of a proposed Amendment to the City's Zoning Ordinance adopting an accommodation policy as part of the Zoning Ordinance. In addition, enclosed is an amendment to Chapter 13, Article II of the City's Code in order to also allow accommodations under the International Property Maintenance Code ("IPMC").

The City Council, due to the provisions of the Michigan Zoning Enabling Act, is authorized to initiate a Zoning Ordinance amendment. However, before such an ordinance is submitted for amendment to the City Council, the City's Planning Commission must hold at least one public hearing. MCL 125.3306. Notice provisions must be given pursuant to the Zoning Enabling Act consistent with any other Zoning Ordinance amendment. The amendments proposed to the IPMC do not require review by the Planning Commission.

Action If City Council is comfortable with the proposed changes to the City's Zoning Ordinance regarding fair housing accommodations, a motion should be made to direct staff to work with the Planning Commission to review the amendments to the zoning ordinance as well as schedule a public hearing.

After a public hearing is held with the Planning Commission, the changes to both the IPMC as well as the Zoning Ordinance will be discussed in the coming weeks by City Council. The amendments will need both a first and second reading before City Council can formally approve.

sb
Enclosures

ORDINANCE NO. _____

AN ORDINANCE TO AMEND APPENDIX A OF THE PETOSKEY CODE OF ORDINANCES, ZONING ORDINANCE ARTICLE XIX

THE PETOSKEY CITY COUNCIL ORDAINS:

1. **Appendix A, Article XIX, Section 1912 of the Petoskey Code of Ordinances is hereby created to read:**

Sec. 1912. Fair Housing Accommodation Policy

1. Purpose.

It is the policy of the City of Petoskey, pursuant to the Federal Fair Housing Act and the Michigan Elliot Larsen Civil Rights Act (hereafter "fair housing laws") to provide individuals with disabilities reasonable accommodation in rules, practices and procedures to ensure equal access to housing and to facilitate the development of housing for individuals with disabilities. This section is intended to provide a procedure for individuals with disabilities and developers of housing for individuals with disabilities to seek relief from the application of zoning regulations, practices and procedures to further the City's compliance with fair housing laws and provide greater opportunities for the development of critically needed housing for individuals with disabilities.

2. Definitions.

For purposes of this section, the following terms shall have the meanings ascribed to them:

Eligible Person: A person who is an individual with a disability, his or her representative, or a developer or provider of housing for individuals with disabilities.

Individual with a Disability: Someone who has a physical or mental impairment that limits one or more major life activities; anyone who is regarded as having such impairment; or anyone with a record of such impairment, but such term does not include current, illegal use of, or addiction to, a controlled substance (as defined in 21 U.S.C. § 802).

Person: An individual, partnership, limited-liability company, corporation or other entity.

Reasonable Accommodation: Providing eligible persons with flexibility in the application of zoning regulations, practices and procedures, or even granting variances from certain requirements, when it is necessary to eliminate barriers to equal housing opportunities.

Request for Reasonable Accommodation: A request by any individual with a disability, his or her representative, a developer or provider of housing for individuals with disabilities, when the application of a zoning regulation, policy, practice or procedure acts as a barrier to fair housing opportunities.

3. Notice of fair housing accommodations policy, assistance available.

- a) Notice of the availability of reasonable accommodation shall be prominently displayed at City Hall, advising the public of the availability of the procedure for eligible individuals. Forms for requesting reasonable accommodation shall be available to the public in the Office of City Planner.
- b) The notice shall indicate that the Office of City Planner will provide an applicant with assistance in filing a request for reasonable accommodation or an appeal from a decision on such request so that the process is accessible.

4. Requests for reasonable accommodation.

- a) The Zoning Board of Appeals shall have the jurisdiction and power to grant a special exception from the non-use requirements of the Zoning Ordinance where necessary to provide reasonable accommodation to allow individuals with disabilities to have reasonable access to housing in the City of Petoskey.
- b) A special exemption is not necessary for state-licensed adult foster care homes to the extent that state law preempts local zoning and may exist legally without the special exception.
- c) An eligible person may request a reasonable accommodation in zoning regulations, practices and procedures.
- d) Requests for reasonable accommodation shall be made in writing, filed in the Office of the City Planner and provide the following information:
 - 1. Name and address of the individual(s) requesting reasonable accommodation;
 - 2. Name and address of the property owner(s) (if different);
 - 3. Address of the property for which accommodation is requested;
 - 4. Evidence that the request is for an individual with a disability under fair housing laws;
 - 5. Description of the requested accommodation and the regulation(s) or procedure for which accommodation is sought;
 - 6. Reason that the requested accommodation may be necessary for the individual(s) with the disability to use and enjoy the dwelling;
 - 7. Evidence that all alternative accommodations and other options have been considered by the applicant;
 - 8. Evidence of whether the property is within 400 feet of another property granted accommodations for use by four (4) or more unrelated persons under this section; and
 - 9. The written consent of the property owner.
- e) Any information identified by an applicant as confidential shall be retained in a manner so as to respect the privacy rights of the applicant and shall not be made available for public inspection except as may be required by the Michigan Freedom of Information Act.

- f) A request for reasonable accommodation in regulations, practices and procedures may be filed at any time that the accommodation may be necessary to ensure equal access to housing. A reasonable accommodation does not affect an individual's obligations to comply with other applicable regulations not at issue in the requested accommodation.
- g) Requests for reasonable accommodation shall be reviewed by the Zoning Board of Appeals using the criteria set forth in Subsection (e).
- h) Notice of the application and hearing shall be given in accordance with Section 2006 of the Petoskey Code of Ordinances.

5. Standards of review. The written decision by the Zoning Board of Appeals shall be consistent with fair housing laws and based on some or all of the following factors:

- a) Whether the housing, which is the subject of the request for reasonable accommodation, will be used by an individual with disabilities protected under fair housing laws;
- b) Whether the requested accommodation is necessary to make housing available to an individual with disabilities under the fair housing laws;
- c) Whether the requested accommodation would impose an undue financial or administrative burden on the City;
- d) Whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning plan;
- e) Whether there is an alternative accommodation which may provide an equivalent level of benefit to the applicant;
- f) Whether the recovery residence is state licensed as a substance use disorder facility;
- g) Whether the recovery residence is a certified member of an established entity that conducts its own inspections and has its own standards for the benefit of occupants, e.g., CARF International, National Alliance for Recovery Residences (NARR) or any equivalent entity having similar requirements for membership;
- h) Whether the property should be managed by a person living on site;
- i) Whether and how the requested accommodation will benefit the people in the program; and
- j) Whether the property is within 400 feet of another property granted accommodations for use by four (4) or more unrelated persons under this section.

6. Written decisions, notice to applicant.

- a) The Zoning Board of Appeals shall issue a decision on a request for reasonable accommodation within 45 days from the date a complete application has been filed with the Office of City Planner and may either grant, grant with modifications or conditions, or deny a request for reasonable accommodation in accordance with the criteria in Subsection 5.
- b) If necessary to reach a determination on the request for reasonable accommodation, the Zoning Board of Appeals may request further information from the applicant consistent with fair housing laws, specifying in detail the information that is required. In the event that a request for additional information is made, the forty-five-day period to issue a decision is stayed until the applicant completely responds to the request.
- c) If the Zoning Board of Appeals fails to render a decision on the request for reasonable accommodation within the 45 days from the date a complete application has been filed with the Office of City Planner, the request shall be deemed granted.
- d) The written decision of the Zoning Board of Appeals shall explain in detail the basis of the decision, including its findings on the criteria set forth in Subsection 5. The decision shall give notice of the applicant's right to appeal and to request reasonable accommodation in the appeals process as set forth below. A copy of the decision shall be provided to the applicant or sent to the applicant by first class mail.
- e) The written decision of the Zoning Board of Appeals shall be final unless an applicant appeals it to the circuit court.

7. Effect of zoning pending a determination. While a request for reasonable accommodation is pending, all zoning regulations, practices and procedures otherwise applicable to the property that is the subject of the request shall remain in full force and effect.

8. Appeals. An applicant may appeal a decision by the Zoning Board of Appeals as provided by statute.

2. Conflicting Standards.

If any of the standards set forth in this amendment conflict with any other standards of previous or further ordinances or amendments, the stricter standards shall apply.

3. Repeal; Savings Clause.

All ordinances, resolutions, or orders, or parts thereof, in conflict with the provisions of this ordinance are, to the extent of such conflict, repealed.

4. Severability.

The various parts, sections and clauses of this Ordinance are hereby declared to be severable. If any part, sentence, paragraph, section or clause is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of the Ordinance shall not be affected thereby.

5. Effect.

This ordinance shall take effect fifteen (15) days following its enactment and shall be published once within seven (7) days after its enactment as provided by Charter.

Adopted, enacted and ordained by the City of Petoskey City Council this _____ day of _____ 2018.

John Murphy
Its Mayor

Alan Terry
Its Clerk

FACT SHEET: FAIR HOUSING, ZONING & LAND USE



Fair Housing Center
of West Michigan

20 Hall Street SE
Grand Rapids, MI 49507
616-451-2980 phone
616-451-2657 fax
866-389-FAIR
fhcwm.org

What is fair housing?

Fair housing is the right to choose housing free from unlawful discrimination. The federal Fair Housing Act (FHA) and Michigan laws protect people from discrimination in housing based on the following *protected classes*: race, color, religion, sex, national origin, familial status, disability, marital status, and age. Discrimination is illegal in housing transactions such as rentals, sales, lending, and insurance. Fair Housing laws also apply to zoning and planning practices.

How does the Fair Housing Act apply to zoning and land use?

The FHA prohibits municipalities and other local government entities from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against individuals protected by fair housing law, whether intentionally or by discriminatory effect. Discriminatory effect can be established by showing that an action, such as a zoning decision, while facially neutral, has either an adverse impact on a particular minority group or harm to the community generally by the perpetuation of segregation.

The FHA prohibits discrimination in a *dwelling* which means “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof” (42 USC §3602(b)). Therefore, decisions related to the development or use of such land must comply with the FHA’s regulations and cannot be based upon the protected class (i.e. race, religion, disability, etc.) of the residents or prospective residents. The FHA also requires municipalities and local governments to make *reasonable accommodations* to zoning and land use rules, policies, practices and procedures as necessary to provide an individual with a disability equal housing access.

What is a reasonable accommodation?

Reasonable accommodations, as defined by the FHA, are changes in rules, policies, or practices that are necessary to afford persons or groups of persons with disabilities equal opportunity to use and enjoy housing. The FHA requires municipalities to make reasonable accommodations in land use and zoning policies and procedures. Reasonable accommodations provide 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.

For example: a zoning board grants an accommodation to designate a group of individuals with disabilities who intend to live together in a group or recovery home as a “family” so as to allow more unrelated adults in a single family home than normally permitted under zoning restrictions.

Approving New Housing Developments

Placement of new or rehabilitated housing for lower-income people is one of the most controversial issues communities face. If fair housing objectives are to be achieved, the goal must be to avoid high concentrations of low-income housing and to approve housing developments that will promote integration. A municipality considering a proposal from an independent housing developer or provider to provide integrated housing within the municipality’s jurisdiction must **not** deny the housing without careful consideration of the need for new integrated housing opportunities in the vicinity of the developer’s proposed project and the degree of residential segregation in that community in light of the population demographics in the overall metropolitan area.

Combatting NIMBYism

Whether the persons to be served are families with children, persons with disabilities, homeless persons, or lower-income minorities, many communities feel strongly that housing for these persons should be provided but “not in my back yard” (NIMBY). This attitude seriously affects the availability of housing for people in these groups and is one of the most difficult challenges jurisdictions encounter in promoting fair housing objectives. Discriminatory stereotypes, fears and comments about residents of prospective residents of a certain dwelling or area should **not** influence municipal zoning or land use decisions.

Definition of “Family” and “Single-family” Residential Zones

Single-family residential zones allow family residential use by right, i.e., without any conditional or special use permit, and are not in and of themselves discriminatory. Local governments have their own definitions of “family”, and such definitions may generally restrict the ability of groups of unrelated persons to live together as long as the restrictions are imposed on all such groups regardless of race, religion, etc. However, they may be discriminatory when they exclude group homes for persons with disabilities, or if group homes are allowed only by conditional or special use permit. Further, policies that have a ceiling of 4, or fewer, unrelated adults in a household may be considered discriminatory if they have an adverse impact on minorities, families with children or people with disabilities. Further, in Michigan, a definition of family cannot be restrictive on the basis of marital status, and cannot define family as persons “related by blood, marriage or adoption”.

Land Use Regulations

Zoning policies such as large minimum lot requirements, minimum multifamily zoning and age-restricted zoning may restrict and limit the ability for lower income families and families of color from moving into certain neighborhoods and suburbs. Such strict zoning restrictions limit the affordability and number of rental multifamily housing opportunities and should be carefully considered in light of fair housing laws.

Suggested Fair Housing Strategies

Adopt a Reasonable Accommodation Policy

This will provide a written procedure, especially for developers of housing for persons with disabilities, to follow when requesting reasonable accommodations in zoning and land use decisions in addition to guidelines for the Planning Commission to follow when considering requests.

Adopt an Inclusionary Zoning Policy

Inclusionary zoning promotes mixed-income development and results in many benefits for communities, particularly the creation of affordable places to live in desirable neighborhoods. Neighborhoods which are ethnically and economically integrated provide greater opportunity for creating a diverse work force and more diverse and vibrant communities.

Affirmatively Furthering Fair Housing

- Consider specific changes that should be made in zoning or building occupancy ordinances or regulations to foster inclusion of lower-income housing, including housing accessible to persons with disabilities and families with children in developments intended for households with higher incomes.
- Ensure that the ordinances and regulations do **not** contain special rules or restrictions for housing that only apply to individuals with physical or mental disabilities (i.e. requiring individuals with mental disabilities to show they had the capacity to live independently, or prohibiting a group of persons with mental illness from residing in an area where other groups of unrelated adults may reside)
- Consider specific changes that should be made in policies and procedures, other than those relating to zoning and building occupancy, to promote greater variation in the location of lower-income housing.

Regional Planning

For jurisdictions located in metropolitan areas, serious consideration should be given to ways they can participate in cooperative, inter-jurisdictional planning for construction of assisted housing.

**MODEL ORDINANCE FOR PROVIDING
REASONABLE ACCOMMODATION UNDER
THE FAIR HOUSING AMENDMENTS ACT**

The following documents have been prepared for use by cities and counties to provide a process for making reasonable accommodation to land use and zoning decisions and procedures regulating the siting, funding, development and use of housing for people with disabilities.

Developed by Mental Health Advocacy Services, Inc.
December 1997
FHIP Grant #FH700G96034

For More Information, Contact:
Kim Savage, Staff Attorney
Mental Health Advocacy Services, Inc.
1336 Wilshire Blvd., Suite 102
Los Angeles, CA 90017
(213)484-1628

INTRODUCTION

The Fair Housing Amendments Act of 1988 prohibits cities and counties from discriminating against individuals with disabilities through land use and zoning decisions and procedures. Not only must local governments not discriminate, but the Fair Housing Act requires that cities and counties provide reasonable accommodation to rules, policies, practices and procedures where such accommodation may be necessary to afford individuals with disabilities equal opportunity to housing.

The model ordinance presented here provides cities and counties with a comprehensive reasonable accommodation procedure, including forms and guidelines, for implementing the federal mandate. Requesting reasonable accommodation is appropriate where changing an existing rule, policy or procedure would provide an individual with a disability equal opportunity to housing of choice or a developer the flexibility necessary for developing housing for individuals with disabilities.

Adopting a reasonable accommodation ordinance will not cure a zoning ordinance which 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. In fact, adopting a reasonable accommodation ordinance is just one of several necessary components for complying with fair housing laws. Other parts include reviewing zoning ordinances for the purpose of identifying and eliminating facially discriminatory policies and procedural requirements and developing trainings to address discriminatory attitudes about individuals with disabilities.

We urge cities and counties to take a comprehensive approach to eliminating discrimination and furthering housing opportunities for individuals with disabilities. By adopting a reasonable accommodation ordinance, reviewing and revising as necessary local zoning ordinances and addressing discriminatory attitudes through trainings, local governments will go a long way in meeting the mandate of fair housing laws.

REGULATIONS GOVERNING REQUESTS FOR REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT

NOTE: These regulations should be read in conjunction with the attached “Guidelines for Regulations Governing Requests For Reasonable Accommodation Under the Fair Housing Amendments Act of 1988” for a more comprehensive understanding of the regulations and to ensure that the decision making process for requests for reasonable accommodation is in compliance with federal law.

Sec. 1. Purpose

It is the policy of the jurisdiction, pursuant to the Fair Housing Amendments Act of 1988, to provide people with disabilities reasonable accommodation in rules, policies, practices and procedures that may be necessary to ensure equal access to housing. The purpose of these provisions is to provide a process for making requests for reasonable accommodation to land use and zoning decisions and procedures regulating the siting, funding, development and use of housing for people with disabilities. In these regulations, “use of housing” includes, but is not limited to, housing related services and the use and enjoyment of the property.

Sec. 2. Definitions

Act. The Fair Housing Amendments Act of 1988.

Applicant. The individual making the request for reasonable accommodation pursuant to these Regulations.

Code. The municipal zoning code or ordinance which sets forth the jurisdiction’s land use and zoning regulations.

Department(s). The department(s) within the jurisdiction responsible for administering requests for reasonable accommodation pursuant to these Regulations.

Designee or Appeals Designee. The person(s), commission or other group of persons designated to make determinations on fair housing accommodation requests pursuant to these Regulations.

Disability. Any person who has a physical or mental impairment that substantially limits one or more major life activities; anyone who is regarded as having such impairment or; anyone who has a record of such impairment. People who are currently using illegal substances are not covered under the Act, unless they have a separate disability.

Sec. 3. Notice to the Public of Availability of Accommodation Process

At all counters where application is made for a permit, license or other authorization for the siting, funding, development or use of housing, notice in the form set forth in Exhibit A shall be prominently displayed advising applicants that they may request a reasonable accommodation of existing rules, policies, practices and procedures. Forms for requesting an accommodation shall be available in all departments where decisions are made regulating the siting, funding, development and use of housing.

Sec. 4. Requesting Reasonable Accommodation

- A. In order to make specific housing available to an individual with a disability, any person may request a reasonable accommodation in the rules, policies, practices and procedures regulating the siting, funding, development or use of housing by completing the “Fair Housing Accommodation Request” form (Exhibit B) and filing it with the Department.
- B. If an individual needs assistance in making the request for reasonable accommodation, the department shall provide the assistance necessary to ensure that the process is accessible to the applicant.
- C. A request for reasonable accommodation in rules, policies, practices and/or procedures may be filed at any time that the accommodation may be necessary to ensure equal access to housing; at the outset or during the approval process.

Sec. 5. Review of Requests for Reasonable Accommodation

- A. When a request for reasonable accommodation is filed with the Department, it is referred to the designee for review and consideration. The designee shall issue a written decision within thirty (30) days of the date of the application and may grant the reasonable accommodation request or deny the request. See Notice of Decision on Fair Housing Accommodation Request form (Exhibit C) for designee’s use.
- B. If necessary to reach a decision on the request for reasonable accommodation, the designee may request further information from the applicant consistent with the Act, specifying in detail what information is required.
- C. Not more than thirty (30) days after receiving a written request for reasonable accommodation, the designee shall issue a written decision on the request; provided that, in the event that the designee requests further information pursuant to the above paragraph, the running of this period shall be tolled (stopped) until the applicant responds to the request.

Sec. 6. Factors for Considering Requests for Reasonable Accommodation

The designee shall consider the following criteria when deciding whether a requested accommodation is reasonable:

- Is the housing, which is the subject of the request for reasonable accommodation, to be used by an individual protected under the Act?
- Is the request for accommodation necessary to make specific housing available to an individual protected under the Act?
- Whether the requested accommodation would impose an undue financial or administrative burden on the jurisdiction?
- Whether the requested accommodation would require a fundamental alteration in the nature of a program?

Sec. 7. Written Decision on the Request for Reasonable Accommodation

- A. The designee’s written decision on the request for reasonable accommodation shall explain in detail the basis

of the decision, including the designee's findings on the criteria set forth in Sec. 6, above. All written decisions shall give notice of the right to appeal and to request reasonable accommodation in the appeals process as set forth below. The designee's Notice of Decision shall be sent to the applicant by certified mail.

- B. If the designee fails to render a written decision on the request for reasonable accommodation within the time period allotted by Sec. 5, above, the request shall be deemed granted.

Sec. 8. Appeals

- A. Within thirty (30) days of the date of the designee's written decision, the applicant may appeal an adverse decision by filing the Appeal of Denial of Fair Housing Accommodation Request form (Exhibit D).
- B. An applicant may request reasonable accommodation in the procedure by which an appeal will be conducted. If an applicant needs assistance in filing an appeal, the Department shall provide the assistance that is necessary to ensure that the appeal process is accessible to the applicant.
- C. All appeals shall contain a statement of the grounds for the appeal.
- D. Nothing in these Regulations shall preclude an aggrieved individual from seeking any other state or federal remedy available.

NOTICE OF FAIR HOUSING ACCOMMODATION PROCEDURES FOR PEOPLE WITH DISABILITIES

THIS IS NOT A COMPREHENSIVE EXPLANATION OF YOUR RIGHTS UNDER THE FEDERAL FAIR HOUSING AMENDMENTS ACT.

You may request a reasonable accommodation to rules, policies, practices and procedures for the siting, development and use of housing, including housing related services or facilities, if you meet all of the following:

- you have a disability* or the housing is for people with disabilities;
- you may need a reasonable accommodation to existing rules and regulations to have equal opportunity to housing AND;
- your request for accommodation would not be an undue burden on the city or county.

If you believe that you satisfy the above criteria and are entitled to a reasonable accommodation under the Fair Housing Amendments Act of 1988, you may obtain a Fair Housing Accommodation Request form from the front desk. If you need assistance in applying for a reasonable accommodation, the Department will assist you.

*The Fair Housing Act defines “disability” as any of the following: a physical or mental impairment that substantially limits one or more major life activities; a record of having such an impairment or; being regarded as having such an impairment. The Fair Housing Act does not protect individuals currently using illegal substances, unless they have a separate disability.

EXHIBIT A

FAIR HOUSING ACCOMMODATION REQUEST

EXPLANATION OF RIGHTS UNDER THE FAIR HOUSING AMENDMENTS ACT

Before completing the request for a reasonable accommodation, below, please read the following information about who is protected by the Fair Housing Amendments Act and what accommodation may be available under the law. This is not a comprehensive explanation of your rights under the Fair Housing Amendments Act.

Do the protections of the Fair Housing Amendments Act apply to me?

You are protected by the Fair Housing Amendments Act if you have a disability or the housing is for people with disabilities. "Disability" means any one of the following: a physical or mental impairment that substantially limits one or more major life activities or a record of having such an impairment or being regarded by others as having such an impairment. The Fair Housing Amendments Act does not protect an individual currently using illegal substances, unless that person has a separate disability.

What kind of accommodation may I request under the Fair Housing Amendments Act?

If you have a disability or the housing is for people with disabilities, the Fair Housing Amendments Act requires that the city or county provide you with reasonable accommodation in rules, policies, practices and procedures that may be necessary for people with disabilities to have equal opportunity to use and enjoy a dwelling. More specifically, the city or county must provide you with reasonable accommodation in decisions and procedures regulating the siting, funding, development or use of housing, including housing related services or facilities.

How do I request reasonable accommodation from the City or County?

To make a request for reasonable accommodation, answer the questions on the attached one page request form, sign and date the form and return it to the Department. If you need help in answering the questions on the request form, you may ask for assistance from the Department. Your accommodation request will be reviewed by the designee who will issue a written decision on your request within thirty (30) days of the date of the request. If the designee does not issue a written decision within 30 days, your request will automatically be granted. If the designee needs additional information consistent with the Fair Housing Amendments Act to consider your request, the 30 day time period will stop running until you respond to the request.

What if my request for reasonable accommodation is denied?

If your request for accommodation is denied, you may appeal the adverse decision by filing a Notice of Appeal with the appeals designee within thirty (30) days of the decision. You may request reasonable accommodation in the procedure by which an appeal may be conducted. You may also contact your local fair housing or disability rights organization or legal services office for further assistance. Nothing in this accommodation request procedure limits your right to any other available state or federal remedy.

EXHIBIT B

APPLICATION FOR REQUEST FOR REASONABLE ACCOMMODATION

NOTE: If you need help in completing this request form, the Department will assist you. Please contact the person at the counter where you received this request form for assistance.

1. Name of Applicant

Telephone Number

2. Address

3. Address of Housing At Which Accommodation Is Requested

4. Describe the accommodation you are requesting and the specific regulation(s) and/or procedure(s) from which accommodation is sought.

5. Give the reason that the reasonable accommodation may be necessary for you or, the individuals with disabilities seeking the specific housing, to use and enjoy the housing. You do not need to tell us the name or extent of your disability or that of the individuals seeking the housing.

6. If we have questions about your request for reasonable accommodation and you would like us to contact someone assisting you with this request, instead of you, please give us that person's name, address and telephone number.

7. Signature of Applicant _____ Date _____

**PLEASE ATTACH ANY DOCUMENTS THAT YOU THINK SUPPORT YOUR REQUEST FOR
REASONABLE ACCOMMODATION AND WOULD ASSIST US IN CONSIDERING YOUR
REQUEST.**

NOTICE OF DECISION ON FAIR HOUSING ACCOMMODATION REQUEST

1. Date of Application: _____

2. Date of Decision: _____

3. The request for a Fair Housing Accommodation is:

_____ Granted _____ Denied (See Notice below re right to appeal decision.)

4. The reasons for this decision are as follows:

5. The facts relied on in making this decision:

Signature of Designee _____ Date _____

NOTICE: If your request for accommodation was denied, you may appeal the Designee's decision to the Appeals Designee within thirty (30) days of the date of this decision. To file an appeal, complete and file an Appeal of Denial of Fair Housing Accommodation Request form with the Department. You may request reasonable accommodation in the procedure by which an appeal may be conducted.

EXHIBIT C

APPEAL OF DENIAL OF FAIR HOUSING ACCOMMODATION REQUEST

NOTICE: PLEASE ATTACH TO THIS APPEAL FORM (1) A COPY OF YOUR FAIR HOUSING ACCOMMODATION REQUEST ALONG WITH ANY ATTACHMENTS SUBMITTED WITH THE REQUEST AND (2) THE NOTICE OF THE DECISION DENYING YOUR ACCOMODATION REQUEST.

1. Date of Adverse Decision: _____

2. Date Appeal Filed: _____

3. State why you think the denial of your request for accommodation was wrongly decided:

4. Provide any new information, facts or documents that support your request for accommodation:

5. Signature _____ Date _____

EXHIBIT D

GUIDELINES FOR REGULATIONS GOVERNING REQUESTS FOR REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT

Sec. 1. Purpose

The Fair Housing Amendments Act of 1988 (hereafter “the Act”) prohibits local governments from making housing opportunities unavailable to people with disabilities through discriminatory land use and zoning decisions. The Act creates an affirmative duty to “make reasonable accommodations in rules, policies, practices, or services when accommodation may be necessary to afford such person[s] equal opportunity to use and enjoy a dwelling.”¹

When the jurisdiction considers an application or proposal for the siting, funding, development or use of housing in which people with disabilities are likely to reside or when the jurisdiction applies existing codes, regulations, or other standards to such housing, the jurisdiction must comply with all applicable fair housing laws and administer local policies, procedures and practices in a manner that affirmatively furthers those laws.²

In addition to federal law protections, in 1994 California enacted its own fair housing legislation.³ This state’s law explicitly prohibits discriminatory “public or private land use practices, decisions and authorizations” including, but not limited to, “zoning laws, denials of use permits, and other [land use] actions . . . that make housing opportunities unavailable” to people with disabilities.⁴

Sec. 2. Definitions

Disability. The Act protects any of the following: an individual with a physical or mental impairment that substantially limits one or more major life activities; anyone who is regarded as having any such impairment or; anyone who has a record of having such an impairment.⁵

The Act protects individuals in recovery from drug or alcohol abuse.⁶ However, individuals currently using illegal substances are not protected under the law, unless they have a separate disability.

The protections afforded people with disabilities under the Act extend to those who are associated with them, including providers and developers of housing for people with disabilities.⁷

Note that for the purposes of these Regulations, the term “handicap” and “disability” and any derivative of these terms, shall have the same meaning as the term “handicap” in the Fair Housing Amendments Act.

Sec. 3. Notice to the Public of Availability of Accommodation Process

Under the Act, a jurisdiction has an affirmative duty to make reasonable accommodations in rules, policies, practices and procedures where accommodation may be necessary to ensure that people with disabilities have equal access to housing.⁸ By providing the public with notice of the availability of its procedure for requesting accommodation, the jurisdiction takes an affirmative step in accordance with the federal mandate to make accommodation available to people with disabilities.⁹ To reach all individuals who may need to request accommodation, notice should be posted in all departments where decisions are made regulating the siting, funding,

development and use of housing. Accommodation request forms should be available in those same departments. Both a notice for posting and an accommodation request form, for a jurisdiction's use, are included with the regulations governing requests for accommodation. (Exhibits A and B.)

Sec 4. Requesting Reasonable Accommodation

Note: The imposition of a fee for requesting reasonable accommodation or, appealing an adverse decision on a request, is contrary to the Act.^{1 0}

- A. A request for accommodation may be made by any individual for the purpose of making specific housing available to individuals with disabilities. For example, a reasonable accommodation request may be made by an individual with a disability, a family member or friend of a person with a disability, or a developer of housing for people with disabilities.
- B. The process for making a reasonable accommodation request must be accessible to an individual with a disability. Therefore, the department must provide assistance necessary to an individual who needs help in requesting accommodation and offer flexibility in the procedure set forth in the Regulations. For example, the department might record on the application form information provided by an individual who because of a disability is unable to complete the form alone.
- C. The Regulations provide flexibility in the time to request an accommodation because unforeseen circumstances often arise in the approval process for the siting, funding, development or use of housing. For example, a developer seeking initial approval of building plans for housing specifically designed for people with disabilities might need an accommodation on a side yard requirement. Or, a project already approved may need to be modified to accommodate an additional change due to state licensing requirements.

Sec. 5. Review of Requests for Reasonable Accommodation

- A. This section outlines the time frame for review, consideration and issuance of a written decision by the designee. The term "designee" is used because each jurisdiction will have to determine who in the jurisdiction will make determinations on requests for reasonable accommodation. In selecting the designee(s), a jurisdiction should consider the following: (1) individuals knowledgeable in both land use and zoning and fair housing issues; (2) a decision making system that will further timely review and issuance of written decisions on requests for accommodation and; (3) the relationship, if any, between the designee and an appeals designee. Possible choices for a designee include planning department personnel, the city attorney or some combination of the two to act as a team in the decision-making process. Small jurisdictions with limited personnel may have requests for accommodation go directly to the planning or zoning administrator for review and determination.
- B. The designee may request additional information necessary for making a determination on the request for reasonable accommodation that does not conflict with the Act and privacy rights of the individual with a disability to use the specific housing. For example, questions as to why the requested accommodation is necessary or what, if any, land use impact would result from granting the accommodation are within the legal scope of inquiry under the Act. Inquiries seeking information as to the nature, extent or severity of a disability are contrary to fair housing laws and privacy rights.^{1 1}

C. If the designee requests additional information consistent with the Act from the applicant, the 30-day time period for making a determination on the request stops running until the additional information is provided to the designee. This procedure is intended to expedite the information gathering process and facilitate the issuance of a timely decision by the designee. It is in the best interest of the applicant seeking accommodation to provide the requested information as soon as possible to obtain a speedy decision.

Sec. 6 Factors for Considering Requests for Reasonable Accommodation

Factor 1: Is the housing, which is the subject of the request for reasonable accommodation, to be used by an individual protected under the Act?

An individual is protected under the Act if he or she meets the definition of disability set forth in Sec. 2, above.^{1 2} Additionally, if the specific housing is for people with disabilities, this prerequisite is met.

Factor 2: Is the request for accommodation necessary to make specific housing available to an individual protected under the Act?

Under the Act, cities and counties have an affirmative duty to provide individuals with disabilities reasonable accommodations to “rules, policies, practices, or services, when such accommodation may be necessary to afford such persons equal opportunity to use and enjoy a dwelling. . . .”^{1 3} Whether an accommodation is necessary requires a “fact-specific inquiry regarding each such request.”^{1 4} Failure to make reasonable accommodation is a violation of the Act.^{1 5}

Factor 3: Whether the requested accommodation would impose an undue financial or administrative burden on the jurisdiction?

Once an individual establishes that an accommodation is necessary for equal access to housing, then the jurisdiction must provide the requested accommodation unless they present evidence that granting the accommodation would impose an undue financial or administrative burden on the jurisdiction.^{1 6} Here again, the analysis is a fact-specific inquiry. If the jurisdiction establishes an undue burden, then the accommodation is not reasonable and should not be granted by local government. In the land use and zoning context, many requests for accommodation will be a request to modify or waive a regulation or procedure. It costs a jurisdiction nothing to waive a rule, meaning that “. . . the accommodation request amounts to nothing more than a request for non-enforcement of a rule.” In those instances, a jurisdiction would not be likely to demonstrate undue burden.^{1 7}

Factor 4: Whether the requested accommodation would require a fundamental alteration in the nature of a program?

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.^{1 8} “Fundamental alteration” has been defined as, “(1) a substantial change in the primary purpose or benefit of a program or activity; or (2) a substantial impairment of necessary or practical components required to achieve a program or activity’s primary purpose or benefit.”^{1 9} 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.²⁰

Sec. 7. Written Decision on the Request for Reasonable Accommodation

- A. The designee's written decision is to be based on a consideration of the four factors set forth in the preceding section. The designee shall not rely on discriminatory stereotypes.²¹
- B. This provision encourages prompt decision-making on requests for reasonable accommodation as delays in the development process may increase costs or even jeopardize the future of a project.

Sec. 8 Appeals

- A. An individual denied a reasonable accommodation request has 30 days from the date of the decision to file an appeal. An appeals form is provided for the jurisdiction's use (Exhibit D).
- B. As with the filing of the original appeal, the Department must make all necessary efforts to ensure that the appeals process is accessible to individuals with disabilities. An individual with a disability may request flexibility in the appeals process including modifying or waiving certain procedures which the individual cannot satisfy because of a disability. For example, an individual may request a face to face meeting with the appeals designee in order that he or she may better explain the need for the accommodation. Or, an individual may want to submit new information explaining the need for the requested accommodation at the appeals stage because the applicant was unable to obtain the information at the time of the original request.
- C. The statement of the grounds for appeal is necessary for the appeals designee to review the appeal and reconsider the individual's request for accommodation.
- D. The jurisdiction's administrative procedure for requesting accommodation and the appeals process in no way limits an individual's right to any other available remedy including, but not limited to, filing a complaint with the Department of Housing and Urban Development, the state Fair Housing and Employment Department or commencing an action in state or federal court.

¹ 42 U.S.C. §§ 3601 et seq. The analysis in these guidelines is based on the Fair Housing Amendments Act of 1988. Two other significant federal anti-discrimination laws offer protection against discrimination to people with disabilities, including land use and zoning activities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of disability in any program or activity that is conducted by the federal government or that receives federal financial assistance. The Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., prohibits discrimination against individuals with disabilities in a number of areas, including all public services – irrespective of federal financial assistance. Both § 504 and the ADA require reasonable accommodation and the accommodation analysis under these federal laws is very similar to that of the Fair Housing Act.

² The federal regulations that implement the Fair Housing Amendments Act state that its fundamental purpose is to prohibit practices that “restrict the choices” of people with disabilities to live where they wish or that “discourage or obstruct choices in a community, neighborhood or development. 24 C.F.R. § 100.70(a)(1994). The legislative history is precise in identifying discriminatory land use practices:

The Act is intended to prohibit the application of restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.

54 Fed. Reg. 3246 citing House of Representatives Report No. 100-711, 100th Congress, 2d Session at 24.

³ Government Code §§ 12900 et seq.

⁴ In a statement of legislative intent that accompanied the amendments, the following findings were made:

- 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.

Stats. 1993 ch 1277, § 18 (emphasis added).

⁵ 42 U.S.C. § 3602(h); 24 CFR § 100.201.

⁶ 24 C.F.R. § 100.201. See *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).

⁷ See *Judy B. v. Borough of Tioga*, 889 F.Supp. 792 (M.D. Pa 1995) (a person who is not himself handicapped, but who is prevented from providing housing for handicapped persons by a municipality's discriminatory acts, has standing to sue under the Act); *Epicenter of Steubenville, Inc. v. City of Steubenville*, 924 F.Supp. 845 (S.D. Ohio 1996) (operators of adult care facilities have standing to challenge a city's moratorium on new facilities where the operator couldn't get a permit and thus was prevented from opening a new facility); *Simovits v. Chanticleer Condominium Ass'n*, 933 F.Supp. 1394 (N.D. Ill. 1996) (a fair housing agency may sue under the Act if it shows deflection of the agency's time and money from counseling to legal efforts directed against discrimination).

⁸ 42 U.S.C. § 3604(f)(3)(B). *Turning Point, Inc. v. City of Caldwell*, 74 F. 3d 941 (9th Cir. 1996) (cities have an affirmative duty to provide reasonable accommodation). Additionally, the opportunity to obtain a variance is not a reasonable accommodation because the process is an excess burden not imposed on others. See *Horizon House v. Township of Upper Southampton*, 804 F.Supp. 683 (E.D. Pa. 1992) *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *Oxford House v. Township of Cherry Hill*, 799 F.Supp. 450 (D.N.J. 1992).

⁹ The Department of Housing and Urban Development (HUD) has promulgated regulations under both § 504 of the Rehabilitation Act of 1973 and the Fair Housing Act that require a notice of rights under federal law. Under § 504, which is looked to for interpretation of the Fair Housing Act, HUD requires "initial and continuing steps to notify program participants, beneficiaries, applicants" . . . of its policy of nondiscrimination under the law. 24 CFR § 8.54. Under Fair Housing regulations, HUD requires that a fair housing poster be displayed at any place of business where a dwelling is offered for sale or rent, real estate-related transactions are conducted and brokerage services are provided to the public. 24 CFR § 110.10. Additionally, under federal assisted housing programs, HUD requires notice of the availability of reasonable accommodation at the time of the prospective tenant's application interview for housing and in any written letter of rejection. Handbook 4350.3, par. 12-23j; par. 12-30c.

¹⁰ Requiring a fee for requesting an accommodation is analogous to the burden imposed on an individual with a disability who is required to apply for a variance. As indicated in note 8, above, the variance process has been rejected, in part because it is a costly burden that is not similarly imposed on other persons.

Reasonable accommodation means changing some rule that is generally applicable to everyone so as to make its burden less onerous on the handicapped individual. . . Here defendant's suggestion that making the process of applying for a C.O. more onerous for plaintiffs than it is for the majority of applicants, somehow constitutes a "reasonable accommodation," stands the concept on its head. It is analogous to arguing that a rule requiring only handicapped people to pay a special fee before entering a building constitutes a reasonable accommodation.

Oxford House v. Township of Cherry Hill, 799 F.Supp. at 462, note 25; see also *Alliance For Mentally Ill v. City of Naperville*,

923 F.Supp. 1057 (N.D. Ill. 1996).

¹¹ See *Cason v. Rochester Housing Authority*, 748 F.Supp.1002 (W.D.N.Y.1990)(inquiry as to whether an applicant has the “ability to live independently” is contrary to the Fair Housing Act). The scope of inquiry made to prospective tenants of HUD housing is as follows:

It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such person.

24 CFR § 100.202. See also the discussion of factors for considering requests for reasonable accommodation , Sec. 6, *infra*.

¹² The Fair Housing Amendments Act of 1988 specifically adds persons with disabilities

¹⁰ the list of those protected by federal fair housing laws.

¹³ See note 8.

¹⁴ *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 at 6.

¹⁵ *Oxford House-C v. City of St. Louis*, 843 F.Supp. 1556 (E.D. Mo. 1994) (forcing a group home to use the variance process was not a reasonable accommodation where compliance would have a discriminatory effect and the process, which required a public hearing and notice, stigmatized the prospective residents, increased their stress and evidence showed that any attempt to obtain a variance would be futile); *United States v. City of Philadelphia*, 838 F.Supp. 223 (E.D.Pa. 1993), *aff’d w/o opinion*, 30 F.3d 1488 (3d Cir. 1994) (the City of Philadelphia violated the Act by refusing to allow substitution of a side yard for the zoning requirement that a building have a rear yard for a home for chronically homeless people with mental disabilities); *Oxford House v. Babylon*, 819 F.Supp.1179 (E.D.N.Y. 1993) (group home established as reasonable their request that the town accommodate them by modifying its interpretation under the ordinance of the term “family”); *Parish of Jefferson v. Allied Health Care, Inc.*, C.A. No.91-1199, (E.D.La., June 10, 1992), 1992 WL 142574 (E.D. La.1992) (allowing six individuals with mental retardation to reside in a dwelling was a reasonable accommodation to a zone restricting single family dwellings to a maximum of four unrelated persons).

¹⁶ The “undue financial or administrative burden” standard for determining whether an accommodation is reasonable under the Fair Housing Act is borrowed from case law interpreting Section 504 of the Rehabilitation Act. *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed. 2d 980 (1979); H.R. Rep.No.711, 100th Cong.,2d Sess. 25 (1988).

¹⁷ *Proviso Ass’n v. Village of Westchester*,914 F.Supp. 1555 (N.D. Ill. 1996).

¹⁸ The “fundamental alteration” test, like “undue financial or administrative burden,” derives from Section 504 of the Rehabilitation Act and is also explained in *Southeastern Community College v. Davis*, 442 U.S. 397. See note 16.

¹⁹ Robert Burgdorf, “Equal Access to Public Accommodations,” in West, Jane, ed., *The Americans with Disabilities Act, From Policy to Practice*, Milbank Memorial Fund (1991), p.190. Elaborating on what constitutes a fundamental alteration, Professor Burgdorf explains:

Lower court have further outlined the concept: reasonable accommodations are not mandated if they would endanger a program’s viability; massive changes are not required; nor are modifications that would ‘jeopardize the effectiveness’ of the program or would involve a ‘major restructuring’ of an enterprise; and modifications that would so alter an enterprise as to create, in effect, a new program are not required.

²⁰ *U.S. v. City of Taylor*, 872 F.Supp. 423 (E.D. Mich. 1995); *U.S. v. City of Taylor*, 798 F.Supp. 442 (E.D. Mich. 1992) and *Smith & Lee Assoc. v. City of Taylor*, 13 F.3d 920 (6th Cir. 1993)(rehearing and suggestion for rehearing En Banc denied March 11, 1994) (allowing a 12-person adult foster care home to locate in a single family residential zone is fundamentally consistent with the single family uses surrounding the proposed home and would not constitute an undue burden or a fundamental alteration of the city’s master plan); *Martin v. Constance*, 843 F.Supp. 1321 (E.D. Mo. 1994)(it would be neither an undue burden nor undermine the basic purpose of maintaining the residential character of a neighborhood to not enforce a restrictive covenant against a state operated home for individuals with developmental disabilities); *Oxford House v. Babylon*, 819 F.Supp. 1179 (E.D.N.Y. 1993) (modifying city’s interpretation under the ordinance of the term “family” was reasonable where the group home had no adverse effect on the residential character of the neighborhood and neither the operation of the group home nor the residents caused any financial or administrative burdens on the town); *United States v. Marshall*, 787 F.Supp. 872 (W.D. Wis. 1992) (granting a variance under state law to allow a group home for people with mental disabilities to locate within 2500 feet of a group home for the elderly would not “undermine the basic purpose which the requirement seeks to achieve” where the

homes would not be separated by a wide portion of a river with no bridge connection).

²¹United States v. Borough of Audubon, 797 F.Supp. 353 (D.N.J. 1991) aff'd 968 F.2d 14 (3d Cir. 1992) (the Court sanctioned the Borough and permanently enjoined it from interfering with the living arrangements of the residents of the home and held that when acts are undertaken with improper discriminatory motive, the Act may be violated even though those acts may have otherwise been justified under state law); A.F.A.P.S. v. Regulations & Permits Admin., 740 F.Supp. 95 (D.P.R. 1990) (the denial of an application for a special use permit to operate a residence for persons with AIDS violated the Act where the intent and effect of the denial discriminated against AIDS patients and the asserted reason for the denial was pretextual).

FAIR HOUSING REVIEW ZONING AND LAND USE ISSUES

Fair Housing and Zoning Overview

According to the Fair Housing Act, a dwelling includes “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof”. Therefore, decisions related to the development or use of such land may not be based upon the race, sex, religion, national origin, color, disability, or familial status of the residents or potential residents who may live in the dwelling.

Zoning ordinances may not contain provisions that treat uses such as affordable housing, supportive housing, or group homes for people with disabilities differently than other similar uses, and municipalities may not enforce ordinances more strictly against housing occupied by members of the protected classes. Similarly, a municipality may not make zoning or land use decisions based on neighbors’ fears that members of protected classes would occupy a dwelling.

Another way that discrimination in zoning and land use may occur is when a facially neutral ordinance has a disparate impact, or causes disproportional harm, to a protected group. Land use policies such as density or design requirements that make residential development prohibitively expensive, prohibitions on multifamily housing, or a ceiling of 4 or fewer unrelated adults in a household may be considered discriminatory if it can be proven that these policies have a disproportionate impact on minorities, families with children, or people with disabilities. Although zoning and land use is an area where municipalities have primary power, courts have consistently held that the Fair Housing Act prohibits local governments from exercising their zoning and land use powers in a discriminatory way.

A Municipality MAY NOT:

- Reject a proposed affordable housing development in response to neighbors’ fears that racial minorities will occupy such housing.
- Require neighbor notification or a public hearing only for the development of affordable housing or group homes, but not other types of residential development.
- Refuse to allow an exception to a setback requirement as a reasonable accommodation for a disabled resident who must build a wheelchair ramp in order to access his or her home.
- Impose spacing requirements on group homes for persons with disabilities.
- Require additional studies or procedural steps or unnecessarily delay decision making when considering a development that may be occupied by members of the protected classes.

In addition to prohibiting discrimination against persons with disabilities, the Fair Housing Act also makes it unlawful to refuse to make “reasonable accommodations”, or changes to rules, policies, practices, or services, when such accommodations are necessary to allow persons with disabilities an equal opportunity to use or enjoy a dwelling. Under the Fair Housing Act, an accommodation is considered “reasonable” if it does not impose an undue financial or administrative burden and if it does not fundamentally alter the zoning ordinance. Unless a municipality can prove that an accommodation request is unreasonable according to the above criteria, the municipality must grant the accommodation.

Exemptions

Housing for older persons (80% of the units are occupied by at least one person over the age of 55 or 100% of occupants are age 62 or older) is exempt from the portion of the Fair Housing Act that prohibits discrimination against families with children. A municipality would be prohibited under the Fair Housing Act from making a zoning or land use decision based on the presence of families with children residing in a dwelling or proposed development. However, any area zoned specifically for housing for older persons would be exempt from this prohibition.

Local Zoning Cases

Horizon House Developmental Services, Inc. v. Township of Upper - Southampton, PA: A 1,000 foot spacing requirement for group homes was found to violate the Fair Housing Act. Furthermore, requiring group homes to obtain a variance to locate within 1,000 feet of another group home was found to be an insufficient reasonable accommodation, and the township was ordered to cease enforcement of the spacing requirement.

ReMed Recovery Care Centers v. Township of Willistown, PA: The township was ordered to make a reasonable accommodation from its limitation on the number of unrelated persons that can constitute a family under its zoning ordinance, allowing a group home of 8 unrelated individuals rather than the 5 permitted under the zoning ordinance.

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The Housing Equality Center is a nonprofit organization leading the effort to eliminate housing discrimination in Pennsylvania through education, advocacy and enforcement of fair housing laws. We provide victims of discrimination with legal help, perform testing to determine the existence of discrimination, educate the public, consult with and train housing providers, and work with housing and related service providers to ensure compliance with anti-discrimination laws. We assist housing discrimination victims and conduct testing investigations in Bucks, Chester, Delaware, Lehigh, Montgomery, Northampton and Philadelphia Counties.



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