

## **APPENDIX A**

FAIR HOUSING LAW: ZONING AND LAND USE ISSUES	A-3
ADDITIONAL BACKGROUND MATERIAL	A-22
Checklist for Reviewing City and County Zoning Ordinances For Compliance with Fair Housing Laws	A-26

**FAIR HOUSING LAW: ZONING AND LAND USE ISSUES**

# **FAIR HOUSING LAW: ZONING AND LAND USE ISSUES**

Report Prepared by  
Ann T. Fathy, AICP, Attorney at Law

## I. INTRODUCTION

Within our cities and counties live a variety of people, some of whom have disabilities. Nationwide, it is estimated that almost 20% of the population (about 49 million people) fit the federal definition of disability. Therefore, it is likely that within the community where you live at least 15% of the people have a disability.

Unless you are personally familiar with the problems faced by persons with disabilities, you probably have not given much thought to the difficulties they may encounter obtaining the housing they desire. In 1988, in response to testimony on the kinds and extent of problems persons with disabilities face in obtaining housing, Congress amended the Fair Housing Act to include specific protections for persons with disabilities. (The 1988 amendment also added protections for families with children.)

As expressed in a House Report of the 100<sup>th</sup> Congress, one of the intentions of the Fair Housing Amendments Act of 1988 was:

that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, 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.

[HR Report 100-711, page 24]

It is significant that the Fair Housing Amendments Act had strong support from both sides of the House and Senate. It passed the House with a 376-23 vote, and passed the Senate with a 94-3 vote.

Unfortunately, local governments have not given the Act the same kind of support. In California, for instance, there has been great reluctance on the part of cities and counties to change their zoning and land use practices to comply with requirements of the Fair Housing Act.

It may be that much of this reluctance is caused by local elected officials and other government decision-makers not fully understanding the Act and what is required. A test or audit is a tool with which to get credible and objective information regarding compliance with the law. Conducting a test or audit which documents regulatory barriers to housing choice for persons with disabilities is an important tool for educating local officials. Hopefully, it will lead to the removal of barriers, so that persons with disabilities will be able **to live in the residence of their choice in the community**.

## II. FEDERAL FAIR HOUSING LAW

The federal Fair Housing Act (FHA) is found in the United States Code commencing at 42 USC 3601. Cited below are excerpts from the Act which are particularly relevant to the issue of discriminatory zoning and land use practices. (The sections cited refer to sections of the Act.)

### DEFINITION OF HANDICAP

The Fair Housing Act refers to persons with disabilities as “handicapped.” The Act states:

“Handicap” means, with respect to a person -

- (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21).

[42 USC 3602(h)]

Persons considered handicapped under the Act include persons recovering from drug and alcohol addiction, but not currently using a controlled substance. (Alcohol is not a controlled substance.)

A number of successful fair housing lawsuits have been brought by Oxford House, which provides group housing for persons recovering from drug and alcohol addiction. The Oxford House concept requires abstinence from both drugs and alcohol as a condition of residence.

### UNLAWFUL ACTS

Section 3604, Discrimination in the Sale or Rental of Housing and Other Prohibited Practices, lists a number of unlawful acts. Subsections related to unlawful zoning and land use practices include the following:

(f)(1) To discriminate in the sale or rental, **or to otherwise make unavailable or deny**, a dwelling to any buyer or renter because of a handicap of -(A) that buyer or renter,

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

(C) any person associated with that buyer or renter.

[Emphasis added.]

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

(A) that person; or

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

(C) any person associated with that person.

[Emphasis added.]

(3) For purposes of this subsection, discrimination includes -

**(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling**

[Emphasis added.]

[42 USC 3604]

## ENFORCEMENT

The Fair Housing Act provides for the enforcement of its provisions by several means: (1) administratively through a complaint filed with the U. S. Department of Housing and Urban Development (HUD), (2) through the courts through a lawsuit filed by the U. S. Attorney General, and (3) through the courts through a lawsuit filed by a private party ("private attorney general"). HUD refers complaints of land use and zoning discrimination to the U. S. Attorney General for enforcement.

## REMEDIES

For private lawsuits, the remedies include (1) a court order to comply with the FHA, (2) attorney's fees, and (3) compensatory and punitive damages. Actions by the Attorney General can result in (1) the same kind of injunctive and monetary relief as in private suits, and (2) fines of up to \$50,000 for the first violation and up to \$100,000 for subsequent violations.

### III. STATE FAIR HOUSING LAWS

Each state should have fair housing laws which are in substantial compliance with the federal Fair Housing Act. When California amended its fair housing law to bring it into compliance with the FHA, it also put into law important concepts that were part of the intent of the federal law. Your state may also have some laws which similarly enrich the federal law. Look at your own situation to see how your state and local laws interact with the federal law. [If you have any questions, you can call Ann Fathy at (619) 238-0504 or Wanda Remmers at (510) 548-8776; we will try to help you sort it out.]

Below are key provisions of California's fair housing laws against housing discrimination of persons with disabilities:

#### LAND USE, ZONING AND RESTRICTIVE COVENANTS

In 1993, when the California Legislature enacted AB 2244, it added specific language addressing discriminatory land use practices, zoning, and restrictive covenants. At that time, the Legislature declared its intent as follows:

It is the Legislature's intent to make the following findings and declarations regarding unlawful housing practices prohibited by this act:

- (a) That public and private land use practices, decisions, and authorizations have restricted, in residentially zoned areas, the establishment and operation of group housing...
- (b) That persons with disabilities...are significantly more likely than other persons to live with unrelated persons in group housing.
- (c) That this act covers unlawful discriminatory restrictions against group housing for these persons.

The language added by the Legislature is Government Code Section 12955(l), which reads:

[It shall be unlawful]

(l) To discriminate through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable.

## DISCRIMINATORY EFFECT

In enacting AB 2244, the California Legislature also added Government Code Section 12955.8, excerpts of which read:

12955.8. For purposes of this article, in connection with unlawful practices:

(a) Proof of an intentional violation of this article includes, but is not limited to, an act or failure to act that is otherwise covered by this part, that demonstrates an intent to discriminate in any manner in violation of this part. A person intends to discriminate if race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice. An intent to discriminate may be established by direct or circumstantial evidence.

(b) Proof of a violation causing a discriminatory effect is shown if an act or failure to act that is otherwise covered by this part, and that has the effect, regardless of intent, of unlawfully discriminating on the basis of race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry. [...] In cases that do not involve a business establishment, the person whose action or inaction has an unintended discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of this part if the person can establish that the action or inaction is necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect and effectively carries out the purpose it is alleged to serve.

(1) Any determination of a violation pursuant to this subdivision shall consider whether or not there are feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect.

## IV. LEGAL ISSUES

As fair housing cases involving the rights of persons with disabilities have been litigated through the courts, a number of legal issues have been addressed. They include the following:

### A Discriminatory Intent

To prove discriminatory intent under the FHA, the plaintiff need only show that the plaintiff's disability was one factor considered by the defendant in making a land use or zoning decision. The plaintiff's handicap need not be the sole basis for the defendant's discriminatory actions. Further, a plaintiff need not demonstrate that the defendant harbors personal animosity, ill will, or a malicious desire to discriminate. Intentional discrimination includes actions motivated by stereotypes, prejudice, unfounded fears, misperceptions, paternalistic attitudes and a desire to respond to certain neighborhood and community concerns. Both circumstantial and direct evidence may be admitted to demonstrate discriminatory intent.

### B. Discriminatory Effect or Impact

A plaintiff may establish discrimination under the FHA by proving that the defendant's housing practices have a disparate impact on persons with disabilities. Evidence that the housing rights of a person with a disability will be negatively affected constitutes a showing of discriminatory effect, regardless of impact on non-disabled persons. A plaintiff need not prove discriminatory intent to state a claim; however, such evidence may bolster the case for discriminatory impact.

### C. Reasonable Accommodation

The FHA at Section 3604(f)(3)(B) requires provision of reasonable accommodations in order to afford equal opportunity in housing to persons with disabilities. The legislative history of the Act shows that Congress intended to define "reasonable accommodation" by reference to Section 504 of the Rehabilitation Act of 1973. "Rules, policies, practices, and services" of local governments are subject to the reasonable accommodation requirement. Courts have interpreted this to include land use and zoning actions.

To establish a violation of the reasonable accommodation section of the FHA, a plaintiff must show that the accommodation "may be necessary" to allow a person with a disability to equally use and enjoy housing opportunities. Where a zoning ordinance or land use practice or policy is involved, a plaintiff can request that a waiver or modification of the rule be made as a reasonable accommodation. Accommodations are not required (i.e., not considered reasonable) where they pose an undue financial or administrative burden on the defendant or constitute a fundamental alteration in the nature of the program.

## D. Direct Threat Exception

42 USC 3604(f)(9) of the FHA provides that a dwelling does not need to be made available “to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”

## E. Illegal Acts

### 1. Conditional and Special Use Permits

Congress intended the FHA to prohibit the application of conditional and special use permits which “have the effect of limiting the ability of [individuals with handicaps] to live in the residence of their choice in the community.” [HR Report 100-711, page 24] Requiring conditional and special use permits to operate congregate living facilities, or denial of such permits, may violate the FHA under a theory of discriminatory intent, discriminatory effect, or failure to make reasonable accommodation.

Courts differ as to whether it is necessary to apply for and be denied a use permit before going to court. If you are considering legal action, you should seek the advice of an attorney licensed to practice in your jurisdiction.

### 2. “Family” Ordinances and Residential (Single-Family) Zoning Laws

Many land use practices designate districts as “single-family residential” or “commercial” and restrict such districts to compatible uses. In limiting the use to single-family residences, the land use laws must define what constitutes a “family.” A definition of “family” that singles out persons with disabilities or restricts their housing opportunities may violate the FHA. Further, failure to modify the definition of family or make an exception may constitute a failure to make reasonable accommodations. The FHA exempts from its coverage reasonable restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 42 USC 3607(b)(1). In addition, the FHA includes a prohibition against discrimination on the basis of familial status. The law defines “familial status” as one or more individuals, under the age of 18 living with a parent, a person having legal custody of such individual(s), or the designee of such parent or legal custodian. This provision therefore provides an additional ground to challenge discriminatory land use practices, when such practices effect group or other supported housing for disabled children.

### 3. Occupancy Standards

The FHA exempts from its coverage reasonable restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 42 USC 3607(b)(1). The legislative history clearly indicates that maximum occupancy limits are permissible only if applied equally to all applicants and do not oper-

ate to discriminate on the basis of handicap.

#### 4. Health and Safety Regulations

The legislative history of the FHA clearly indicates Congressional intent to prohibit discriminatory health and safety laws:

These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. 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 with handicaps to live in communities.

[HR Report 100-711, page 24.]

Land use practices and other regulatory authority involving housing, which are justified on health and safety grounds, must be based on an individualized inquiry, must not be overbroad, and cannot impose requirements greater than those imposed on similarly situated non-disabled persons.

#### 5. 42 USC 3617 (Interference, Coercion or Intimidation) and First Amendment Issues

This section of the FHA makes it illegal to coerce, intimidate, threaten or interfere with the exercise or enjoyment of housing rights protected by the Act. It additionally makes it illegal to engage in similar activities against any one who has encouraged or aided a person with disabilities (and other protected classes) in enjoying housing rights protected by the Act. The actions prohibited by this section go beyond expressions protected under the First Amendment of the U. S. Constitution.

#### 6. Neighbor Notice and Comment Requirements

To obtain a special or conditional use permit, building permit or certain types of licensing may require notification of neighbors or a public meeting. Whether a group home must submit to neighbor notice and comment procedures must be determined on a case-by-case basis. Persons with disabilities may not be singled out, set apart, or otherwise stigmatized in their choice of housing and the disability of proposed residents may not be the basis for the denial of a group home site.

#### 7. Restrictive Covenants

Restrictive covenants are provisions in deeds, or other documents transferring title, that limit the use of property and prohibit certain uses. Violations of

the FHA may occur when neighbors and others seek to enforce terms of restrictive covenants against the operation of housing for persons with disabilities. This may arise where those opposed to the housing argue that the group or supported housing that may be provided is not “residential” but a “business” which is a nonconforming use.

8. Spacing: Concentration and Dispersal Requirements

Many states and local jurisdictions have laws or policies that seek to disperse group homes and other types of facilities to address possible “overconcentration” of this type of housing in certain areas. Another purported rationale behind these laws and policies is a goal of integration. In California, the Community Care Facility Act, Health & Safety Code Section 1520.5, declares that it is state policy to prevent overconcentration of residential care facilities and requires at least 300 feet between facilities. This code section has not been challenged in the courts.

## V. UNLAWFUL ZONING AND LAND USE PRACTICES

In the early history of zoning in the United States, the concept was to create separate zones for residential, commercial, and manufacturing uses. The manufacturing uses of that era were not something that you would want next door to your house. The legal underpinning of zoning was the use of a city's police power to protect the health, safety and general welfare of its citizens.

Over the years, this health, safety and general welfare basis of zoning was expanded to include other land use issues, such as aesthetics. Recently, zoning has crossed the line from regulating land uses to restricting where certain classes of people can live. Many people who know it is unlawful to discriminate on the basis of race, ethnicity or religion, find nothing wrong in using zoning to prevent persons with disabilities from living in their neighborhood.

Analysis of some of the zoning devices that have been used shows that criteria such as (1) number of persons permitted to occupy a dwelling, (2) permitted accessory uses, and (3) zoning requirements are applied differently based on classes of people. Because of the special needs and preferences of many persons with disabilities, these class-based regulations effectively limit where and how they can live.

When reading the material below, keep in mind the intent of the Fair Housing Amendments Act of 1988, namely:

**to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of [persons with disabilities] to live in the residence of their choice in the community.**

Ask yourself:

**Do these regulations limit the residential choice of persons with disabilities?**

### SINGLE-FAMILY RESIDENTIAL ZONE

Single-family (and multifamily) residential zones, in themselves, are not discriminatory. They may be discriminatory when they exclude the possibility of group homes for persons with disabilities. They may also be discriminatory if group homes for persons with disabilities are allowed only by conditional or special use permit.

### DEFINITION OF "FAMILY"

Single-family residential zones allow family residential use by right, i.e., without any conditional or special use permit. Different jurisdictions have different definitions of "family." Below are some definitions of "family" which would have a discriminatory effect if group

homes for persons with disabilities were not otherwise allowed in the zone. The definitions come from cities in California, but may be similar to those in your area.

- Family: An individual, or two or more persons related by blood, marriage, or adoption, or a group of not more than five persons, who are not related by blood, marriage, or adoption, excluding servants, living together as a single household unit in a dwelling unit. [City of Modesto] (This definition, with minor variations, is found in many California zoning codes.)
- “Family” means one or more persons occupying a premises and living as a single housekeeping unit as distinguished from a group occupying a hotel, club, fraternity, sorority house, roominghouse, or boardinghouse. A family shall be deemed to include necessary servants. [City of San Bruno] (This definition, with minor variations, is found in many California zoning codes.)
- “Family” means individuals that may occupy a dwelling unit and consisting of persons related by blood, marriage or adoption plus not more than two additional unrelated persons; or unrelated persons not to exceed a total of three. [City of Menlo Park]
- “Family” means an individual or group of persons living together who constitute a bona fide single housekeeping unit in a dwelling unit. “Family” shall not be construed to include a fraternity, sorority, club, or other group of persons occupying a hotel, lodginghouse, or institution of any kind. [City of Cupertino]
- Family: A single and separate living unit, consisting of either:
  - (a) One person, or two or more persons related by blood, marriage or adoption or by legal guardianship pursuant to court order; plus necessary domestic servants and not more than three roomers or boarders; or
  - (b) A group of not more than five persons unrelated by blood, marriage or adoption or such legal guardianship.

A group occupying group housing, or a hotel, motel or any other building or portion thereof other than a dwelling unit, shall not be deemed to be a family. [City and County of San Francisco]

- “Family” shall mean:
  - (1) One person living alone;
  - (2) Two or more persons living together who have made social, economic and psychological commitments to each other and who constitute a bona fide single housekeeping unit.[City of Fremont]

As you can see from these definitions, zoning has come a long way from just dealing with land use impacts. The issue here is not the number of people permitted to occupy a dwelling (in California the state housing code regulates occupancy limits). The issue is the relationship among the people. Nor are the issues the number of off-street parking spaces

(regulated elsewhere under parking requirements) or noise concerns (regulated elsewhere by noise regulations or nuisance laws).

In 1980 the California Supreme Court ruled that the relationship of people living as a single housekeeping unit is protected under the privacy right of the California Constitution. [City of Santa Barbara v. Adamson, 164 Cal.Rptr. 539, 610 P.2d 436 (Cal. 1980)] In spite of this ruling many California jurisdictions continue to define “family” in terms of relationships.

## LICENSED COMMUNITY CARE FACILITIES

California’s Community Care Facilities Act requires residential care facilities serving six or fewer persons to be treated the same as single family residences. [Health & Safety Code Sections 1566 et seq.] A residential care facility is any group care facility, or similar facility that provides 24-hour nonmedical care of persons in need of supervision or assistance essential for sustaining activities of daily living or for protection of the individual on less than 24-hour basis. [Health & Safety Code Section 1502(a)(1).]

The Community Care Facilities Act was enacted prior to the recent changes in fair housing law. Jurisdictions throughout the State of California are familiar with the requirement to treat a licensed group home serving no more than six persons the same as a single family residential use. Most jurisdictions comply with this requirement, even though their zoning regulations may not reflect it.

As the majority of California jurisdictions are not knowledgeable about federal and state fair housing law regarding group homes, they continue to require a conditional use permit (CUP) for licensed group homes serving more than six persons.

## GROUP HOMES NOT REQUIRING LICENSING

The State of California requires licensing when a group home meets the definition of a residential care facility (see above). If the group home is just a congregate living arrangement of persons with disabilities, many jurisdictions treat it the same as a licensed residential care facility because the residents are disabled. If more than six persons will live in the home, those jurisdictions will require a conditional use permit.

## NONPROFIT ORGANIZATIONS

Some group homes are run by nonprofit organizations, either specifically for persons with disabilities or for others—battered women and children, persons who are homeless—some of whom qualify as persons with disabilities. If the group home does not require State licensing, the jurisdiction may require a conditional use permit based on the fact that it is operated by a nonprofit organization. The zoning code may include a CUP requirement for “charitable institutions” or for projects receiving some government funding. (Do you see a land use issue here?)

## SUPPORTIVE SERVICES

If a group home does not require State licensing, the jurisdiction may require a conditional use permit based on the fact that some supportive services will be made available to the intended residents. A person with disabilities may need some supportive service to be able to live in a group home. If that same person received the supportive service while living with his or her family, it would not trigger a CUP requirement. (Note that many of the definitions of “family” include a statement to the effect that “family includes all necessary servants.”)

## CONDITIONAL USE PERMIT

How does a conditional use permit requirement have a discriminatory effect on persons with disabilities?

The CUP process is generally used for the type of projects whose impacts need to be evaluated on a case-by-case basis related to a specific site. For instance, a CUP may be required for churches in residential zones. The reason for this requirement would be the need to assess the particular impacts the proposed uses of the church might have on the residential neighborhood, particularly the probable traffic and on-street parking impacts caused by the church uses.

The CUP process is designed to notify immediate neighbors and the general community of the proposed project, so that they may express their concerns before any action is taken on the proposal. Because the CUP is a discretionary permit, under the California Environmental Quality Act (CEQA) it is subject to environmental review, although some projects are categorically exempt from CEQA.

The CUP process also requires a noticed public hearing. Typically, this is a hearing before the planning commission, with the possibility of an appeal to the city council (or board of supervisors).

When the CUP process is applied to a group home for persons with disabilities, experience has shown that the notice and public hearing requirements bring out a vocal and determined opposition who do not want “those people” living in their neighborhood. Faced with strong neighborhood opposition to the group home, decision-makers most often bow to this opposition and deny the project, or condition it on so many conditions that it becomes infeasible.

The CUP requirement acts as a deterrent to potential providers of group homes for persons with disabilities because of the costs involved and the uncertain outcome of the permit process. An applicant may spend significant money processing the permit and complying with additional requirements that may be imposed or suggested by staff. If there is an appeal involved, more money will be spent. Frequently, the final decision is to deny the project.

And if the project is approved, the neighbors will all know, because of the public notice procedure, the nature of the disability of the persons who will reside there. (As yet, nobody

has challenged this violation of the privacy right of the California Constitution.)

Essentially, the CUP requirement has a discriminatory effect on persons with disabilities because it makes it difficult, and often impossible, to locate a group home in a residential neighborhood.

### SPECIAL LOCATIONAL CRITERIA FOR GROUP HOMES

Besides the general requirements of a CUP, jurisdictions often impose additional requirements for residential care facilities. Typically, these requirements relate to spacing and over-concentration. For example, the City of San Diego requires a distance of one-quarter mile between any two residential care facilities (this is far greater than the State requirement of 300 feet). This kind of distance requirement significantly limits residential choice. Similarly, over-concentration requirements, that effectively prohibit any more group homes in a particular area, significantly limit residential choice.

### SPECIAL DEVELOPMENT STANDARDS FOR GROUP HOMES

Some jurisdictions include in their zoning code special development standards for group homes. For example, the City of San Diego specifies (1) criteria for sleeping areas, (2) “one full bathroom (toilet, sink, shower and/or bathtub) per seven beds,” and (3) “five square feet of living area per bed, exclusive of the sleeping, dining and kitchen areas.” (These requirements are in addition to locational requirements, special parking requirements, and standard zoning and general plan consistency requirements.)

Internal sleeping area, bathroom, and living area criteria are not land use issues. Their inclusion as requirements for residential care facilities suggests that these requirements are more stringent than for a home for persons without disabilities. Furthermore, State law already governs residential occupancy and building code standards.

### SPECIAL OPERATING CONDITIONS FOR GROUP HOMES

The purpose of a conditional use permit is to enable conditions to be placed on the permit. For instance, going back to the example of a CUP for a church in a residential neighborhood, the permit might include conditions intended to mitigate any traffic and parking impacts caused by the church’s operations.

When it comes to CUP conditions for group homes, some jurisdictions have gone so far as to restrict when and where the residents can use their outdoor property. (Imagine being told you can only use your backyard (because we don’t want to see you in your front yard) and then only during certain hours!) Such discriminatory conditions usually are in response to concerns expressed by neighbors during the public hearing on the proposed group home.

### BOARDING OR ROOMING HOUSE

If a group home for persons with disabilities does not meet the definition of a licensed

residential care facility, some jurisdictions will classify the use as boarding or rooming house. This use is generally not allowed in a single family residential zone. It may be allowed either by right or by CUP in a multifamily residential or commercial zone. This classification, therefore, limits the ability of persons with disabilities to live in the residence of their choice in the community. If the choice is to live with others in a group home in a single-family neighborhood, that may not be possible.

## FUNDING

Even where there are no zoning impediments to the establishment of a group home for persons with disabilities, there may be an impediment caused by a request for local government funding. Most funding programs have some sort of neighborhood or community notice which identifies the proposed project site and the intended residents. Such notice gives an opportunity for opposition to develop, often growing to the point where the decision-makers decide to withdraw funds for that particular site.

This funding issue is not truly a zoning and land use practices issue—it applies only to projects seeking public funding—but it is one that needs to be addressed. Local governments receive funds from state and federal sources to fund certain housing and services programs, some of whose beneficiaries would be persons with disabilities. Nonprofit organizations which want to access these funds to provide the housing and services have difficulty getting site-specific funding because of neighborhood opposition. The result can be, for example, AIDS funds not being used when first made available and/or not being used at the most appropriate location.

## VI. SOLUTIONS

How a jurisdiction chooses to address compliance with fair housing law may result in a few changes to existing regulations and practices, or it may result in a comprehensive effort to affirmatively expand housing opportunities for persons with disabilities. Section VIII, Recommendations, lists a series of actions which, if carried out, should ensure compliance with fair housing law. It is hoped, however, that jurisdictions will take a more comprehensive and inclusive look at ways to expand housing opportunities for persons with disabilities.

### CITY OF SALINAS

The City of Salinas, California, provides an example of a simple approach to bring a zoning code into compliance with fair housing law. The City did the following:

1. Added a definition of disability:

Disability: A physical or mental impairment that substantially limits one or more of the major life activities of individuals, there is a record of such an impairment, or the individual is regarded as having such an impairment. It is the intent of this definition to substantially comply with the term “disability” as defined by the Americans With Disabilities Act of 1990, as may be amended from time to time.

2. Added a definition of residential care facility:

Residential care facility: Residential facilities in a single family dwelling in which group care, supervision and/or assistance are provided for persons under the age of 18 years or for persons who have a disability. Residential facilities do not include family day care, foster care or any medical services, including nursing services, beyond that required by the residents of the facility for sustaining the activities of daily living. Examples of residential care facilities include, but are not limited to, facilities for the following: developmentally or mentally disabled; physically disabled; substance abuse recovery; wards of the juvenile court; dependent and neglected children.

3. Added a definition of residential service facility:

Residential service facility: Residential facilities in a single family dwelling in which group care, supervision and/or assistance are provided for persons which do not meet the definition of a “residential care facility” or “interim housing.” Residential service facilities do not include family day care, foster care or any medical or nursing assistance. Examples of residential service facilities include, but are not limited to, facilities for the following: correctional halfway houses for adults; elderly group housing.

4. Added a definition of interim housing:

Interim housing: Shared living quarters, generally without separate kitchen and bathroom facilities for each room or unit, intended to meet short-term shelter and/or other immediate needs. Interim housing includes, but is not limited to the following: homeless shelters; emergency shelters; fraternities; sororities; dormitories; boardinghouses; labor camps; half-way houses. Interim housing does not include residential care facilities, family day care homes, family day care centers, convalescent hospitals, hotels, motels or single room occupancy housing.

5. Designated residential care facilities as a permitted use in all residential zones.

#### CITY OF PORTLAND

The City of Portland, Oregon, provides an example of a comprehensive approach to affirmatively expand housing opportunities for persons with disabilities. City Commissioner Gretchen Kafoury appointed a citizen “Task Force on Strategies for Fair Housing.” The Task Force developed a comprehensive program of actions which was subsequently adopted by the City Council and is now being implemented.

## **VII. RECOMMENDATIONS**

1. Review local regulations to identify any which may have the effect of limiting the opportunity of persons with disabilities to live in the residence of their choice in the community.
2. Amend or repeal regulations identified in 1, above, so that they no longer have a discriminatory effect on persons with disabilities.
3. Review local practices to identify any which may have the effect of limiting the opportunity of persons with disabilities to live in the residence of their choice in the community.
4. Modify or eliminate practices identified in 3, above, so that they no longer have a discriminatory effect on persons with disabilities.
5. Adopt a policy and procedures to provide for reasonable accommodations to enable persons with disabilities to live in the residence of their choice in the community.
6. Educate staff about fair housing law and the rights of persons with disabilities to live in the residence of their choice in the community. Explain the reasonable accommodations policy and procedures.

**ADDITIONAL BACKGROUND MATERIAL**

## ADDITIONAL BACKGROUND INFORMATION

This project is designed to learn whether a jurisdiction's regulations and practices may limit the housing choices of persons with disabilities, particularly the choice to live in a group housing situation with unrelated adults. A common term for this form of housing is group home.

Historically, local zoning regulations have treated group homes differently from single family residential use. The same single-family house may be allowed "by right" in any residential area of the city so long as it is occupied by a household of related persons, but if it is occupied by unrelated persons it may be restricted to where and how it can be located.

The following information is presented to help you better understand zoning terminology and practices which you will need to know for this project.

**"Accessory uses"** are uses that are not the primary use of the site but may be allowed with the primary use. For instance, a single-family residential zone may allow the "family" to take in one or two lodgers or boarders.

From a zoning point of view, the distinctive feature of a **board and care home** is that 24-hour nonmedical care is provided onsite.

When unrelated persons with disabilities would occupy the house, zoning staff may want to classify the use as a board and care home. Most zoning codes restrict the location of board and care homes and may require a CUP.

**"By right"** is a zoning term which is usually not found in the zoning code but means a particular use is allowed without any special zoning permit.

**"Conditional use permit" ("CUP")** is a special zoning permit which generally requires notice to the neighbors and in a newspaper of general circulation that a proposed use or development is being considered for a particular site. The CUP process includes a public hearing, often before the planning commission. The process may allow an appeal to the city council from the planning commission decision. Some jurisdictions call the CUP by another name.

**Conditions.** CUPs are approved with conditions. Generally, the conditions depend on the particular use and site. In the planning and zoning context, "condition" has to do with the requirements or limitations attached to a discretionary permit, such as a conditional use permit (CUP). As a condition granting the desired permit, the issuing agency may require the applicant to do certain things and may limit what the applicant can do with the permit. Failure to comply with the conditions of the permit may result in the revocation of the permit.

Permit conditions should relate to the anticipated impacts of a particular use. In the

case of group homes for persons with disabilities, the conditional use permit process has sometimes been abused by imposing limitations on the intended residents of the group home which would not be imposed on persons without disabilities residing in a single-family homes. This is a form of discrimination.

**“Family”** is defined in the zoning code. There is no standard definition, but often it means persons related by blood, marriage or adoption. Sometimes it includes a limited number of unrelated persons.

**Findings.** Approval of a CUP requires that certain findings be made. Usually there is a required finding of “neighborhood compatibility.”

**“Including necessary servants”** is an interesting term that is in some definitions of family. It is likely that cities which have this definition would allow unrelated persons such as nannies, cooks, and gardeners to live in the single-family house.

It is equally likely that these same cities would say that a household of unrelated persons with disabilities which included necessary support persons would be classified as a board and care home and not allowed in the single-family residential zone.

Distinction between **sharing a house** and renting a room. When unrelated persons would occupy the house, zoning staff may want to classify the use as a “boarding or lodging house.” Lodgers are generally thought of as people who rent a room but do not have full access to the rest of the house. Boarders are generally thought of as lodgers who also take meals at the house. The term boarding or lodging house sounds old-fashioned. In years past, this use was more common. The use is generally not allowed in a single-family residential zone, though renting to one or two persons may be an allowed “accessory use.”

Distinction between **sharing a house** and a “board and care home.” Board and care home generally refers to a group home which provides 24-hour nonmedical care to persons who have some form of disability. Board and care homes are generally licensed by the state, which is concerned about the welfare of the residents.

**“Single-family residential zone”** is a zoning term and generally means the use of housing in that particular zone is limited to occupancy by households meeting the definition of “family.”

The zoning questions relate to **“use,”** not “structure.” A single-family house (structure) may already occupy a particular site. A “family” could move into that house “by right.” A group of unrelated persons who would share the house may not be allowed to occupy the house or may require a “conditional use permit” to occupy the house.

In the planning and zoning context, “use” has to do with the use of a particular parcel of land. Broad categories of use include residential, commercial, and industrial. These broad categories are generally broken down into subcategories related to the intensity of the use.

Residential use is usually broken down into single-family residential use and multi-family residential use. Use does not mean the structure which accommodates the use, but typically single-family residential use is accommodated in single-family homes (one dwelling unit) and multi-family residential use is accommodated in buildings which contain more than one dwelling unit.

Zoning issues related to group homes frequently occur when a single-family home is occupied by persons who are sharing the house as a household unit, but do not meet the zoning definition of “family” because the occupants are not related by “blood, marriage, or adoption.” Such zoning definitions limit the number of unrelated persons who can occupy the dwelling. This is a form of discrimination, because it is not based on objective health and safety criteria, nor is it based on the intensity of the use.

When **unrelated persons** share a house, each person has access to the common areas of the house (such as living room, dining room, and kitchen).

The above information is meant to give you an understanding of how zoning code words can have the effect of limiting the housing choice of persons with disabilities. One of the purposes of fair housing law is to enable a person with a disability to live in the residence of his or her choice in the community. The questions you will ask and the documents you will obtain will help determine whether a jurisdiction is complying with the law.

**Checklist for Reviewing City and County Zoning Ordinances For Compliance with Fair Housing Laws**

## **Checklist for Reviewing City and County Zoning Ordinances For Compliance with Fair Housing Laws That Protect Congregate Living Arrangements for People with Disabilities.**

This checklist is intended to assist cities and counties in identifying discriminatory provisions in their ordinance and formulating revisions which further fair housing goals by providing equal opportunity in the development, siting and use of congregate living arrangements for people with disabilities.

☐ **1. Does the zoning ordinance impose any rules or procedural requirements on congregate living arrangements based on the personal characteristics of the residents, that they are people with disabilities?**

In answering this question, a jurisdiction should determine whether its zoning ordinance imposes restrictions or additional requirements on the development, siting or use of congregate living arrangements for people with disabilities, including both regulations and procedures, that are not imposed on other similarly sized and situated housing.

If the answer to the inquiry is “yes,” then the discriminatory provisions must be eliminated, and the ordinance revised to conform to fair housing laws. A zoning provision that is discriminatory on its face is not remedied by an offer of reasonable accommodation to persons with disabilities.

☐ **2. Does the zoning ordinance impose special restrictions on disability related services provided at congregate living arrangements?**

This inquiry also asks about rules, regulations and procedures that are intentionally discriminatory because they are based on the personal characteristics of the residents, that they are individuals with disabilities. Fair housing laws prohibit the imposition of special fees or restrictions on congregate living arrangements that provide on site supportive services for residents with disabilities.

☐ **3. Does the zoning ordinance treat congregate living arrangements for people with disabilities as a business or residence?**

Cities and counties may not treat congregate living arrangements for people with disabilities as a non-residential use and require payment of a business license or other special fees when the same is not imposed on other similarly sized and situated residences. Business license or other special fees should be eliminated for congregate living arrangements for people with disabilities.

☐ **4. Does the zoning ordinance characterize and regulate congregate living arrangements for people with disabilities as boarding houses, room and boards, nursing homes or some other use that is contrary to fair housing laws?**

Fair housing laws provide specific protections for housing for people with disabilities in order to promote integration into the community and equal access to housing opportunities. A jurisdiction that characterizes and restricts congregate housing for people with disabilities as some other type of use must eliminate such erroneous categorizing to ensure that its zoning ordinance complies with fair housing laws.

☐ **5. Do any of the zoning ordinance rules or procedures have the effect of discriminating against the development, siting and use of congregate living arrangements for people with disabilities?**

Zoning ordinances that have the effect of discriminating against congregate living arrangements for people with disabilities, although not intentionally discriminatory, violate fair housing laws. A city or county must not

enforce a provision that has a discriminatory effect on the development, siting or use of housing for people with disabilities.

¶ **6. Does the jurisdiction have a reasonable accommodation procedure within the zoning ordinance as relief from a rule or regulation that has a discriminatory effect on the development, siting and use of group homes for people with disabilities?**

All cities and counties should have a fair housing reasonable accommodation procedure in their zoning ordinance whereby an individual can request flexibility in the application of a zoning provision or, waiver of a particular requirement.