Town of Montreat
Planning and Zoning Commission
Meeting Agenda
November 19, 2015 – 7:00 p.m.
Walkup Building

I. Call to Order

- Welcome
- Moment of Silence/Invocation

II. Agenda Adoption

III. Staff Communications

IV. Meeting Minutes Adoption

A. May 21, 2015 Meeting Minutes
B. July 16, 2015 Meeting Minutes: Pending
C. October 22, 2015 Special Meeting Minutes
   - **Suggested Motion:** To adopt the October 22, 2015 Special Meeting and May 21, 2015 minutes as presented/amended

V. Public Comment

VI. Old Business

VII. New Business

A. Consideration of modifying building setbacks as required in Montreat Zoning Ordinance, Article VII: *Zoning District Regulations* and other referenced sections
   - Supporting Documents
   - **Suggested Motion**: To recommend revisions to Montreat Zoning Ordinance Article VII: Zoning District Regulations and Article(s)/Section(s) _____ as presented/amended

All Business Items are presented for discussion and possible action. Although any suggested motions language is always phrased in the affirmative, the Commission may choose to alter the motion or defer action on any agenda item at its discretion.

B. Consideration of reasonable accommodation for persons with disabilities within Montreat Zoning Ordinance
   - Supporting Documents
   - **Suggested Motion**: To recommend revisions to Montreat Zoning Ordinance Article(s)/Section(s) _____ to include reasonable accommodation for persons with disabilities as presented/amended

VIII. Public Comment

IX. Adjournment

Town of Montreat
Planning and Zoning Commission – Special Meeting
May 21, 2015 – 1:00pm
Town Services Office

Call to Order:
Emory Underwood called the meeting to order followed by a moment of silence.

Commission members present: Emory Underwood, Chair; Gill Campbell, Vice Chair; Kay Layman, Secretary; Lucile Jackson; Judy Shillinglaw.

Town Staff present: David Currie, Building inspector/Code Administrator; Misty Gedlinske, Town Clerk; Jack Staggs, Police Chief

Members of the public present: Anne Seaman; Ashton Phelps; Suzanne Phelps; Heather Scott; Jack McCaskill (arrived @ 1:33 p.m.) Carol Steele, VP for Programs, MRA; Tanner Pickett, VP for Sales, Marketing and Communications, MRA; one unidentified person

Agenda Adoption:
Lucile Jackson moved and Gill Campbell seconded the adoption of our agenda. Motion passed.

Staff Communication:
David Currie presented highlights of the previous meeting and emphasized the limited number of applications for Amplified Sound Permits issued by the Police Department. He informed the commission members that Town Council asked that P & Z look at the possibility of eliminating permits for amplified sound altogether.

Chief Staggs made the statement that investigation of noise complaints are exclusively "call driven" in nature. The permits don't really have any bearing on noise complaints; therefore, the few permits issued really are negligible. The MRA does an excellent job of monitoring their [own] activities.

Public Comment:
Carol Steele mentioned that the Conference Center is concerned that the proposed changes to the ordinance would lower the "cap" on Institutional decibels from 80 to 60 db. They have received no warnings from Montreat Police Department for noise violations. A 60 db level is not adequate to allow clear projection of amplified sound at many MRA-sponsored events.

New Business:
Emory Underwood introduced the topic of new business – Amplified Sound Permitting Regulations.

Gill Campbell made a motion to adopt the suggested revisions to MGO Chapter I, Article II: "Noise Control" with some additional changes detailed in a sheet he handed out to the commission members and staff. The changes include eliminating Section 2(2); eliminate Section 2(8); add to Section 3(3) to read: All Montreat College sponsored events; and add to Section 3(8) All Montreat Conference Center activities. This would effectively allow 80 db for activities "sanctioned" as MRA and College activities. Mr. Currie cautioned that this appears to afford certain privileges or rights to specific people groups, creating a "class" system of applying regulations, which may have tenuous legal footing.

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Kay Layman seconded the motion.

During ensuing discussion Kay Layman and Lucile Jackson supported Gill Campbell's motion and spoke in favor of the suggested changes. Further discussion called in question the effectiveness of the 60 decibel level and Gill suggested raising the limit to 80 db in Table II. Emory Underwood disagreed. After further discussion, the possibility of assigning certain decibel levels to specific zoning districts was suggested. Emory handed out another sheet "*Comparative Examples of Noise Sources, Decibels and Their Effects*."

Chief Staggs commented that the Town of Black Mountain dealt with a situation where a wedding party using the town-owned building on Lake Tomahawk was in violation of their noise ordinance and paid a $250 fine to continue their activities until the celebration was over.

Kay Layman suggested separate decibel levels in the I, I/R and other districts; this would mean increasing the limit to 80 db in the I and I/R districts but leaving the limit at 60 db in the other districts. There was further discussion about decibel limits for places like Robert Lake Park, Bill Wilde Youth Center and the Conservation District. The problem with differing terminology used in Table II from that of the zoning districts listed in the zoning ordinance was discussed. Emory Underwood suggested eliminating the term "Public Space" from Table II, along with "Business or Commercial" as well. Lucile Jackson and Judy Shillinglaw agreed.

Lucile Jackson suggested an amendment in Table II to leave the first two categories of residential at 60 db, remove "Public Space" and set "Institutional Zone" and I/R decibels at 80.

Mr. Currie asked how to address Robert Lake Park and Bill Wilde Youth Center, since these are in different zones.

After further discussion, it is agreed to remove incompatible terms listed in Table II by grouping non-residential Land Use Categories under the heading of "All Other Areas."

Gill Campbell stated that it may be necessary to make other amendments throughout the ordinance to address different scenarios; therefore, it may be better to leave it alone and let the College and MRA go to 80 decibels, make the other changes at a later date and eliminate permitting for the summer. After Mr. Currie restated Gill's suggestion for clarification, Gill suggested going back to his original motion because the other proposed changes seem like micromanagement to him.

Kay Layman stated for clarification that it seems like the intent is to limit sound levels to 60 db in residential areas but to allow 80 db in areas more frequently associated with College and MRA activities.

Mr. Currie reviewed the zoning of Welch Field and Robert Lake Park (RLP), determining that Welch Field is Institutional – RLP is not.

Lucile Jackson withdrew her suggested amendment.

Emory Underwood stressed that the MRA and College uses need to be discussed further.

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Gill Campbell proposes giving that to the Town Attorney to decide. Mr. Currie once again expressed concerns over "preferential treatment" given to specific organizations.

Kay Layman suggests that sound limits can be done by designated zones as contained in the zoning ordinance. Kay states that residential zones should remain at 60 decibels and Gill Campbell agrees.

Mr. Currie described the process of ordinance revision and subsequent review by the Town Attorney before going to the Town Council.

Emory Underwood asked if it would be simpler to go back to Gill Campbell's original motion and come up with a way to include the Bill Wilde Youth Center and Robert Lake Park. Kay Layman proposed adding the Conservation District to the 80 decibel category. Mr. Currie pointed out the area encompassed by the Conservation District on the map.

Emory Underwood agrees that residential areas should be 60 decibels and proposed granting an exception for Robert Lake Park. Gill Campbell disagrees and after further discussion, Emory suggests that everything except residential categories go to 80 decibels. This would eliminate Section 3, exception 3 from the suggested amendment. Gill agrees with this modification. Emory restated to make this an amendment to the original motion.

A vote was taken on the amendment to the motion, which passed 5/0.

The amended motion was then voted on, which also passed 5/0.

Public Comment: Anne Seaman thanked everyone for their work in consideration of this matter.

Suzanne Phelps asked that if they were to host a wedding reception at their home, how would this be regulated? Mr. Currie responded: "Don't get rowdy!" Then, he went on to state that the 60 decibel limit for residential properties is measured at the property line and that investigations/enforcement is strictly complaint-driven.

Tanner Pickett also thanked the commission members for their work and for making sure that Institutional property owner's interests continue to be considered.

Mr. Currie thanked everyone for coming.

Adjournment:
Gill Campbell moved with Lucile Jackson seconding that the meeting be adjourned; motion passed.

Respectfully submitted,
David Currie, Zoning Administrator

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Town of Montreat
Planning and Zoning Commission
October 22, 2015 – 7:00pm
Walkup Building

Call to Order:
Emory Underwood called the meeting to order followed by a moment of silence.

Commission members present: Emory Underwood, Chair; Gill Campbell, Vice Chair; Kay Layman, Secretary; Lucile Jackson; Anne Seaman; Judy Shillinglaw.

Town Staff present: David Currie, Building inspector / Code Administrator

Members of the public present: Wade Burns and Betsy Hester

Agenda Adoption:
Anne Seaman moved and Gill Campbell seconded the adoption of our agenda. Motion passed.

Staff Communication:
David Currie stated that he encouraged the Commission, after extensive input and discussion, to complete our current deliberations on the Stormwater Management Ordinance so that it can be passed along to the Town Council for further review.

Meeting Minutes Adoption:
Lucile Jackson moved with a second from Gill Campbell that we adopt the October 6, 2015 Special Meeting minutes as presented.

Public Comment:
Wade Burns urged the commission to use proportionality as a strong guideline for determining the Stream Buffer for a lot like his that is 2/10 of an acre. His contention is that there are many other environmental issues, like ruts in the roads where water runs during a storm which are more concerning than a buffer on his small lot.

Old Business:
There was extensive discussion regarding the 4 amendments to the Montreat Code of General Ordinances, Chapter K – Environment, Article III: Stormwater Management.

1) Section 300. *General Provisions* (page 4 of our packet); the last sentence to be added to this provision:
"The separation requirements for built-upon areas form regulatory surface waters as defined in Section 305 (1) of this Article apply to all development activities unless a variance is granted by the Board of Adjustment."

2) Section 303(3)(a) (page 10 of our packet). The first bullet would be added to say:
"Perennial or Intermittent streams as classified according to North Carolina Department of Environment and Natural Resources (NCDENR) methodology;"

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3) Section 303(4). (page 13 of our packet) to be added – as amended:
"Variances: Any person may petition to the Montreat Zoning Board of Adjustment for a variance granting permission to make use of the person's land in a manner otherwise prohibited by specific provisions of this ordinance. To qualify for a variance, the petitioner must show all of - (*Staff is to insert language here that specifically references items in the Montreat Zoning Ordinance Articles pertaining to findings of the Board of Adjustment for variances*).

The Board of Adjustment or other local governing body having jurisdiction may impose reasonable and appropriate conditions and safeguards upon any variance it grants. This may include certain requirements to evaluate, offset and/or mitigate potential impacts to classified regulatory waters receiving surface drainage or potential impacts to classified regulatory waters receiving surface drainage or discharge from stormwater systems. The Town shall provide guidance through approved methodology for evaluating potential stormwater impacts to surface waters and various options for mitigation. Any such hearing before the Board of Adjustment shall be conducted in the manner provided in the provisions of the Variance section of Article XII of the Montreat Zoning Ordinance. No variance shall be issued by the Board that approves any modification to provisions of this ordinance that constitute a violation of the requirements of the Municipal Separate Storm Sewer System (MS4) permit issued to the Town."

4) Section 305(1). (Page 16 of our packet) to be added as amended:
"<u>Riparian Buffer</u>: All built-upon area shall be at a minimum of 30 feet landward on all sides of any regulatory surface water as measured horizontally on a line perpendicular to a vertical line marking the edge of the top of the bank for development projects one acre or larger. For lots less than one acre in size, a minimum buffer zone of 10 feet shall be required on all sides of any regulatory surface water as measured horizontally on a line perpendicular to a vertical line marking the edge of the top of the bank. No land disturbance shall be permitted within this buffer unless it is to enhance the vegetative protection of the surface water. Enhancement of the vegetative buffer shall be through the use of approved native plant species or other proven methods shown to be effective and with prior approval from the Town. Anyone desiring to commence land-disturbing activity must secure a permit from the Town prior to the start of work. All built-upon area shall be a minimum of 20 feet landward of the above-described buffer unless a variance is granted by the Board of Adjustment. If any land disturbance is to occur within the 20 foot buffer, a stormwater permit is required which will provide specific details in a plan designed to protect the surface water, post-development."

Lucile Jackson moved and Judy Shillinglaw seconded to recommend revisions to Montreat General Ordinance Chapter K, Article III "Stormwater Management" as amended. Motion passed.

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It was acknowledged that there needs to be some guidelines designed to assist the Board of Adjustments in requests regarding variances for stormwater buffers.

New Business:
A Conditional Use Permit Request from Wade and Susie Burns, 211 Virginia Road, was discussed. Gill Campbell moved and Anne Seaman seconded to recommend that the Conditional Use Permit request of Mr. Burns be sent to the Zoning Board of Adjustment for consideration as presented. Motion passed.

Public Comment: Wade Burns discussed his feeling that our recommendation of a strict 10' stream buffer on all size lots was an unfair condition for a lot like his that is 2/10 of an acre.

Adjournment:
Gill Campbell moved with Kay Layman seconding that our meeting be adjourned; motion passed.

Respectfully submitted,
Kay Layman, Secretary

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Comments from the Code Administrator

I. New Business

A. Setback Modification Consideration

At their Annual Board Retreat in April this year, the Montreat Town Council requested that Planning and Zoning look at the possibility of modifying front and rear yard setback requirements based upon neighboring developed properties and other conditions such as challenging terrain. Due to the heavy workload of agenda items for P&Z so far this year, it is just now coming before you for consideration. During development and discussion of the Comprehensive Plan in 2006-2007, there was mention of modifying building setbacks in the front and rear yards based upon steeply-sloping conditions of some lots, as well as the suggestion of increasing front yard setbacks for properties under development within the Assembly Drive Corridor to maintain visual consistency. In keeping with the guidance of the Comprehensive Plan, the Hillside Development Ordinance (adopted in 2009) *does* include provisions for administratively reducing the front yard setback of smaller lots within steeply-sloping areas by as much as 50% for the associated zoning district. A case was brought before the Zoning Board of Adjustment in January of this year highlighting the need to take a good look at the challenges steeper lots create for development. A property owner requested a reduction of the front yard setback from 30' to 15' in order to facilitate driveway and parking access from Kanawha Drive for a new single-family dwelling. Any time a variance is requested for undeveloped property, it is a good idea to review the terms of the request and consider if certain conditions or requirements of the zoning ordinance may need to be revisited and "tweaked" in order to address a problem. I have included in your agenda packet the relevant Montreat Zoning Ordinance definitions, sections pertaining to establishing front and rear yard setbacks in various zoning districts, setback modifications based upon specific lot frontage conditions and the aforementioned section of the Hillside Development Ordinance pertaining to relief for smaller, steep lots. The guidance provided in the Comprehensive Plan is also included as a resource. While not directly related to consideration of modifying setbacks based upon terrain or neighboring properties, I have also included Section 612.4 pertaining to *Accessibility Features* - which is the second item of New Business before you tonight – since it deals with modifying setbacks as well.

B. Reasonable Accommodation within the Zoning Ordinance for Persons with Disabilities

As mentioned above, the Montreat Zoning Ordinance does provide some accommodation that allows persons with disabilities to request modification of the zoning setback(s), enabling construction of accessibility features. This change occurred in 2013 in response to a renewed awareness of specific requirements under the Federal Fair Housing Act (FHA). At that time, the Town Attorney did review the proposed amendments to the zoning ordinance and indicated that she believed this change provided "reasonable accommodation" within our development regulations that met FHA guidelines. Earlier this year, a case came before the Board of Adjustment that caused us to reconsider this position. A property owner requested a variance to allow addition of square footage to an

existing bathroom for increased accessibility. After reviewing the variance request and other case law on the books for similar situations, staff decided that a variance procedure and the associated findings is not well-suited to consider modifying provisions of the zoning ordinance. It is our belief that a Conditional Use approval process or a similar approach better addresses the need to provide reasonable accommodation, since a variance is tied to peculiar physical aspects of the property irrespective of the applicant's condition. Earlier this fall, Town Council directed staff to bring this issue before the Planning and Zoning Commission and requests consideration of how additional accommodation may be created within the ordinance.

I have included quite a bit of material touching on the topic of providing "reasonable accommodation" within a jurisdictions' development ordinances, ranging from case law and associated commentary to guidance provided by the U.S. Department of Justice. As you peruse the information, please keep in mind the concept of what you believe constitutes "reasonable" accommodation and what may be beyond the pale of allowing a person with disabilities to make use of their property.

Montreat General Ordinances
Chapter K – Environment
Article IV: Hillside Development

Section II. Administration and Procedures.

4. Development Standards.

b) Front Yard Setback Reduction. Owners of previously-platted smaller parcels defined as 0.30 acre or less with an existing grade of forty percent (40%) or greater may request up to a fifty percent (50%) reduction in the required front yard building setback for the associated Zoning District. Requests will be evaluated on a case-by-case basis, and permission must be evidenced by written approval bearing signatures of both the Zoning and Town Administrators.

Town of Montreat
Comprehensive Plan
Implementation Matrix

CHARACTER & DESIGN STRATEGIES FOR IMPLEMENTATION

Goals(s)	*Recommendations*	*Implementation Strategies*
A, C	**Recommendation 3:** Guide the design of new and renovated structures in existing neighborhoods to foster consistency in scale, style, materials and design with the existing built form that is characteristic of Montreat.	**Strategy 4:** Modify zoning ordinance to ensure that new homes conform to the setbacks of existing structures to provide visual continuity.

D	**Recommendation 4:** Preserve the character of Assembly Drive.	**Strategy 2:** Set standards for the Overlay District that includes:
		• Minimum setbacks (whichever is more stringent of the following)
		  ○ Minimum setback of 100 feet from centerline
		  ○ Average setback of the two adjoining structures
		• Building height less than two stories or 35 feet
		• Preservation of existing vegetation
		• Incorporate provisions for the replacement of trees (e.g. require two new trees replace each mature tree taken down).

Montreat Zoning Ordinance
Article II: Definitions

Setback: The distance from any property line to the closest edge of a Principal or Accessory Building.

Setback Line: A line establishing the minimum allowable distance between the nearest portion of any Principal or Accessory Building, excluding the outermost three feet (3') of any attached steps, roof, gutters and similar fixtures, and the property line when measured perpendicular thereto. Covered porches, whether enclosed or not, shall be considered as part of the Building and shall not extend beyond the setback line. Decks, whether free-standing or not, shall not extend beyond the setback line unless otherwise permitted in accordance with Section 612.4.

Yard: A space on the same lot with a principal Building which is open, unoccupied, and unobstructed by Buildings or Structures from ground to sky except where encroachments are expressly permitted.

1) Minimum Front Yard: A required open space on the same lot with a principal Building, between the front setback line and the front property line and extending the full width of the lot.

2) Minimum Rear Yard: A required open space on the same lot with a principal Building between the rear setback line of the Building and the rear property line extending the full width of the lot.

3) Minimum Side Yard: A required open space on the same lot with a principal Building between the side setback line of the Building and the side property line of the lot and extending from the front property line to the rear property line.

Montreat Zoning Ordinance
Article VI: General Provisions

612 Accessory Buildings and Uses.

612.1 General Requirements.

1) Accessory buildings shall not be used as a dwelling unit.
2) In residential zoning districts, no more than two (2) accessory buildings or uses shall be permitted per lot.
3) Accessory buildings larger than six hundred (600) square feet including entrance and/or outside covered areas and/or exceed ten (10) feet in height at eave line shall be permitted by Conditional Use permit only.
4) Accessory buildings or uses must meet the minimum setbacks required by the respective zoning district. Garages shall be located only in the side or rear yards and must meet the minimum setbacks required by the respective zoning district except under the provisions found in Section 612.2.
5) Accessory buildings with any dimension greater than twelve feet (12’) must meet the provisions of current NC State Residential Building Code.

612.4 Accessibility Features. In addition to meeting the general requirements of Section 612.1, a property owner may request approval to erect or install accessibility features within the required yard setback, subject to meeting all the following conditions: lots. However, in no case shall front setbacks be less than fifteen feet (15').

1) The proposed accessibility improvements shall be demonstrated to be the least possible modification of the setback(s) that provides "reasonable accommodations" within the zoning ordinance to avoid discrimination against individuals with disabilities.

2) Expansion of, or addition to, decks and other appurtenant structures beyond what is deemed necessary by the Zoning Official to provide reasonable accommodation for accessibility shall not be permitted.

3) Accessibility improvements designed and sited to occupy a portion of street right-of-way fronting the property served are also subject to review for Administrative Approval by the Zoning Official and Town Administrator prior to application for the associated construction permits.

4) The applicant must provide the minimum documentation in accordance with U.S. Department of Justice guidelines under the Fair Housing Act, which verifies the associated disability or medical condition(s) justify the need to modify provisions of the zoning ordinance.

613 Corner Lots. Any Structure on any corner lot shall comply with the minimum setback (front yard) requirements of the street which it faces, and shall comply with fifty percent (50%) of the minimum front yard setback requirements on any other street which the corner lot abuts. The yard opposite the designated front yard shall meet the minimum rear yard requirements and the remaining yard shall meet the minimum side yard requirements.

Where a Structure faces a corner formed by two (2) streets having different setback requirements, the Structure shall comply with the more restrictive requirements. In case of doubt as to which street a Structure faces, or if a Structure is built so as not to face any street, the Zoning Official shall determine which setback, side yard and rear yard requirements apply.

614 Double Frontage Lots. On lots having frontage on two streets, but not located on a corner, the minimum front yard shall be provided on each street in accordance with the provisions of this Ordinance. On lots having frontage on more than two streets, the minimum front yard shall be provided in accordance with the regulations set forth in this Ordinance on at least two of the street frontages. The minimum front yard on the other frontage or frontages may be reduced along the other streets in accordance with the side yard requirements of the Zoning District.

615 Special Front Yard Requirements in Developed Areas. The setback requirements of this Ordinance shall not apply to any lot where the average front setback on already built upon lots located wholly or in part within the same block and Zoning District and fronting on the same street as such lot, is less than the minimum required setback. In such cases, the setback on such a lot may be less than the required setback but not less than the average of the existing setbacks on the developed

Montreat Zoning Ordinance
Article VII: Zoning District Regulations

701 R-1 Residential Districts.

701.7 Minimum Front Yard. Thirty feet (30').

701.9 Minimum Rear Yard. Twenty percent (20%) of the mean lot depth provided that rear yards on lots used for dwelling purposes need not exceed thirty five feet (35').

702 R-2 Residential Districts.

702.7 Minimum Front Yard. Thirty feet (30').

702.9 Minimum Rear Yard. Twenty percent (20%) of the mean lot depth, provided that such rear yards used for dwellings need not exceed thirty feet (30').

703 R-3 Residential District.

703.7 Minimum Front Yard. Thirty feet (30’).

703.9 Minimum Rear Yard. Twenty percent (20%) of the mean lot depth, provided that rear yards on lots used for dwelling purposes need not exceed thirty-five feet.

704 I/R Institutional/Residential District.

704.7 Minimum Front Yard. Twenty-five feet (25').

704.9 Minimum Rear Yard. Twenty-five feet (25').

705 I – Institutional.

705.7 Yard Requirements.

705.71 Adjacent lots within the Institutional District shall have no front, side, or rear yard requirements except that a twenty five foot (25') Building setback shall be required from the right-of-way lines of any adjacent streets.

705.72 Lots within the Institutional District and abutting a different Zoning District shall be required to provide a twenty five foot (25') side, rear, and/or front yard on the perimeter facing the different Zoning District.

Montreat Zoning Ordinance
Article VII: Zoning District Regulations

710 Lot Requirements Summary Table.

Zoning District and Use	Minimum Lot Dimensions			Minimum Yard/Setback		
	Size	Width	Depth	Front	Side	Rear
	(sq. ft.)	(feet)	(feet)	(feet)	(feet)	(feet)
R-1						
Single Family, Group	10,000	75	100	30	15	**
Two Family	15,000	75	100	30	15	**
Other uses	15,000	75	100	30	25	**
R-2						
Single Family, Group	8,000	60	100	30	10	**
Two Family	12,000	60	100	30	10	**
Multifamily*	20,000	60	100	30	20	**
Other uses	12,000	60	100	30	20	**
R-3 (septic)						
Single Family	20,000	75	100	30	15	**
Two Family	30,000	75	100	30	15	**
Other uses	30,000	75	100	30	25	**
I/R						
Single Family	6,000	65	100	25	12/17.5	25
Two Family	10,000	80	100	25	12/17.5	25
Multifamily***	15,000	100	100	25	12/17.5	25
Other uses	10,000	100	100	25	12/17.5	25
					interior/corner	
I						
All permitted uses	7,500	75	100	N/A - 25' from street right-of-way and when adjacent to a different Zoning District		

501 Definitions.

Accessibility Feature: A separate structure or attached building appurtenance, or any combination thereof, which provides an increased level of accessibility for building occupants or members of the public constituting an improved accessible path of travel from the parking/passenger loading area to a building entrance. Accessibility features may include, but are not limited to: tramways, ramps, stairs and stairway landings, chair lifts, stair lifts and elevators.

612.4 Accessibility Features. In addition to meeting the general requirements of Section 612.1, a property owner may request approval to erect or install accessibility features within the required yard setback, subject to meeting all the following conditions:

1) The proposed accessibility improvements shall be demonstrated to be the least possible modification of the setback(s) that provides "reasonable accommodations" within the zoning ordinance to avoid discrimination against individuals with disabilities.

2) Expansion of, or addition to, decks and other appurtenant structures beyond what is deemed necessary by the Zoning Official to provide reasonable accommodation for accessibility shall not be permitted.

3) Accessibility improvements designed and sited to occupy a portion of street right-of-way fronting the property served are also subject to review for Administrative Approval by the Zoning Official and Town Administrator prior to application for the associated construction permits

4) The applicant must provide the minimum documentation in accordance with U.S. Department of Justice guidelines under the Fair Housing Act, which verifies the associated disability or medical condition(s) justify the need to modify provisions of the zoning ordinance.

A Zoning Ordinance Will Violate the Fair Housing Act, Americans with Disabilities Act and the Equal Protection Clause Where a Disparate and Discriminatory Impact on the Protected Class is Shown by Explicit Discrimination by a Municipality

Marriot Senior Living Services, Inc. v Springfield Township, 78. F.Supp. 2d 376 ED Pa (December 7, 1999)

Cross Reference: Fair Housing Act, Americans with Disabilities Act, Equal Protection Clause

A developer, seeking to build a senior assisted living facility, filed suit for a township's alleged denial of a reasonable accommodation claim and alleged failure to waive its zoning laws pursuant to the Fair Housing Act and the Americans with Disabilities Act. The developer also claimed that the township maintained a both a facially discriminatory zoning scheme and a zoning scheme which had a greater adverse impact on elderly people with disabilities than on others, regardless of intent.

The developer proposed building an assisted living facility for senior citizens in a zoning district which specifically excluded hospital, sanitarium, rest home, and convalescent home uses. The developer initiated the project through "informal discussion", a procedure provided for in the subdivision and land development ordinance allowing the developer to submit a sketch plan to the planning commission for informal review and comment. The informal discussions between the developer and the township led to revisions to the sketch plan and the submission of a proposed zoning amendment. Upon hearing certain "negative comments" about the project from a township commissioner, the developer abandoned the subdivision and land development approval process and issued a demand to the township for reasonable accommodation of the project under the Fair Housing Act. The township solicitor responded in a letter advising the developer that the township did not have sufficient information to provide a final response to the demand. The developer claimed the letter to be the township's final decision on the project.

Both parties requested summary judgment. The court held as follows:

A. The reasonable accommodation claim based upon FHA and ADA violations was not ripe for judicial review based upon the two pronged test of 1) the "fitness of the issues for judicial decision" and 2) the "hardship to the parties of withholding court consideration". The Court determined that hardship was clearly demonstrated but the developer failed to demonstrate that the issues were ripe for the court's review for a series of reasons: a) the developer did not show that further action through the formal planning process would be futile-the township did not attempt to subvert the approval process, the township did meet and discuss changes to the sketch plan; b) no final application had been submitted for land-use approval, amendment to the zoning ordinance, or other relief from the zoning requirements; c) no public hearings were held for public comment; d) the municipality charged with making the decision had not had a full and meaningful discussion of the issues or stated its reasons in writing for any decision; and e) The solicitor's letter only advised that the township needed more information, and was not a final decision.

B. The claim that the zoning code was facially discriminatory was dismissed for failure to identify any specific provision of the zoning code or land use ordinance whereby elderly persons with disabilities were expressly treated differently from others.

C. The "disparate impact" claim was placed in suspense pending the developer's formal application to the township and the township's issuance of a final decision.

DISCRIMINATORY ZONING and the FAIR HOUSING ACT

Prepared by:

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DISCRIMINATORY ZONING AND THE FAIR HOUSING ACT

I. INTRODUCTION

This booklet is designed to acquaint people with disabilities, advocates, providers, and attorneys with the Fair Housing Amendments Act of 1988 ("FHAA" or the "Act")[1] and, in particular, its impact on state and local zoning laws and land use regulations.[2] Restrictive zoning laws that limit housing choices for persons with disabilities were a particular target of the FHAA, and many lawsuits under the Act have successfully challenged the use of zoning laws to prohibit or limit group homes and other housing arrangements for people with disabilities.[3]

PLEASE NOTE: THE INFORMATION IN THIS BOOKLET IS NOT INTENDED TO CONSTITUTE LEGAL ADVICE APPLICABLE TO SPECIFIC FACTUAL SITUATIONS.

II. BACKGROUND OF THE FAIR HOUSING AMENDMENTS ACT

The FHAA was enacted in 1988 to extend the protections of the 1968 Fair Housing Act to people with disabilities. In passing the FHAA, Congress recognized that "[t]he right to be free of housing discrimination is essential to the goal of independent living."[4] The purpose of the Act, therefore, is to prohibit practices that restrict the choices of people with disabilities to live where they want to live or that "discourage or obstruct [those] choices in a community, neighborhood or development."[5] Given the broad remedial goals of the FHAA, courts have held that its provisions should be broadly construed.[6] Courts have also rejected constitutional challenges to the application of the FHAA to local zoning laws and decisions.[7]

Who Is Protected By The FHAA?

The Act protects people with "handicaps." The term "handicap" is defined broadly and includes those individuals with physical or mental impairments which substantially limit one

or more of their major life activities.[8] "Major life activities" include, but are not limited to, caring for one's self, walking, seeing, hearing, speaking, breathing, learning, and working.[9] Many people with disabilities, especially those who live in residential placements, will readily meet this standard (e.g., people with mental retardation, organic brain syndrome, emotional or mental illness, significant hearing or visual impairment, severe physical disabilities, and AIDS).[10] Persons who are recovering from substance abuse are also considered to have a disability under the FHAA, but persons engaged in current illegal use of or addiction to controlled substances are not protected by the FHAA.[11]

In addition to persons with actual and current impairments that substantially limit their major life activities, the Act extends protection to people who do not currently have disabilities but who have histories of disabilities (for example, individuals who have histories of mental illness or substance abuse) and people who are treated as though they have disabilities, even if they do not (for example, individuals whose high blood pressure does not substantially limit their major life activities but who are treated by others as being unable to undertake certain major life activities).[12]

Who Must Comply With The FHAA's Requirements?

Property owners, most landlords, real estate agents, and others involved in the sale or lease of housing and apartments must comply with the FHAA's requirements. In addition, as discussed below, the Act prohibits a broad range of activities, including restrictive zoning. As a result, zoning boards, municipalities, and other governmental entities that take actions in violation of the FHAA will be liable.[13]

What Activities Or Acts Does The FHAA Prohibit?

The FHAA prohibits a broad range of discriminatory activities. Under the Act, it is unlawful:

* 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 the buyer or renter, a person residing in or intending to reside in the dwelling after it is bought or rented, or any person associated with that buyer or renter.[14]

* 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 a dwelling, because of a handicap of that person, a person residing in or intending to reside in the dwelling, or a person associated with that person.[15]

* To refuse to permit, at the expense of the person with the handicap, *reasonable modifications of existing premises* occupied or to be occupied by such person if those modifications are necessary to afford the individual full enjoyment of the premises (although, in renting property, a landlord may, where reasonable, obtain an agreement to restore the property to the original condition).[16]

* To refuse 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.[17]

A person who demonstrates a violation of any of these provisions establishes liability under the FHAA and need not prove that the violation was the cause of some specific type of harm; the harm is the discrimination.[18]

The FHAA also makes it unlawful "to coerce, intimidate, threaten, or interfere with" a person's right to enjoy fair housing.[19] For example, attempts by municipalities to interfere with group homes may give rise to liability under the Act.[20] Similarly, efforts by municipalities or community residents to interfere with the sale of a home to individuals with disabilities through enforcement of restrictive land covenants violates the Act.[21] It is more difficult, however, to impose liability for interference under the FHAA against neighbors for opposition to group

homes.[22] Occasionally, a neighborhood group may seek to invoke the FHAA to challenge residences for people with disabilities, but such challenges are unlikely to be successful.[23]

III. ZONING AND THE FAIR HOUSING ACT

While state and local governments have authority to regulate land use, that authority has sometimes been invoked to restrict the ability of individuals with handicaps to live in communities. The legislative history of the FHAA makes plain that Congress sought to prohibit the application of state and local zoning and land use laws in ways that limit access to housing by people with disabilities, stating:

> The Committee intends 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.[24]

While the Act prohibits intentional discrimination, it also prohibits other forms of discrimination in zoning, including discriminatory classification of persons with disabilities; zoning laws which, although neutral on their face, have a "disparate impact," i.e., a discriminatory effect, on persons with disabilities; and the failure of municipal officials to reasonably accommodate the needs of persons with disabilities.

Intentional Discrimination

If the land use law or zoning decision is the result of an intention to discriminate against people with disabilities, it violates the FHAA. Intentional discrimination may be the product of discriminatory animus, e.g., stereotypes, fears about crime or diminution in property values, prejudice about people with disabilities, or a malicious desire to discriminate. As one court has explained: "Any discrimination in housing that is based on unsupported stereotypes, prejudices,

fear stemming from ignorance or generalizations, or aversion toward the handicapped is illegal."[25] Intentional discrimination also includes acts simply "motivated by or based on consideration of the protected status itself" and that are not based upon discriminatory animus.[26] A plaintiff need not prove that discrimination was the *sole* motivating factor in the challenged action; it is sufficient that he show that discrimination was a motivating factor.[27]

Intentional discrimination may violate the FHAA even though it does not result in an actual denial of a housing opportunity. As one court has reasoned: "It would run contrary to the remedial purposes of the [FHAA] to hold that a defendant, acting with the intent of denying a handicapped person housing, could avoid liability merely because his efforts were unsuccessful. ... [T]he [FHAA] is directed at the elimination of discriminatory conduct, not merely discriminatory results ...."[28]

Generally, in an FHAA case alleging intentional discrimination, courts apply the burden-shifting framework for proof established in *McDonnell Douglas Corp. v. Green*[29] (concerning employment discrimination based on race and gender),[30] at least when there is no direct proof of discriminatory intent.[31] Under this burden-shifting scheme, the plaintiff must establish that: (1) he is a member of a protected class; (2) he applied for and was qualified for the housing opportunity; (3) he was rejected for the housing opportunity; and (4) the housing opportunity remained available.[32] The fourth element alternatively may be established by showing that the rejection occurred in circumstances that gave rise to an inference of unlawful discrimination.[33] After the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce evidence that shows some legitimate, nondiscriminatory reason for its action.[34] If the defendant meets that burden, then the ultimate burden of proof switches back to the plaintiff to

demonstrate that the defendant's reasons were not the true reasons, but, rather, were a pretext for discrimination.[35]

Ultimately, "[t]he determination of whether an action is based on 'discriminatory intent' requires a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"[36] As evidence that a challenged action was motivated by discriminatory intent, courts may consider: (1) the discriminatory impact of the action; (2) the historical background of the action; (3) the sequence of events leading up to the action; (4) departures from normal procedures; and (5) departures from normal substantive criteria.[37] Further, a municipality may be liable for actions that deny housing opportunities because of discriminatory animus by its constituents, i.e., "for effectuating the discriminatory wishes of the body politic," even though the local officials did not themselves inflame, direct, or encourage such discriminatory sentiments.[38]

As the zoning cases summarized below demonstrate, intentional discrimination can take many forms.

* Denial of special use permit for halfway house for recovering alcoholics may have been result of intentional discrimination. Statements by decision-makers reflected that the decision was based on the identity of the clients and that the legitimate reasons advanced by the city (e.g., safety concerns) could have been pretextual since the city allowed the development of a child-care project on the same property on which the halfway house was to be developed.[39]

* Circumstantial evidence showed a city's discriminatory animus against individuals with disabilities. The original version of the city's zoning ordinance banned all youth homes from residential neighborhoods and was only amended after a state administrative body found the ordinance to be discriminatory. The city also amended its ordinance to remove language about integration of special needs housing and replaced it with language about avoiding concentration of such housing and protecting residential

neighborhoods from adverse impacts. In addition, the city had no youth homes within its residential areas.[40]

* A one-year moratorium on new adult care facilities for persons with disabilities was held to be a "classic case of discriminatory treatment because ... the ordinance was passed with the intent to discriminate against" persons with mental impairments.[41]

* A court found evidence of discriminatory intent in enacting a zoning ordinance requiring that group homes be separated by at least 1,000 feet where the evidence established that the officials imposed the requirement in response to community fears and concerns about property values.[42]

* The denial of a permit to allow renovations for a group home for people who are mentally ill and substance abusers was held to be the result of intentional discrimination in violation of the Act where the decision was based on objections to the residents' handicaps.[43]

* Requiring a zoning application for a special exception to provide a residence for persons who are HIV-positive was deemed to be the result of intentional discrimination where there was significant community opposition, the residence met the town's zoning criteria for a "family" residence, and the zoning officials departed from normal procedures in considering the issue.[44]

* Zoning officials' requirement that group home apply for variance and local government's issuance of summonses for noise and parking violations were the result of discriminatory intent. The intent was revealed by community opposition and the fact that no similar citations had previously been issued.[45]

* Amendment of a zoning ordinance in response to effort to create group home for persons who are HIV-positive that generated intense community opposition was result of unlawful discriminatory intent.[46]

* Zoning officer's reversal of initial decision that group home for recovering substance abusers was a permitted use under the zoning ordinance following expression of neighborhood and City Council opposition evidenced discriminatory animus in violation of the Act.[47]

* Excessive police activity and regulatory actions designed to force residents out of home for recovering substance abusers stated

claim for intentional discrimination under FHAA given statements of officials that they objected to the residences.[48]

* A town's amendment of its zoning ordinance to bar an assisted living facility in a particular zone following expressions of community hostility evidenced discriminatory intent in violation of the FHAA.[49]

* Statute that placed special burdens on boarding homes (e.g., requiring new certificates of inspection each time a new resident moved in; posting bond to cover relocation costs in case the facility was forced to close; and requiring homes to obtain zoning permission even when they are in properly zoned areas) was "freighted with discriminatory intent" and violated the FHAA.[50]

* The county's requirement that a provider of housing for recovering substance abusers could locate such housing only in one type of zoning district and even then only if it received a special exception may reflect intentional discrimination when such limitations were not required by the county's zoning law.[51]

* The District of Columbia's treatment of a group home for people with disabilities as a treatment facility rather than a family (even though it met the zoning law's definition of family) constituted intentional discrimination since it was due to widespread and vocal community opposition.[52]

Of course, the courts in a few cases have held that the evidence was insufficient to establish that zoning decisions affecting individuals with disabilities were motivated by discriminatory intent.[53]

Discriminatory Classifications

Zoning laws that use discriminatory classifications (i.e., "discriminate on their face") violate the FHAA. Such laws are a form of disparate treatment which, like disparate treatment which is motivated by discriminatory animus, violates the FHAA.[54] Proof that the laws were motivated by discriminatory animus is unnecessary.[55]

If a zoning law is discriminatory on its face,[56] the burden is on the defendant to justify the discriminatory classification.[57] The "'justification must serve, in theory and in practice, a

legitimate, bona fide interest of the ... defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.'"[58] The fact that a facially discriminatory zoning law may also apply to certain types of facilities for non-disabled persons does not detract from the discriminatory nature of the classification.[59] Several FHAA cases have addressed discriminatory classifications, holding:

* Dispersion requirements mandating that group homes be separated by a particular distance are discriminatory classifications that violate the Act.[60]

* Requirements that group homes occupy detached single family houses; that they be operated only by non-profit organizations; that there can be no more than one person per room; and that they be subject to special inspections violate the FHAA.[61]

* Application of fire code which required sprinkler system and fire alarm monitoring system to group home for persons with mental illness (who had no problems with evacuation in case of emergency) simply because the house was deemed a residential board and care facility under the fire code was held to be a discriminatory classification in violation of the FHAA.[62]

* A zoning ordinance that excluded from single-family residential districts group homes for persons with disabilities was deemed to violate the Act.[63]

* Reversing the dismissal of a FHAA claim challenging a statute that allowed permits for group homes to be conditioned on 24-hour supervision and establishment of a community advisory committee to hear neighbors' complaints, a federal appeals court held that the plaintiff had stated a valid claim under the Act that the statute constituted a discriminatory classification.[64]

* A zoning ordinance that imposed rigorous safety requirements on homes for individuals with developmental disabilities and did not tailor those requirements to specific types of disabilities violated the Act.[65]

* A zoning ordinance that imposed certain requirements on "residential social service facilities" (including minimum spacing

requirements, health and safety inspections and requirements, and informational requirements) was held to violate the Act.[66]

* A zoning ordinance that required notice to neighbors of a group home's existence constituted a discriminatory classification in violation of the Act because it was not imposed on any other properly zoned residential unit.[67]

* A regulation that required boarding home residents to be able to self-evacuate (and, therefore, required them to be ambulatory) might be an unlawful discriminatory classification under the FHAA.[68]

* Requiring a six-person group home for people with disabilities to secure a certificate of occupancy when a six-person home that did not house people with disabilities did not have to secure such a certificate was a discriminatory classification under the FHAA.[69]

Disparate Impact

Zoning laws that are "facially neutral" (that is, they apply to all persons, not just those with disabilities) will violate the FHAA if they have a "disparate impact" or discriminatory effect on people with disabilities. A plaintiff can establish a disparate impact claim by showing "'(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices.'"[70] If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to show that it had a legitimate, non-discriminatory reason for the action and that no less discriminatory alternatives were available.[71]

One type of zoning law that often has been held to have a disparate impact on people with disabilities is a definition of the term "family" that allows any number of related persons to live together but limits the number of unrelated persons who may live together. Although such laws apply to groups of unrelated, non-disabled persons (e.g., college students, nuns, etc.), such laws may be deemed to have a disparate impact on persons with disabilities because

usually such individuals need to live in group settings for both programmatic and financial reasons.[72] The disparate impact analysis also has been utilized in finding that facially neutral zoning ordinances that have the effect of barring nursing facilities, congregate care facilities, or similar types of dwellings from the municipalities' residential areas have a disparate impact on people who have disabilities.[73]

It is not enough, though, that a facially neutral zoning law has the effect of barring a particular use for people with disabilities to establish an unlawful disparate impact. For example, one court rejected a disparate impact claim asserted against a zoning law that limited housing to family residences for up to four unrelated persons when the plaintiff wanted to use a residence in the district for a vacation home for between five and twenty-three persons with developmental disabilities at a time.[74] Another court rejected an FHAA claim that the fire department's application of fire code regulations for lodging and rooming homes to a group residence for people with disabilities had an unlawful disparate impact on people with disabilities.[75]

Disparate impact analysis theoretically is inappropriate when analyzing the validity of zoning laws that treat people with disabilities differently than people without disabilities and are not "facially neutral," i.e., those laws that affect people with disabilities explicitly (such as spacing or dispersion requirements for group homes or zoning laws that require certain safety features only in group homes).[76] Many courts, nevertheless, have applied a disparate impact analysis to laws that are facially discriminatory. For example:

* Spacing or dispersion requirements for group homes have been held to create a disparate impact on people with disabilities in violation of the FHAA.[77]

* A requirement that group homes be subject to evaluation by a "program review board" prior to issuance of a group home license

was determined to have a disparate impact on people with disabilities in violation of the FHAA.[78]

* A requirement that group homes include only "exceptional persons" (defined as persons with disabilities who are "capable of proper judgment in taking action for self-preservation under emergency conditions" and are "mobile and capable of exiting from a building, following instructions and responding to an alarm") was held to have a disparate impact on persons with disabilities in violation of the FHAA.[79]

* Requiring a group home for persons who are HIV-positive to apply for special exception (when zoning commission did not require other unrelated groups of people to apply for special exceptions) was held to have a disparate impact on people with disabilities.[80]

* The denial of special use permit for AIDS hospice was held to have a disparate impact on people with disabilities in violation of the Act.[81]

Reasonable Accommodation

The failure of zoning officials to allow for "reasonable accommodations" in their policies to allow persons with disabilities to live in the community will violate the FHAA regardless of whether the officials acted with discriminatory intent.[82] The failure to provide a reasonable accommodation is an independent form of discrimination under the FHAA.[83] The reasonable accommodation requirement of the Act mandates that officials "'change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities.'"[84] A reasonable accommodation claim does not require proof that the defendant's actions were motivated by animus.[85]

There are three elements to a reasonable accommodation claim. The requested accommodation must be (1) reasonable and (2) necessary (3) to provide equal opportunity.[86] The concept of "equal opportunity" under the FHA generally means providing people with disabilities with the right to choose to live in single-family neighborhoods so as to end their

exclusion from the American mainstream.[87] An accommodation is "necessary" if, but for the accommodation, the plaintiff is likely to be denied an equal opportunity to enjoy the housing of his choice.[88] An accommodation is "reasonable" if it does not impose an undue financial or administrative burden and does not undermine the zoning scheme.[89] Whether an accommodation is reasonable is a highly fact-specific inquiry.[90] Speculation concerning potential burdens resulting from the accommodation is insufficient to render a requested accommodation unreasonable.[91]

It is increasingly important that any evidence in support of a reasonable accommodation request be presented to local zoning officials.[92] One federal appellate court has ruled that federal courts reviewing FHAA reasonable accommodation claims may not consider any evidence that was not presented to the local zoning officials.[93] However, this does not mean that the decisions of local zoning officials are entitled to deference.[94]

The courts are divided as to who has the burden of proving that an accommodation is reasonable/unreasonable. The majority of courts, however, have concluded that plaintiff has the burden of showing that the requested accommodation is necessary to provide equal opportunity and is not unreasonable on its face. If the plaintiff satisfies that burden, the burden shifts to the defendant to show that the requested accommodation is unreasonable.[95]

Courts have applied the FHAA's reasonable accommodation provision to zoning laws and ordinances in a variety of circumstances:

* A municipality's refusal to permit a nursing home to operate in a mixed residential zone violated the reasonable accommodation mandate.[96]

* Philadelphia's failure to grant a reasonable accommodation of its minimum side yard requirement for a single room occupancy facility for persons with mental illness and recovering substance abusers violated the reasonable accommodation provision.[97]

* A municipality's failure to issue a variance to its zoning laws to allow the operation of a single room occupancy facility for persons with mental illness and recovering substance abusers in a commercial/industrial district was deemed likely to violate the reasonable accommodation provision.[98]

* Noting the need for alternative housing for persons who are elderly and have disabilities and the economic inefficiency of operating adult foster care facilities for only six persons (as permitted by the existing law), a court held that the FHAA's reasonable accommodation provision required a city to take the steps necessary (through amendment of its zoning laws) to allow a 12-person adult care facility to operate.[99]

* A requirement that group homes obtain a variance to operate within 1,000 feet of another group home was deemed to be an insufficient accommodation where the variance process was lengthy, costly, and burdensome.[100]

* Refusal to waive requirements concerning sewage disposal that would allow operation of assisted living facility was likely a violation of the FHAA's reasonable accommodation requirement given the facility's workable proposal to address the sewage issue and the town's accommodation of such issues for other developments.[101]

* Refusals to grant exceptions to spacing/dispersion requirements have been held to violate the FHAA's reasonable accommodation provision.[102]

* Refusal to waive zoning laws that restrictively define "family" and/or limit the number of unrelated persons who may live together so as to bar operation of group facilities have been held to violate the FHAA's reasonable accommodation provision.[103]

While these decisions reveal that many zoning laws must yield to the right of people with disabilities to live in the homes of their choice, it would be a mistake to assume that they always will do so. For example:

* A court held that a city's refusal to turn water on for group home when the home refused to extend the water/sewer line to the edge of the property did not violate the reasonable accommodation requirement.[104]

* A court held that a refusal to grant a variance to erect a 6-foot fence on a property to accommodate a person with post-traumatic stress disorder and a heart condition was not unlawful since the plaintiff did not establish that the fence would force him to move.[105]

* Traffic safety issues and inadequate access for emergency vehicles raised by site plan for 95-bed nursing facility rendered the requested accommodation unreasonable.[106]

* A court held that a zoning board's refusal to allow a group home to expand from 8 to 15 persons did not violate the FHAA's reasonable accommodation requirement.[107]

* A court held that an accommodation to allow construction of an assisted living facility in a commercial district would not be reasonable since individuals with disabilities were not being denied any housing opportunities available to non-disabled individuals, even though the town had re-zoned some parts of the commercial district to allow some residential uses.[108]

* A court held that a municipality did not violate the FHAA's reasonable accommodation requirement when it denied a developer's request for a waiver of density requirements to allow it to build accessible housing units for persons with disabilities since the developer's reason for the requested waiver -- concern about the increased cost of the units if the requirement was not waived -- was not a valid reason to justify a zoning accommodation.[109]

* A court held that plaintiffs had failed to establish their reasonable accommodation claim to require the town to allow operation of a vacation residence for persons with mental retardation by waiving the law limiting to four the number of unrelated persons who can live together because plaintiffs had failed to prove that the residence would not be economically viable without a larger number of residents than allowed by the zoning law or that there was a need for such a program.[110]

* A court held that the City's application of its zoning ordinance, which required group homes for five or more persons to seek a special exception to operate in the primary residential district, did not violate the FHAA's reasonable accommodation requirement.[111]

* A court held that a city's refusal to allow more than eight people to live in a group home did not violate the reasonable

accommodation requirement since the city's zoning law permitted up to eight unrelated persons with disabilities to live together while it permitted only three unrelated, non-disabled persons to live together.[112]

* A court held that it was not a reasonable accommodation to grant a variance to allow construction of a two-story, four-unit apartment building in residential district simply because the first floor units would be accessible, stressing that the reasonable accommodation mandate did not require waiver of any zoning rule any time a developer wants to develop accessible housing.[113]

* A court held that denial of a conditional use permit to construct a community-based residential facility was not a violation of the reasonable accommodation provision since the application was denied due to the inadequacy of the plans and because the proposal was inconsistent with the zoning scheme.[114]

* A court rejected a reasonable accommodation claim challenging a city's denial of a special use permit to allow an adult foster care facility to operate in the central business district since the city stated it would assist the provider to locate another location.[115]

* A city did not violate the FHAA by refusing to allow the plaintiffs to re-zone their property to build four five-person homes for people who are elderly or have disabilities since the plaintiffs could have built as many as 15 three-person residences on their property without the city's permission and thus the accommodation was not necessary.[116]

* The town's refusal to waive a requirement that the plaintiffs subdivide their property if they wanted to keep their own residence on the site of their proposed 21-unit assisted living facility and the requirement that the plaintiffs allow review of the plans did not violate the FHAA because waiver of those requirements were not necessary for the plaintiffs to establish the facility.[117]

IV. ENFORCEMENT OF THE FHAA

Who Can Complain Of FHAA Violations?

The FHAA permits any "aggrieved party" to complain of violations.[118] This obviously includes individuals with disabilities who live in or would live in the housing. It also includes

individuals who do not have handicaps but who live with those who do as well as entities that provide services to people with handicaps.[119] In order to assert a claim, a person or entity must show only that (1) there has been an actual or threatened injury; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury can be redressed by the requested relief.[120]

Are There Means Of Relief Short Of Going To Court?

Yes. An "aggrieved party" who has been the victim of housing discrimination may file an administrative complaint with the United States Department of Housing and Urban Development (HUD). An administrative complaint *must* be filed within one year of the discriminatory act.[121] HUD can send you a complaint form or you can download a complaint form from HUD's website, www.hud.gov, which you can complete and mail to:

Office of Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
Room 5204
451 Seventh Street, S.W.
Washington, D.C. 20410-2000

Alternatively, you can file a complaint online at HUD's website, www.hud.gov or by calling HUD toll-free at 800-669-9777.

If you do not use HUD's complaint form, you can send a letter to HUD, which includes: (1) your name, address, and phone number; (2) the name and address of the person or entity who your complaint is against; (3) the address of the dwelling that is the subject of your complaint; and (4) a description of the violation, including the date or dates when important actions occurred. You should mail the letter to:

Philadelphia Regional Office of Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
The Wanamaker Building
100 Penn Square East

Philadelphia, PA 19107-3380

Within 100 days after you file a complaint with HUD, the agency should conduct an investigation and make a determination as to whether reasonable cause exists to believe a discriminatory housing practice has occurred.[122] In addition, HUD may seek to resolve the matter through "conciliation."[123] If conciliation is unsuccessful and HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, HUD will prosecute the action,[124] either administratively or in court,[125] and pay all litigation expenses that may be incurred.[126] If, however, the matter involves the legality of local zoning or land use laws or ordinances and conciliation proves unsuccessful, HUD will not make a reasonable cause determination but, instead, will refer the investigative material to the United States Department of Justice.[127]

In addition to formal methods of enforcing the FHAA, bringing to the attention of local officials the requirements of the Act and the many examples of successful enforcement in Pennsylvania will often succeed in resolving the zoning problems.

How Can You Seek Judicial Relief?

If you believe that you have a claim of housing discrimination, you may file a complaint in state or federal court under the Act within two years of the date of the discriminatory practice.[128] You do *not* need to file a complaint with HUD before filing suit.[129] Since the FHAA allows, but does not require, the court to appoint a lawyer to represent persons who are unable to afford counsel,[130] it may be best for persons who are indigent to proceed directly to court.

For more information on your rights or assistance in enforcing your rights under the Fair Housing Act, you can contact the Regional Fair Housing and Equal Opportunity Office of the Department of Housing and Urban Development at (215) 656-0663 ext. 3241 or (888) 799-2085

(voice) or (215) 656-3450 (TDD) or the intake system of Disability Rights Network of Pennsylvania at (800) 692-7443 (voice) or 877-375-7139 (TDD)

What Remedies Are Available In An FHAA Lawsuit?

The FHAA allows private individuals who establish that a discriminatory housing practice has occurred to recover actual and punitive damages as well as an injunction to stop the FHAA violation.[131] While the statute allows the recovery of punitive damages, it is unsettled whether such damages can be recovered against municipalities in light of a non-FHAA decision by the Supreme Court that held that punitive damages cannot be assessed against municipalities in civil rights suits under 42 U.S.C. § 1983.[132] A prevailing party under the FHAA also may recover his attorneys' fees and costs.[133]

V. POSSIBLE DEFENSES TO FHAA CLAIMS

A municipality may raise any number of defenses to an FHAA claim. A defendant may assert that the prospective residents of a facility do not have disabilities protected by the FHAA. A defendant also may dispute the substance of the FHAA claims (e.g., asserting that the defendant did not intend to discriminate against plaintiffs, that an ordinance does not disparately impact people with disabilities, or that a requested accommodation is unreasonable). There are, however, several other defenses that may arise in FHAA litigation involving zoning laws and practices that should be considered prior to filing suit.

The Maximum Occupancy Limit Exemption

The FHAA exempts completely ordinances that restrict "the maximum number of persons permitted to occupy a dwelling."[134] Until 1995, many municipalities defended FHAA challenges to the limited number of unrelated persons who may live together by arguing that such restrictions were exempt from the FHAA because they constituted maximum occupancy

limitations. In 1995, the Supreme Court settled the dispute and definitively ruled that such zoning ordinances were not exempt from the FHAA's reach (although the Court did not rule on the question of whether the application of such ordinances violated the FHAA).[135] However, true occupancy limitations that serve health and safety purposes (i.e., those that link the number of persons, regardless of disability, to the size of the dwelling) may be exempt under the FHAA.

The Direct Threat Defense

The FHAA provides that a dwelling need not be made available to a person "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."[136] This exception to the FHAA's prohibition on discrimination must be narrowly construed.[137] The FHAA's direct threat provision, therefore, does not permit a municipality to impose zoning restrictions on persons with disabilities that are "based on blanket stereotypes." Instead, any restrictions "must be tailored to particularized concerns about individual residents."[138] Moreover, the FHAA's reasonable accommodation provision may preclude a municipality from determining that an individual is a direct threat if there are reasonable means to accommodate his disability that would eliminate any direct threat.[139]

The Statute of Limitations

The FHAA requires that suits be filed no later than two years after the occurrence or termination of an alleged discriminatory housing practice.[140] If the individual has filed a HUD complaint, however, the two-year statute of limitations does not run while the HUD proceedings are pending.[141]

Ripeness and Exhaustion

It is well-settled that an individual need not file a federal administrative proceeding with HUD before filing a federal lawsuit under the FHAA.[142] It is also well-settled that an individual need not exhaust state remedies before filing a FHAA action in federal court against a state or municipal government under 42 U.S.C. § 1983.[143]

While exhaustion of administrative remedies is not required, many federal courts have now held that an individual cannot proceed with a FHAA action before s/he has received a final negative decision from a local official or body that has final authority to apply the challenged zoning law (e.g., a zoning hearing board or planning commission) because, absent such a decision, the case would not be "ripe."[144] Undue delay in consideration of an application may be sufficient to make a case ripe.[145] There are several exceptions to the ripeness doctrine in the FHAA context:

* Individuals need not present disparate treatment claims, such as facial challenges to zoning laws, to local decision-makers before pursuing federal FHAA claims.[146] For example, if a town has a law that prohibits group homes from operating within 2,000 feet of each other and a provider wants to operate a group home within 1,500 feet of an existing he can immediately file a federal FHAA lawsuit to challenge the validity of the facially discriminatory statute. The provider may not, however, assert that the town violated the FAA's reasonable accommodation provision by failing to waive the 2,500 foot spacing requirement unless the provider first requests such a waiver from the local decision-maker with final authority to make such a determination.

* Individuals who are challenging the local variance procedures need not pursue such procedures.[147]

* Individuals need not request action by a final decision-maker if such action would be futile.[148]

In those instances when an initial zoning decision is necessary for the case to be ripe, a party can proceed with a FAA claim in court after a decision on his zoning application and he need not pursue further administrative or state court appeals. The case is "ripe" after the initial

denial of the application and requiring further procedures would impose an impermissible exhaustion of remedies requirement.[149]

Abstention and Res Judicata

Once an individual has a proceeding pending before a state administrative or judicial body, there are serious ramifications for potential FAA claims in federal court if an individual or provider chooses to pursue state zoning remedies beyond any initial request for a variance, permit, or similar permission. If the individual chooses to bring a FAA claim in federal court while his or her state zoning procedures are pending before administrative or judicial tribunals, the federal court may be -- but is not always -- required to abstain until the state proceedings are completed.[150] Additionally, the federal court may find that the plaintiff is precluded from raising any FAA claims in federal court that he did raise -- or even claims he could have but chose not to raise -- in the state proceedings.[151]

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NOTES

1. 42 U.S.C. §§ 3601-3631.

2. Though this booklet focuses on zoning issues, you should note that other types of local land use laws may also be subject to challenge under the FHAA. For example, in *McGary v. City of Portland*, 386 F.3d 1259, 1264 (9th Cir. 2004), the court held that the plaintiff could pursue an FHAA challenge to the City's enforcement of its nuisance ordinance pursuant to which the City ordered plaintiff -- who had AIDS and was periodically hospitalized -- to clean his front yard and, when he failed, the City cleaned the yard, charged the plaintiff to do so, and imposed a lien on his property.

3. The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act can also be used to challenge discriminatory zoning actions. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574, 579-80 (2d Cir. 2003); *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WL 292179 at * 6 (N.D. Gal. Feb. 7, 2006); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at *5 (D. Neb. Dec. 22, 2005); *Dadian v. Village of Wilmette*, No. 98 C 3731, 1999 WL 299887 at *4-*5 (N.D. Ill. May 4, 1999) (collecting cases). *Contra Kessler Institute for Rehabilitation v. Mayor of Essex Fells*, 876 F. Supp. 641, 655 (D.N.J. 1995); *Robinson v. City of Friendswood*, 890 F. Supp. 616, 620 (S.D. Tex. 1995). The ADA and Section 504 are the only federal laws that can be used to challenge discriminatory zoning actions that affect non-residential property uses (*e.g.*, rehabilitation facilities). *E.g., MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (1999); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48-49 (2d Cir. 1997); *A Helping Hand, L.L.C. v. Baltimore County*, CCB-92-2568, 2005 WL 2453062 at * 8 (D. Md. Sept. 30, 2005); *First Step, Inc. v. City of New London*, 247 F. Supp. 2d 135, 149-53 (D. Conn. 2003).

4. H.R. Rep. No. 100-711, at 13 (1988) (*quoted in Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069 (N.D. Ill. 1996)).

5. 24 C.F.R. §§ 100.50(b), 100.70(a).

6. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-732, 737 n.11 (1995); *Alexander v. Riga*, 208 F.3d 419, 425 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001); *Samaritan Inns, Inc. v. Dist. of Columbia*, 114 F.3d 1227, 1234 (D.C. Cir. 1997); *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069 (N.D. Ill. 1996).

7. *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 200 (5th Cir. 2000) (collecting cases).

8. 42 U.S.C. § 3602(h).

9. 24 C.F.R. § 100.201.

10. *E.g., Keys Youth Services, Inc. v. City of Olathe*, 52 F. Supp. 2d 1284, 1297-1300 (D. Kan. 1999) (holding that youngsters with learning disabilities and severe emotional disorders were protected by the FHAA), *reconsideration denied*, 67 F. Supp. 2d 1228 (D. Kan. 1999), *aff'd in part, rev'd in part on other grounds*, 248 F.3d 1267 (10th Cir. 2001); *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp. 2d 721, 723 (E.D. La. 1999) (holding that persons with Alzheimer's Disease were protected by the FHAA), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 683 (E.D. Pa. 1999) (holding that persons with brain injury were protected by the FHAA). *But see Caron v. City of Pawtucket*, 307 F. Supp. 2d 364, 368 (D.R.I. 2004) (old age, by itself, is not a disability). However, the Supreme Court has held that "mitigating" measures must be considered in determining whether a person is substantially limited in his major life activities so as to be protected by federal disabilities laws. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Thus, a person with diabetes that is controlled completely with medication will not be deemed a person with a disability.

11. 42 U.S.C. § 3602(h); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46-48 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002). In determining whether a person is "currently" using illegal drugs, the courts have held that the benchmark is the date of the alleged discrimination that was the basis for the lawsuit; illegal drug use after the lawsuit is filed would not warrant dismissal. *See Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 608-09 (D.N.J. 2000).

12. 42 U.S.C. § 3602(h). *E.g., Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002).

13. *See San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *Smith & Lee Associates, Inc. v. City of Taylor*, 13 F.3d 920, 924 (6th Cir. 1993), *app. following remand*, 102 F.3d 781 (6th Cir. 1996); *Cohen v. Township of Cheltenham*, 174 F. Supp.2d 307, 320-21 (E.D. Pa. 2001); *United States v. City of Chicago Heights*, No. 99 C 4461, 1999 WL 1068477 at *3 (N.D. Ill. Nov. 19, 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at *6-*7 (E.D. Pa. July 30, 1998); *United States v. Borough of Audubon*, 797 F. Supp. 353, 357 (D.N.J. 1991), *aff'd mem.*, 968 F.2d 14 (3d Cir. 1992); *see also Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

14. 42 U.S.C. § 3604(f)(1) (emphasis added).

15. 42 U.S.C. § 3604(f)(2) (emphasis added).

16. 42 U.S.C. § 3604(f)(3)(A) (emphasis added).

17. 42 U.S.C. § 3604(f)(3)(B).

18. *Alexander v. Riga*, 208 F.3d 419, 426-27 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001).

19. 42 U.S.C. § 3617. A defendant may be found liable for violating Section 3617 without being found liable for any other violation of the FHAA. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613 n.7 (D.N.J. 2000).

20. *E.g., San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477-78 (9th Cir. 1998) (refusing to grant summary judgment for city in case alleging that city officials retaliated against plaintiff after plaintiff proposed using property to provide residential housing for persons with mental illness); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1238-39 (D.C. Cir. 1997) (nonprofit corporation entitled to recover damages for delayed capital contributions caused by city's improper interference with construction permits for facility for former drug and alcohol abusers); *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613-14 (D.N.J. 2000) (refusing to dismiss claim against township and police department accused of campaign of harassment intended to drive out persons living in houses for recovering substance abusers and holding that violence or physical coercion are not a prerequisite to such a claim); *cf. Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48-49 (2d Cir. 1997) (affirming preliminary injunction pursuant to Americans with Disabilities Act and Rehabilitation Act barring city from interfering with rehabilitation center's occupation of new site).

21. *E.g., Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532 (5th Cir. 1996) (nonprofit corporation stated claim against city for refusal to issue necessary permits for treatment center for emotionally disturbed women due to deed restriction); *Martin v. Constance*, 843 F. Supp. 1321, 1325-26 (E.D. Mo. 1994) (enjoining neighbors from attempting to enforce restrictive covenant against group home); *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) (attempt to enforce restrictive covenant to prevent house from being used as group home violated FHAA); *Hill v. Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996) (enforcement of restrictive covenant to bar group home for people with AIDS would violate FHAA).

22. In one case, the court refused to impose liability against neighbors whose vehement opposition to a group home based on stereotypes and prejudice caused the provider to cancel the purchase of a home in the area. *Salisbury House, Inc. v. McDermott*, No. 96-CV-6486, 1998 WL 195693 (E.D. Pa. Mar. 24, 1998). In that case, the court, concerned about potential First Amendment issues, held that only the use of some sort of force or compulsion would be sufficient to establish liability for interference under the FHAA when only speech was involved. *Id.* at *13; *see also Michigan Protection & Advocacy Service, Inc.*

v. Babin, 18 F.3d 337, 347-48 (6th Cir. 1994) (neighbor's purchase of property to prevent it from being used as a group home did not violate FHAA); *Pathways, Inc. v. Dunne*, 172 F. Supp.2d 357, 365-66 (D. Conn. 2001) (discussing application of *Noerr-Pennington* doctrine to preclude FHAA challenge to actions of neighbors to use government channels, including state court proceedings, to stop group home), *aff'd in part, rev'd in part on other grounds*, 329 F.3d 108 (2d Cir. 2003).

23. *See Ventura Village, Inc. v. City of Minneapolis*, 318 F. Supp. 2d 822, 827-28 (D. Minn. 2004) (rejecting neighbors' claim that city violated FHA by allowing group home because it would result in segregation of the residents based on race and disability), *aff'd*, 419 F.3d 725 (8th Cir. 2005).

24. H. Rep. No. 100-711, at 24 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 2173, 2185.

25. *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 851 (S.D. Ohio 1996).

26. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1295 (D. Md. 1993).

27. *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170, 177 (3d Cir. 2005); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 225 (D.D.C. 2003); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774 (E.D.N.Y. 1999).

28. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 611 (D.N.J. May 16, 2000).

29. 411 U.S. 792 (1973); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-10 (1993).

30. *See Sanghvi v. City of Claremont*, 328 F.3d 532, 536 & n.3 (9th Cir.), *cert. denied*, 540 U.S. 1075 (2003); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 273 (10th Cir. 2001); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997); *Ring v. Interstate Mortg., Inc.*, 984 F.2d 924, 926 (8th Cir. 1993).

31. Where a plaintiff has direct evidence of discriminatory intent, it is not necessary to resort to the *McDonnell Douglas* burden shifting scheme. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985); *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 1273 n.6 (10th Cir. 2001).

32. *See Sanghvi v. City of Claremont*, 328 F.3d 532, 536 (9th Cir.), *cert. denied*, 540 U.S. 1075 (2003); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th

Cir. 1997); *Asbury v. Brougham*, 866 F.2d 1276, 1280 (10th Cir. 1989); *Selden Apartments v. U.S. Dep't of Housing & Urban Development*, 785 F.2d 152, 159 (6th Cir. 1986); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1978).

33. *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 401 (2d Cir. 1998).

34. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 797 (3d Cir. 1990).

35. *Weldon v. Kraft, Inc.*, 896 F.2d 793, 797 (3d Cir. 1990). The plaintiff's prima facie case, combined with sufficient evidence that the defendant's proffered justification for the action is false, may permit the court to conclude that defendant's action was discriminatory without more direct evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000).

36. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 612 (D.N.J. 2000) (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 255-56 (1977)).

37. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003); *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WL 292179 at *7 (M.D. Ga. Feb. 7, 2006); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at *6 (D. Neb. Dec. 22, 2005); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774 (E.D.N.Y. 1999) (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977)); *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 612 (D.N.J. 2000); *see also Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002) (noting that discriminatory intent can be inferred from totality of circumstances, including historical background of decision, sequence of events, and contemporaneous statements by decision-making body).

38. *United States v. City of Chicago Heights*, No. 99 C 4461, 1999 WL 1068477 at *5 (N.D. Ill. Nov. 19, 1999).

39. *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48-52 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *see also Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 579-80 (2d Cir. 2003) (factors showed that denial of permit for group home for recovering substance abusers was motivated by discriminatory intent).

40. *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1500 (W.D. Wash. 1997).

41. *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 850-52 (S.D. Ohio 1996).

42. *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992), *aff'd mem*., 995 F.2d 217 (3rd Cir. 1993).

43. *Easter Seal Society of New Jersey, Inc. v. Township of North Bergen*, 798 F. Supp. 228, 234 (D.N.J. 1992).

44. *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1211-16 (D. Conn. 1992).

45. *United States v. Borough of Audubon*, 797 F. Supp. 353, 359-62 (D.N.J. 1991), *aff'd mem.*, 968 F.2d 14 (3d Cir. 1992).

46. *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 133-35 (N.D.N.Y. 1992); *see also United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220, 224 (D.P.R. 1991) (granting preliminary injunction against zoning agency's refusal to give permission to operate nursing home for persons with severe mental and physical disabilities in residential area where decision was based on neighborhood pressure); *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Administration*, 740 F. Supp. 95, 103-06 (D.P.R. 1990) (holding that denial of special use permit for AIDS hospice was the result of discriminatory animus due to community opposition and thus violated the Act); *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720, 732 (S.D. Ill. 1989) (granting preliminary injunction against zoning authority's refusal to issue use permit to create home for persons with AIDS where the refusal was attributable to community opposition).

47. *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991).

48. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 611-13 (D.N.J. 2000).

49. *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774-76 (E.D.N.Y. 1999).

50. *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 221 (3d Cir. 1998) (citing portion of unpublished district court's opinion that defendants did not appeal).

51. *Byrom v. Charlotte County*, No. 204CV365FTM29DNF, 2005 WL 2219379 at *7 (M.D. Fla. Sept. 12, 2005).

52. *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 225-28 (D.D.C. 2003).

53. *See, e.g., Hamm v. City of Gahanna*, 109 Fed. Appx. 744, 747-49 (6th Cir. 2004) (holding that the city did not violate the FHA by refusing to re-zone to allow the plaintiffs to construct on their property group homes for people who are elderly

and have disabilities since the evidence indicated that the decision was based on the city's desire to protect property values and the community opposition was based on concerns about property values rather than the disabilities of the residents); *Sanghvi v. City of Claremont*, 328 F.3d 532, 536-37 (9th Cir.) (upholding jury verdict that city did not intentionally discriminate against operators of residential facility for people with Alzheimer's disease by refusing to allow expansion of the facility and connection to the city's sewer system unless the operators agreed to annexation), *cert. denied*, 540 U.S. 1075 (2003); *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437, 439 (7th Cir. 1999) (holding that decision not to re-zone a lot to allow developer to build a number of wheelchair-accessible units was not the result of intentional discrimination because it was not "actuated by a dislike of handicapped people" and the denial of the developer's plan, even though the defendant had allowed some higher-density developments in the area, was not so anomalous as to support an inference of discrimination); *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WL 292179 at *7-*8 (M.D. Ga. Feb. 7, 2006) (rejecting claim that city's denial of plaintiffs' plan to open group care facility for persons who are elderly or have disabilities was not intentional discrimination (even though the city misclassified the use under its zoning code) because the city's concern was not the disabilities of the prospective clients but the operation of a business in a single family neighborhood); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at *6-*7 (D. Neb. Dec. 22, 2005) (finding no evidence of intentional discrimination in decision to deny special use permit for group residence for recovering substance abusers since the decision was motivated by concerns that the group home would contravene the spacing ordinance that limited the number of group homes in a certain area rather than the disabilities of the residents); *Barry v. Town of Rollinsford*, No. 02-147M, 2003 WL 22290248 at *5-*6 (D.N.H. Oc.t 6, 2003) (holding that the refusal to allow an assisted living facility was not result of intentional discrimination because it was motivated by concern about the size of the facility rather than the residents' disabilities), *app. dismissed*, 106 Fed. Appx. 738 (1st Cir. 2004); *Keys Youth Services, Inc. v. City of Olathe*, 75 F. Supp. 2d 1235, 1243-45 (D. Kan. 1999) (holding that decision not to allow 10-person program for troubled youth with emotional and learning disabilities was not motivated by the disabilities of the potential residents, but, rather, by public safety concerns in light of evidence that residents of similar programs in the area engaged in anti-social and aggressive behavior), *aff'd*, 248 F.3d 1267 (10th Cir. 2001).

54. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 289 (6th Cir. 1996).

55. *Community Services, Inc. v. Wind Gap Municipal Authority*, 42 F.3d 170, 177 (3d Cir. 2005); *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500-01 & n.16 (10th Cir. 1995); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 643 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp.1057, 1069 (N.D. Ill. 1996); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd mem.*, 995

F.2d 217 (3d Cir. 1993).

56. Many courts have held that laws may be facially discriminatory even though they do not expressly use words such as "handicap" or "disability" if the laws' main targets and impact are people with disabilities. This is true even though the laws also may have an incidental impact on non-disabled people. *See Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp.2d 208, 222 (D.D.C. 2003); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 644 n.12 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069-70 (N.D. Ill. 1996). Recently, however, the Court of Appeals for the Third Circuit in *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 U.S. 170 (3d Cir. 2005) held that a "technically neutral proxy" will only be deemed to be facially discriminatory if the focus is on disability status. *Id.* at 177-79. The court concluded that the defendant's "personal care home" classification was not a proxy for disability, finding that it could have encompassed the elderly, juveniles, the homeless, battered women or ex-offenders and, thus, did not necessarily mean "home for the disabled or handicapped." *Id.* at 179; *see also Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp.2d 376, 388-89 & n.20 (E.D. Pa. 1999) (rejecting facial discrimination challenge to zoning ordinance where the ordinance did not expressly treat persons with disabilities different from others and did not even mention personal care homes or senior assisted living homes).

57. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996: *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 643 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1072 (N.D. Ill. 1996); *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 620 (D.N.J. 1994) (citing, *inter alia*, *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978)).

58. *See United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 843 (N.D. Ill. 2001); *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 851 (S.D. Ohio 1996); *Association for Advancement of the Mentally Handicapped v. City of Elizabeth*, 876 F. Supp. 614, 620 (D.N.J. 1994) (quoting *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978)). In examining the zoning law's justification, there is a dispute as to whether a facially discriminatory zoning law will be valid under the FHAA if it has a benign purpose. *Compare Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 94-95 (8th Cir. 1991) (upholding dispersion requirement for group homes against FHAA challenge because it advanced the goals of deinstitutionalization and integration), *with Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504-05 (10th Cir. 1995) (stressing that on remand in FHAA zoning case that court "should be chary about accepting the justification that a particular restriction upon the handicapped really advances their housing opportunities rather than discriminates against them in housing," but accepting that narrowly tailored restrictions that meet the needs of particular individuals could be

acceptable under the FHAA if the benefits clearly outweigh the burdens), *Larkin v. Michigan*, 89 F.3d 285, 291 (6th Cir. 1996) (holding that "integration is not a sufficient justification for maintaining permanent quotas under ... the FHAA"), *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1498-99 (W.D. Wash. 1997) (rejecting argument that integration justified dispersion requirement for group homes), and *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 (D. Md. 1993) ("'integration is not an adequate justification under the FHAA'").

59. *See Association for Advancement of the Mentally Handicapped v. City of Elizabeth*, 876 F. Supp. 614, 621-22 n.6 (D.N.J. 1994); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 n.9 (D. Md. 1993); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993).

60. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 289-92 (6th Cir. 1996) (holding that 1,500 foot dispersion requirement violated the FHAA); *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1496-1500 (W.D. Wash. 1997); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 644-46 (D.N.J. 1996) (holding that dispersion requirements were discriminatory classifications); *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 618, 621-25 (D.N.J. 1994) (holding that dispersion requirement that precluded community residents for six or more persons within 1,500 feet of an existing residence for victims of domestic violence or a school or day care center violated FHAA); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 693-95 (E.D. Pa. 1992) (holding that dispersion requirement that precluded group homes within 1,000 feet of each other violated FHAA), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *cf. Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 950-55 (E.D. Wis. 1998) (holding that density and dispersion requirements were not facially invalid but that they were preempted by FHAA). *Contra Familystyle of St. Paul v. St. Paul*, 923 F.2d 91, 94-95 (8th Cir. 1991) (holding that statute requiring group homes to be located at least one-quarter mile from each other absent a conditional use or special use permit was not invalid under FHAA because the statute advanced the purposes of deinstitutionalization and integration).

61. *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 844-45 (N.D. Ill. 2001).

62. *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069-78 (N.D. Ill. 1996).

63. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 656-59 (W.D. Pa. 2003); *In re Millcreek Township Zoning Ordinance No. 87-24*, 4 D & C 4th 449, 457-61 (Pa. Ct. Com. Pl. July 25, 1989).

64. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500-01 & n.16 (10th Cir. 1995).

65. *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 46-48 (6th Cir. 1992).

66. *Ardmore, Inc. v. City of Akron, Ohio*, Case No. 90-CV-1083, slip op. at 10 (N.D. Ohio Aug. 2, 1990).

67. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296-97 (D. Md. 1993); *see also Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 292 (6th Cir. 1996).

68. *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 19 F. Supp. 2d 567, 571-72 (N.D. W.Va. 1998).

69. *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 221-25 (D.D.C. 2003).

70. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574-75 (2d Cir. 2003); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 467 (3d Cir. 2002); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 655 (W.D. Pa. 2003).

71. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 52-53 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 467 (3d Cir. 2002). Other courts have adopted a somewhat different formulation, holding that it is appropriate to look at: (1) the strength of the showing that the action adversely affects people with disabilities; (2) whether there is some evidence of discriminatory intent; (3) the government's interest in taking the action; and (4) whether the aggrieved person seeks to compel the government to provide housing or merely seeks to restrain it from interfering with individual property owners. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) ((establishing general standard for assessing disparate impact adopted in a race discrimination case); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (same standard in race discrimination case), *cert. denied*, 434 U.S. 1025 (1978); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1295 (D. Md. 1993) (applying *Smith* test in handicap discrimination case under the FHA).

72. *See Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 655-56 (W.D. Pa. 2003); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1182-85 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 461 (D.N.J. 1992); *United States v. Schuylkill Township*, C.A. No. 90-2165, 1990 U.S. Dist. LEXIS 15555 at *25-*32 (E.D. Pa. Nov. 16, 1990).

73. *See Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp. 2d 376, 389 (E.D. Pa. 1999); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp.

2d 762, 776-77 (E.D.N.Y. 1999); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 136 (N.D.N.Y. 1992).

74. *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 688, 690 (N.D.N.Y. 1999).

75. *Tsombanidis v. West Haven Fire Dep't*, 352 F. 3d 565, 575-78 (2d Cir. 2003).

76. *See Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 53 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002) (holding that disparate impact theory is inapplicable when the plaintiff does not challenge a facially neutral policy); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (holding that disparate impact analysis should be utilized only for laws that apply to people with and without disabilities to determine whether their impact on people with disabilities constitutes discrimination).

77. *See Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290-92 (6th Cir. 1996) (holding that licensing requirement that barred issuance of license to adult foster care facility if it was within 1,500 feet of another facility violated FHAA); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 697-99 (E.D. Pa. 1992) (holding that 1,000 foot spacing requirement violated FHAA because, *inter alia*, it had disparate impact on people with disabilities), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993). *Contra Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 93-95 (8th Cir. 1991) (holding that dispersion requirement served valid purpose of promoting integration of people with disabilities and, therefore, did not have a disparate impact that violated the FHAA).

78. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1297-99 (D. Md. 1993).

79. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1299-1300 (D. Md. 1993).

80. *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1216-21 (D. Conn. 1992).

81. *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Administration*, 740 F. Supp. 95, 106-07 (D.P.R. 1990); *Baxter v. City of Belleville*, 720 F. Supp. 720, 732-33 (S.D. Ill. 1989).

82. 42 U.S.C. § 3604(f)(3)(B).

83. *United States v. City of Philadelphia*, 838 F. Supp. 223, 229 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994).

84. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996); *United States v. City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993) (quotation

omitted), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994). The Tenth Circuit has indicated that the FHAA's reasonable accommodation requirement applies to laws that are "generally applicable" and not to those that only affect persons with disabilities. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-02 (10th Cir. 1995). This analysis seems at odds with the approach of many other courts, which have used the FHAA's reasonable accommodation requirement to require municipalities to waive facially discriminatory ordinances in particular instances rather than take the more drastic approach of declaring an entire law to be invalid.

85. *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 561-62 (7th Cir. 2003).

86. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Bd. of Adjustment*, 284 F.3d 442, 457 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 653 (W.D. Pa. 2003).

87. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 459 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002).

88. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 460 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 653 (W.D. Pa. 2003); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 834 (N.D. Ill. 2001). While it is relatively easy to show that an accommodation of a zoning restriction that precludes housing for people with disabilities is "necessary" to afford equal opportunity, it may be more problematic when the zoning restrictions at issue are not absolute. For example, in *Lapid-Laurel*, the plaintiff sought to construct a 95-bed nursing facility where the township objected to the size of the facility for the site and the surrounding neighborhood. The appellate court agreed that the plaintiff had to show that the size of the proposed facility was required to make it financially viable or medically effective in order to meet the "necessary" prong of the test, and concluded that it had failed to do so. 284 F.3d at 461.

89. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462 (3d Cir. 2002); *Smith & Lee Assoc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996); *Judy B. v. Borough of Tioga*, 889 F. Supp. 792 (M.D. Pa. 1995); *United States v. City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1186 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry*

Hill, 799 F. Supp. 450, 461 (D.N.J. 1992).

90. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462 (3d Cir. 2002).

91. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785-87 (7th Cir. 2002).

92. *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 578-79 (2d Cir. 2003). As discussed below, federal courts generally apply the doctrine of "ripeness" to preclude any FHAA reasonable accommodation claims when the plaintiff had not requested an accommodation from local officials prior to filing suit.

93. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 450-54 (3d Cir. 2002); *cf. Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 1275-76 (10th Cir. 2001) (refusing to consider argument in favor of accommodation when the argument had not been presented to local officials). If the United States files a lawsuit to challenge a refusal to grant a reasonable accommodation, however, it may not be bound by the local administrative record. *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 830 (N.D. Ill. 2001).

94. *See Cohen v. Township of Cheltenham*, 174 F. Supp. 2d 307, 314-16 (E.D. Pa. 2001).

95. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 783-84 (7th Cir. 2002) (collecting cases); cf. U.S. Airways, Inc. v. Barnett, *535* U.S. 391, 401-02 (2002) (burden shifting in reasonable accommodation employment case); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 457 (3d Cir. 2002) (plaintiff bears burden to show accommodation is necessary to afford equal opportunity and then the burden shifts to the defendant to show that the accommodation is unreasonable). *Contra Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603-04 (4th Cir. 1997) (plaintiff bears entire burden of proof on reasonable accommodation claim); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996) (same).

96. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103-06 (3d Cir. 1996); *see also Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 Wl 292179 at *9 (M.D. Ga. Feb. 7, 2006) (city may have denied reasonable accommodation by refusing to allow small home for elderly and people with disabilities in a single family residential district).

97. *United States v. City of Philadelphia*, 838 F. Supp. 223, 228-30 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994).

98. *Judy B. v. Borough of Tioga*, 889 F. Supp. 792, 798-800 (M.D. Pa. 1995).

99. *Smith & Lee Assoc. v. City of Taylor*, 102 F.3d 781, 794-96 (6th Cir. 1996).

100. *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993).

101. *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 435-38 (D.N.J. 1998).

102. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785-87 (7th Cir. 2002); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at *7-*8 (D. Neb. Dec. 22, 2005); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 832-42 (N.D. Ill. 2001); *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 955-59 (E.D. Wis. 1998); *"K" Care, Inc. v. Town of Lac du Flambeau*, 510 N.W.2d 697, 5 ADD 713, 717-22 (Wis. Ct. App. 1993); *United States v. Village of Marshall*, 787 F. Supp. 872, 878-79 (W.D. Wis. 1991).

103. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 652-55 (W.D. Pa. 2003); *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp.2d 721, 724-25 (E.D. La. 1999), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp.2d 676, 684-86 (E.D. Pa. 1999); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1185-86 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 & n.2 (D.N.J. 1992); *Parish of Jefferson v. Allied Health Care, Inc.*, Civil Action No. 91-1199, 1992 U.S. Dist. LEXIS 9124 at *15-*19 (E.D. La. June 10, 1992).

104. *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 562-64 (7th Cir. 2003); *see also Sanghvi v. City of Claremont*, 328 F.3d 532, 538 (9th Cir), *cert. denied*, 540 U.S. 1075 (2003) (city's requirement that facility accede to annexation to secure sewer hook-up for expansion of facility for people with disabilities was not a denial of a reasonable accommodation since the requirement would not burden the residents but only had economic consequences for the provider).

105. *Howard v. City of Beavercreek*, 276 F.3d 802, 806-07 (6th Cir. 2002).

106. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462-66 (3d Cir. 2002).

107. *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 604-06 (4th Cir. 1997).

108. *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 152-53 (2d Cir. 1999).

109. *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437, 439-41 (7th Cir. 1999). While the Seventh Circuit indicated that a zoning ordinance that merely increased the cost of housing for everyone need not be waived, *id.* at

440-41, other courts have indicated that an accommodation of zoning laws may be necessary if the financial impact would eliminate the housing opportunity for persons with disabilities (not merely make it more expensive). *E.g., Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp.2d 721, 724 (E.D. La. 1999), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 686 (E.D. Pa. 1999); *cf. Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 689-90 (N.D.N.Y. 1999) (while rejecting reasonable accommodation claim, the court indicated that evidence that the program would not be economically viable absent accommodation might have yielded a different outcome).

110. *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 689-90 (N.D.N.Y. 1999).

111. *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178-79 (5th Cir. 1996).

112. *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251-52 (8th Cir.), *cert. denied*, 519 U.S. 816 (1996).

113. *Brandt v. Village of Chebanse*, 82 F.3d 172, 174-75 (7th Cir. 1996).

114. *Erdman v. City of Fort Atkinson*, 84 F.3d 960, 962-64 (7th Cir. 1996).

115. *Thornton v. City of Allegan*, 863 F. Supp. 504, 510 (W.D. Mich. 1993).

116. *Hamm v. City of Gahanna*, 109 Fed. Appx. 744, 749-50 (6th Cir. 2004).

117. *Barry v. Town of Rollinsford*, No. 02-147M, 2003 WL 22290248 at *7 (D.N.H. Oct. 6, 2003), *app. dismissed*, 106 Fed. Appx. 738 (1st Cir. 2004).

118. 42 U.S.C. § 3613(a)(1)(A).

119. *See Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 n.2 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332-42 (6th Cir. 2002); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 221-22 (3d Cir. 1998); *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1281-82 (3d Cir. 1993); *Byrom v. Charlotte County*, No. 204CV365FTM29DNF, 2005 WL 2219379 at *4 (M.D. Fla. Sept. 12, 2005); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 651 (W.D. Pa. 2003); *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 2573 F. Supp. 2d 208, 221 (D.D.C. 2003); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 425 (D.N.J. 1998).

120. *See San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995).

121. 42 U.S.C. § 3610(a)(1)(A)(i).

122. 42 U.S.C. § 3610(g)(1).

123. 42 U.S.C. § 3610(b)(1).

124. 42 U.S.C. § 3610(g)(2).

125. The complainant may choose whether HUD will prosecute the complaint through administrative review or judicial proceedings. 42 U.S.C. § 3612(a).

126. 42 U.S.C. § 3612.

127. 24 C.F.R. § 103.400(a)(3).

128. 42 U.S.C. § 3613(a)(1).

129. 42 U.S.C. § 3613(a)(2); *see also In re Millcreek Township Zoning Ordinance No. 87-24*, 4 D. & C.4th 449, 461 (Pa. Ct. Com. Pl. 1989).

130. 42 U.S.C. § 3613(b).

131. 42 U.S.C. § 3613(c)(1); *see also Riga v. Alexander*, 208 F.3d 419, (3d Cir. 2000) (indicating that nominal damages are available under FHAA even absent proof of actual injury and that punitive damages are available without proof of egregious or malicious misconduct), *cert. denied*, 531 U.S. 1069 (2001); *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 222-24 (3d Cir. 1998) (holding that court does not have discretion to decline to award compensatory damages under FHAA; it must award such damages to the extent they are established); *Samaritan Inns, Inc. v. Dist. of Columbia*, 114 F.3d 1227, 1234-38, 1239 (D.C. Cir. 1997) (discussing compensatory damages and holding that punitive damages are available under FHAA and warranted in the circumstances).

132. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The Supreme Court, though, did indicate that punitive damages may be available against municipalities if it can be established that the taxpayers are directly responsible for perpetrating an outrageous violation of civil rights. *Id.* at 267 n.29. The Supreme Court has also held that punitive damages cannot be recovered under the ADA or Section 504 of the Rehabilitation Act. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). The courts have not definitively addressed the question of whether punitive damages are available in actions against municipalities under the FHAA. *Compare Dadian v. Village of Wilmette*, No. 98 C 3731, 1999 WL 299887 at *3 (N.D. Ill. May 4, 1999) (punitive damages are available against municipal government), *with New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of Asbury Park*, 152 F.3d 217, 224-25 (3d Cir. 1994) (questioning without deciding whether punitive damages can be awarded against municipality).

133. 42 U.S.C. § 3613(c)(2).

134. 42 U.S.C. § 3607(b)(1).

135. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-738 (1995).

136. 42 U.S.C. § 3604(f)(9). Similar "direct threat" provisions are also included in the Americans with Disabilities Act. 42 U.S.C. §§ 12113(b); 12183(b)(3).

137. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995).

138. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995); *see also Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 622-23 (D.N.J. 1994).

139. *Roe v. Sugar River Mills Associates*, 820 F. Supp. 636, 639 (D.N.H. 1993) (discussing direct threat requirement in landlord-tenant context).

140. 42 U.S.C. § 3613(a)(1)(A); *see also Community Interactions-Bucks County, Inc. v. Township of Bensalem*, 5 ADD 933 (E.D. Pa. 1994).

141. 42 U.S.C. § 3613(a)(1)(B); *see also Comorato v. Fox & Lazo of Pennsylvania, Inc.*, 2 ADD 858 (E.D. Pa. 1993) (discussing equitable tolling of statute of limitations), *aff'd mem.*, 27 F.3d 556 (3d Cir. 1994).

142. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 102-09 & n.11 (1979); *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp.2d 686, 688 (N.D.N.Y. 1999); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 433 (D.N.J. 1998).

143. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1982); *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp.2d 686, 688 (N.D.N.Y. 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at *5 (E.D. Pa. July 30, 1998).

144. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 451-52 n.5 (3d Cir. 2002) (dicta); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir.), *cert. denied*, 519 U.S. 816 (1996); *United States v. Village of Palatine*, 37 F.3d 1230, 1233 (7th Cir. 1994); *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp.2d 376, 385-88 (E.D. Pa. 1999); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1260-62 (E.D. Va. 1993); *see also Smith & Lee Associates v. City of Taylor*, 13 F.3d at 929-30 (holding that city could not simply issue a letter granting a reasonable accommodation when the local zoning law did not permit such a procedure and, instead, any reasonable accommodation would require either "spot zoning" or an amendment of the zoning law); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 726, 771-72 (E.D.N.Y. 1999) (holding that case was ripe where enactment of revised zoning law was "tantamount to a final denial" of a special use permit). *But see*

Advocacy and Resource Center v. Town of Chazy, 62 F. Supp.2d 686, 689 (N.D.N.Y. 1999) (holding that case was ripe after town issued enforcement notices against residential provider).

145. *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 199-200 (5th Cir. 2000).

146. See *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 452 n.5 (3d Cir. 2002); *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp. 2d 376, 388-89 (E.D. Pa. 1999). *See generally Psidium v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (in due process "takings" case, the court noted that facial challenges to ordinances or regulations are generally ripe the moment the challenged ordinance or regulation is passed).

147. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 452 n.5 (3d Cir. 2002).

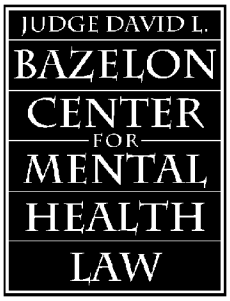
148. *See MX Group, Inc. v. City of Covington*, 293 F.3d 326, 343-44 (6th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 452 n.5 (3d Cir. 2002); *United States v. Village of Palatine*, 37 F.3d 1230, 1233-34 (7th Cir. 1994); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 770 (E.D.N.Y. 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at *6 (E.D. Pa. July 30, 1998); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 425-28 (D.N.J. 1998); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1261 (E.D. Va. 1994); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

149. *Bryant Woods Inn Inc. v. Howard County*, 124 F.3d 597, 601-02 (4th Cir. 1997) (holding that FAA claim filed by group home operator who sought to expand size of program was "ripe" after the zoning board denied his request for expansion and that he was not required to pursue an appeal of that decision either under an "exhaustion" doctrine or a "ripeness" requirement); *cf. Community Interactions-Bucks County, Inc. v. Township of Bensalem*, 8 ADD 276, 278-79 (E.D. Pa. 1994) (refusing to dismiss FAA claim where complaint alleged that defendant refused to issue necessary building permit).

150. *E.g., Pathways, Inc. v. Dunne*, 329 F.3d 108 (2d Cir. 2003) (holding that *Younger* abstention did not preclude court's consideration of FHAA claims since the state proceedings had concluded); *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1074-75 (6th Cir. 1998) (holding that *Younger* abstention was appropriate where an action to enforce local land use ordinance against rooming house operator was pending in state court); *Cohen v. Township of Cheltenham*, 174 F. Supp.2d 307, 317-19 (E.D. Pa. 2001) (rejecting claims of *Burford*, *Younger*, and *Colorado River* abstention); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 430-33 (D.N.J. 1998) (rejecting *Pullman* and

Colorado River abstention arguments and, more importantly, rejecting *Younger* abstention on the basis that *Younger* does not apply when the proceedings pending are non-coercive (i.e., not enforcement proceedings initiated by the government) but, rather, are "remedial" proceedings initiated by the plaintiff in the federal action); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at *2-*4 (E.D. Pa. July 30, 1998) (holding that *Colorado River* abstention was not warranted and that *Younger* abstention was not justified where the federal plaintiff was the party to instigate the state administrative and judicial proceedings).

151. *See, e.g., Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 428-30 (D.N.J. 1998) (rejecting res judicata argument in FAA case). Discussion of the doctrines of claim and issue preclusion are beyond the scope of this booklet. In considering an FAA claim, however, you must consider the potential impact of these issues when there are or were state proceedings, such as a hearing before a local zoning hearing board or state court.



Allocating the Burden of Proof in Disability Cases Under the Fair Housing Act

FACT SHEET

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Allocating the Burden of Proof in Disability Cases Under the Fair Housing Act

Overview

Federal law forbids housing discrimination against people with disabilities.[1] In addition, the Fair Housing Act (FHA) requires housing providers, local zoning authorities and others to make reasonable changes or "accommodations" in rules, policies, practices or services.[2] Accordingly, a person with a disability should have an equal opportunity to use and enjoy a dwelling unit and the common areas in a housing complex.

Most courts have held that there must be a link or "nexus" between the disability and the requested accommodation. Accommodations or modifications[3] can be requested when someone is applying for housing, during tenancy or when challenging an eviction notice. In the request, a person with a disability must provide proof that he or she has a covered disability, but need not disclose a diagnosis or provide a full medical history to the landlord or zoning board.

This memo catalogs the fair housing cases from each circuit that specifically address the burdens of proof for "reasonable accommodation" claims.[4] If a circuit has not addressed a particular burden, then an advocate may look to other circuits.

In enacting the anti-discrimination provisions of the Fair Housing Act, Congress relied on the standard of reasonable accommodations developed under section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794. *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 334 (2d Cir. 1995). The FHA reasonable accommodation standard protects people with disabilities by making it unlawful to "refuse to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford... equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

The federal circuit courts have taken varying approaches to assigning burdens of proof. A person with a disability may face burden-of-proof issues in the following areas:

(1) Documentation or medical opinion that the person with the disability has a physical or mental impairment. (Plaintiffs carry this burden throughout the circuits. Landlords complain if the disability is not apparent or if it seems mutable).[5]

(2) Proof that the accommodation is necessary to cure or lessen some limitation experienced because of the disability. (This burden works with #1. Experts for the person with a disability should emphasize that the accommodation *will* , rather than "may," help the person.)
(3) Proof that the person with a disability asked for an accommodation.
(4) Proof that a housing provider's alternative accommodation is not effective because it does not cure the limitations experienced by the person with a disability.

The burden of proof appears to shift to the housing provider on the following issues:

(1) Proof that the accommodation offered by the person with a disability is unreasonable; i.e., the accommodation would pose an "undue burden" on the landlord or result in a "fundamental alteration" of the landlord's provision of housing.[6]
(2) Proof that a reasonable, less intrusive alternative exists.
(3) Proof that no accommodation will minimize the risk the disabled tenant poses to other tenants.

This memorandum is meant to serve as a convenient desk reference for advocates who need immediate answers to burden-of-proof questions, particularly in the case of a clients who faces imminent eviction. The following tables illustrate where the burden of proof falls in reasonable accommodation claims for the plaintiff and defendant, respectively.

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Plaintiff's (P) Burden of Proof for Reasonable Accommodations Claims in the Federal Circuits

Circuit	Disability	Nexus between disability & RA	Defendant's Refusal of RA	Proposal of Alternative Solution	Zoning Variances Issues	Direct Threat	Service Animal Issues
D.C. Cir.	No cases address burden of proof						
1st Cir.	P must prove disability & limitations w/o RA.[7]	RA will cure limitations of disability.[8]					
2nd Cir.	Physical condition deprives P of equal opportunity to enjoy dwelling.[9]	P shows RA reasonable on its face and D then has burden to prove RA is unreasonable.[10] RA *necessary* to afford P equal opportunity to use and enjoy dwelling.[11]	P must show D refused request.[12] P must show pain & humiliation caused by D's denial of RA.[13]	P must show P offered alternative solution.[14] Court does not have to consider alternative D offered if P rejected it.[15]	P must show complex not economically viable without variance.[16]		
3rd Cir.	P does not need to prove if D does not challenge its existence.[17]	P shows RA reasonable on its face and D then has burden to prove RA is unreasonable.[18] RA is necessary.[19] Causal nexus not necessary when challenging zoning provision.[20]			Developers must follow zoning ordinance requirements before litigating FHA RA claims.[21]		P must show importance and utility of service animal as a RA.[22]
4th Cir.		P bears entire burden of reasonableness and necessity of RA. Strong nexus required.[23]					P must show animal is specially trained and may need to submit animal to doctor's exam.[24]
5th Cir.		P bears entire burden of reasonableness and necessity.[25] P must demonstrate RA will not unduly burden D or cause fundamental alteration.[26]			P must prove compliance with regulary process for securing variances prior to litigating RA claim.[27]		P must prove disability, necessity, and reasonableness of RA for service animal.[28]
6th Cir.	P must prove.[29]	P bears entire burden of proving reasonableness & necessity of RA.[30]	P must prove D knew about P's disability and D refused to make RA.[32]		P must show overall need for RA for housing providers as well as P's needs.[33]		

6th Cir. (cont.)		Nexus b/tw disability and poor financial situation not enough to require RA of third-party guarantor for rent.[31]					
7th Cir.	P must present comprehensible medical evidence as proof of disability.[34]	P shows RA reasonable on its face and D then has burden to prove RA is unreasonable.[35] P must show RA will affirmatively enhance her quality of life by reducing effects of her disability.[36] Close link required b/tw RA and disability.[37]					
8th Cir.		P shows RA reasonable on its face and D then has burden to prove RA is unreasonable.[38]					
9th Cir.		P shows RA reasonable on its face and D then has burden to prove RA is unreasonable.[39] Causal link b/tw refusal of RA and limitations experienced due to disability.[40] RA must be related to disability rather than economic concern of housing provider.[41]					Service animal is individually trained and helps person with disabilities in household.[42]
10th Cir.		P shows RA reasonable on its face and D then has burden to prove RA is unreasonable.[43] P must show RA satisfies safety interests of landlord.[44]					
11th Cir.			P must show she requested and was denied RA.[45]		P must show they meet definition to qualify for zoning variance.[46]		

Defendant's (D) Burden of Proof for Reasonable Accommodations Claims in the Federal Circuits

Circuit	Denial of RA	Alternative Accommodation/ Modification	Direct Threat Exception	Zoning Issues	Service Animal	Miscellaneous
D.C. Cir.	No Cases	No Cases	No Cases	No Cases	No Cases	No Cases
1st Cir.			D show no RA eliminates risk of tenant posing threat to health/ safety of other tenants.[47]	Zoning board must show granting RA fundamentally alters purpose of zoning ordinance.[48]		D landlord must show RAs were identified and implemented prior to eviction, even if not requested by tenant.[49]
2nd Cir.	RA unreasonable or gives tenant inappropriate advantage compared to other tenants.[50]	D must show modification is unreasonable before requiring P to use alternative modification.[51]		D must show how neighborhood's character would be fundamentally transformed by allowing group home.[52]		Scope of RA: D not required to retrofit building to provide full accessibility.[53]
3rd Cir.	RA is unreasonable.[54]			D must show granting variance would pose undue burden or fundamentally alter town's zoning scheme.[55]	D must show service animal creates threat or disturbance to other residents.[56]	
4th Cir.	No Cases					
5th Cir.	No Cases					
6th Cir.		City does not need to explain dismissal of P's proposed RA if court finds alternative effective and reasonable.[57]				D landlord has an affirmative duty to provide an RA.[58]
7th Cir.	D must show RA unreasonable or would pose undue hardship in particular circumstance.[59]		D must prove P is a direct threat if denying RA b/c views P as direct threat.[60]			D landlord must show she requested additional documentation of disability if using defense that disability was not apparent.[61]
8th Cir.	D must show RA is unreasonable.[62]					

9th Cir.	D must show RA is unreasonable.[63]				D landlord must show animal imposes undue burden or constitutes fundamental alteration of services.[64]	
10th Cir.	D must show RA is unreasonable.[65]		D landlord must show that no RA would eliminate or acceptably minimize the tenant's potential threat to the health and safety of others.[66]			
11th Cir.	No cases					

Notes

[1] 42 U.S.C. § 3601 (Fair Housing Act); 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act of 1973); 42 U.S.C. § 12131 (Americans with Disabilities Act).

[2] 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204.

[33] Reasonable modifications are similar to reasonable accommodations. Generally, a landlord or zoning board must allow a tenant or home owner the ability to make reasonable modifications to a house, dwelling unit or the common area in a complex. However, a landlord can condition approval on the assurance that the modification complies with building codes and that the tenant leaves the unit in a condition acceptable to someone who will not need the modification. Thus, a tenant in a wheelchair should replace the cabinet she removed below her bathroom sink but does not have to narrow the doorways she widened.

[4] The only Fair Housing Act (FHA) case concerning disability to reach the United States Supreme Court, *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995), did not explicitly deal with issues of burden of proof. Instead, the case established the rule that zoning ordinances are subject to FHA challenges.

[5] The argument that people with mutable disabilities should not benefit from ADA protection may influence FHA reasonable accommodation claims. Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations"*, 48 HASTINGS L.J. 75, 76 (1996). In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), two plaintiffs claimed discrimination under the ADA after being refused positions as commercial pilots due to their extreme myopia. The Supreme Court upheld the Tenth Circuit's dismissal of the claim because the two plaintiffs were not disabled within the meaning of the ADA.

[6] 24 C.F.R. § 100.204

[7] Two women who had difficulty walking due to cerebral palsy requested a zoning variance to construct a convenient parking spot in front of their home. The court granted the plaintiffs summary judgment on their ADA and Rehabilitation Act claims. *Trovato v. City of Manchester*, 992 F. Supp. 493 (D.N.H. 1997).

[8] Id.

[9] Applicant-plaintiff raised discrimination and reasonable accommodation claims after being rejected by a transitional housing program for women who were working or enrolled in school. The court agreed that the applicant was not discriminated against because she admitted to receiving SSDI benefits. It held the defendants need not accommodate the plaintiff because her physical condition is not what deprived her of equal opportunity to use and enjoy a dwelling. *United States v. Salvation Army*, 1999 U.S. Dist. LEXIS 14861, at *28 (N.Y.D.C. Sept. 14, 1999).

[10] *Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000), *cert. denied*, 531 U.S. 931 (2000).

[11] Applicants with disabilities unsuccessfully challenged the refusal of apartment providers to rent to them because of their status as Section 8 voucher holders. The court held that the housing providers voluntarily participate in Section 8 housing and cannot be forced to participate through reasonable accommodation claims. *Salute v. Stratford Greens Garden Apt.*, 136 F.3d 293 (2d Cir. 1998), *aff'g* 918 F. Supp. 660 (E.D.N.Y. 1996).

[12] Plaintiffs unsuccessfully contested their eviction as they could not prove that mental illness caused them to put belongings in the common areas. ., 2000 U.S. Dist. LEXIS 12000 (S.D.N.Y Aug. 22, 2000).

[13] A tenant with multiple sclerosis requested a parking space but the landlord refused because of a "first- come/first-serve" policy. The court found for the tenant as the parking space was a reasonable accommodation requiring modest costs to the landlord. *Shapiro v. Cadman Towers, Inc*., 51 F.3d 328 (2d Cir. 1995).

[14] Plaintiffs unsuccessfully contested their eviction as they could not prove that mental illness caused them to put belongings in the common areas. *Wiesner v. 321 West 16th St. Assocs*., 2000 U.S. Dist. LEXIS 12000 (S.D.N.Y Aug. 22, 2000).

[15] *United States v. Freer*, 864 F. Supp. 324 (W.D.N.Y. 1994).

[16] Operator of a vacation home for people with disabilities unsuccessfully challenged a local zoning code. *Advocacy & Resource Ctr. (ARC) v. Town of Chazy*, 62 F. Supp. 2d 686 (N.D.N.Y. 1999).

[17] Condo owner successfully challenged his association's refusal to grant him exclusive use of a parking space to accommodate his disability. The court stated the association was responsible for enforcing the FHA even though the association argued that parking spaces are common elements for the non-exclusive ownership of any one tenant. *Gittleman v. Woodhaven Condo. Ass'n*, 972 F. Supp. 894 (D.N.J. 1997).

[18] *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 457 (3d Cir. 2002).

[19] Bringing a claim under the FHA, the appellant-development firm unsuccessfully challenged the town's zoning board's denial of the firm's application for variances and site plan approval to build an elderly care facility. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442 (3d Cir. 2002).

[20] A housing provider for chronically homeless people with mental illness successfully challenged a zoning requirement. *United States v. City of Philadelphia*, 838 F. Supp. 223 (E.D. Pa. 1993).

[21] A developer of a multi-unit senior assisted-living facility brought suit against the zoning commission after being told not to pursue an amendment to the zoning code. The court dismissed the developer's reasonable accommodation claim because he had submitted neither a preliminary nor a final plan as required by the ordinance. *Marriott Senior Living Servs. v. Springfield Twp.*, 78 F. Supp. 2d 376 (E.D. Pa. 1999).

[22] A condo owner with multiple sclerosis and depression acquired a dog against her association's rules. The dog had received over one year of training, performed numerous tasks for the owner and was a certified and registered therapy dog. The owner successfully challenged her association's attempt to make her give up the dog through fines. *Fulciniti v. Village of Shadyside Condo Assoc*., No. 96-1825 (W.D. Pa. Nov. 20, 1998), *available at* "unreported cases" link on http://www.bazelon.org/housing.html.

[23] Elderly housing provider failed in his challenge to increase the county code from eight to fifteen occupants (as a reasonable accommodation) because the court said that people with disabilities deserved an equal opportunity rather than a financial advantage. Also, the court found that the accommodation was unnecessary under the Fair Housing Act because numerous other group homes existed in Columbia, Maryland, having between 18 to 23 percent vacancy rates. *Bryant Woods Inn v. Howard County*, 124 F.3d 597 (4th Cir. 1997), *aff'g* 911 F. Supp. 918 (D.Md. 1996).

[24] A couple with physical disabilities and depression requested a reasonable accommodation of a service animal from a coop. The coop denied the request because the couple could not prove the service animal had specialized training. The couple had presented a statement from their physician about the medical necessity of the service animal. The West Virginia Supreme Court agreed with the lower court that the coop's requirement that a service animal receive specific training was consistent with the FHA and state law. *In re: McKenna Homes Cooperative Corp*., 210 W.Va. 380, 557 S.E.2d 787 (W.Va. 2001).

[25] *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175 (5th Cir. 1996).

[26] A group home operator successfully challenged the city's refusal to make a reasonable accommodation under the FHA. The group home operator wanted to convert a residential property to a facility for women with Alzheimer's disease. The court relied on the fact that the plaintiff was able to show that the city council had made multiple exceptions to the zoning ordinance for businesses that were more intrusive and disruptive than the group home she requested. *United States v. City of Jackson*, FH-FL Rptr. ¶ 16,230 (S.D. Miss. October 14, 1997).

[27] A homeowner with a physical disability built a carport without a permit in violation of the zoning ordinance. After unsuccessfully seeking a variance, he filed suit claiming the variance was a reasonable accommodation as defined by the FHAA and ADA. He lost because the court said he held an arbitrary and uncompromising position about the carport and had converted an existing two-car garage into living space. The court declared that the FHAA requires a reasonable accommodation rather than the best possible accommodation. The court reasoned that the concept of "reasonable accommodation" requires a balancing of the individual's and municipality's respective interests based on the facts of each case. *Robinson v. City of Friendswood*, 890 F. Supp. 616, 622-623 (S.D. Tex. 1995).

[28] A tenant with mental disabilities appealed the district court summary judgment decision. The circuit appellate court reversed and remanded the district court's decision enforcing the housing authority's "no pets" rule. The appellate court stated that "[e]ven if the 'no pet' rule is itself imminently reasonable, nothing in the record rebuts the reasonable inference that the [Housing]Authority could easily make a limited exception for that narrow group of persons who are handicapped and whose handicap requires... the companionship of a [service animal]." *Majors v. Housing Authority of County of De Kalb*, 652 F.2d 454, 454 (5th Cir. 1981).

[29] Housing applicant unsuccessfully challenged the refusal of a landlord to reasonably accommodate an applicant with a mental disability by allowing a guarantor rather than a blood relative to co-sign. Court discounted applicant's parallel examples as this was an economic rather than a zoning accommodation. *Schanz v. Village Apts*., 998 F. Supp. 784 (E.D. Mich. 1998).

[30] Plaintiff-tenant's disability caused him to make loud noises that disturbed his neighbor and apartment complex began eviction proceedings. Plaintiff failed to show the requested accommodations to inform therapist when he had an outburst, soundproof his apartment, or move him to another apartment were reasonable. *Groner v. Golden Gate Apartments*, 250 F.3d 1039 (6th Cir. 2001).

[31] *Schanz v. Village Apts*., 998 F. Supp. 784.

[32] *Id.*

[33] An owner of a home for adults with Alzheimer's failed in getting a city to allow a variance. The court found that the City of Taylor faced no significant financial or administrative burdens in accommodating Smith & Lee. It also found that such an accommodation would not fundamentally alter the residential nature of areas zoned for single family use because the residents lived as a family. Appellate Court reversed and remanded district court's decision for Smith. *Smith & Lee Assocs. v. City of Taylor, Michigan*, 102 F.3d 781 (6th Cir. 1996).

[34] A public housing tenant's FHA claim failed because he did not present sufficient medical evidence. He had a long and acrimonious relationship with his PHA as it had repeatedly tried to evict him. *Grubbs v. Housing Auth. of Joliet*, 1997 U.S. Dist. LEXIS 7294 (N.D.Ill. May 20, 1997).

[35] *Oconomowac Res. Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002).

[36] The Seventh Circuit remanded the suit by two deaf women against their landlord who refused to let them keep their dog in their rented townhouse. Improper jury instructions had conflated local, state and federal laws. *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

[37] Court refused to recognize economic necessity as a reasonable accommodation to a builder who sought a special-use permit and rezoning that would allow him to build more units and create more affordable housing for people with disabilities. *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437 (7th Cir. 199), *aff'g* 1998 WL 100291 (N.D. Ill. Feb. 12, 1998)

[38] *Fjellestad v. Pizza Hut of America, Inc*., 188 F.3d 944, 950 (8th Cir. 1999).

[39] *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

[40] A mobile home owner failed in her challenge to waive the park owner's guest and parking fees for the treatment provider of the owner's daughter. The court stated that "[w]ithout a causal link between defendants' policy and plaintiff's injury, there can be no obligation on the part of the defendants to make a reasonable accommodation." *United States v. California Mobile Home Park Mgmt. Co*., 107 F.3d 1374, 1381 (9th Cir. 1997).

[41] *Sanghvi v. City of Claremont*, 328 F.3d 532 (9th Cir. 2003).

[42] A tenant successfully challenged the housing authority's threat to evict a family after it acquired a service animal for a child who had been hit by a car because he did not hear it approaching. The housing authority agreed that having such a dog was a reasonable accommodation but questioned whether the particular dog had been professionally trained. The court emphasized that under 28 C.F.R. § 36.104, there is no federal requirement as to the amount or type of work a service animal must provide for the benefit of the disabled person. *Green v. Hous. Auth.*, 994 F. Supp. 1253, 1255 (D. Or. 1998).

[43] *White v. York Int'l Corp*., 45 F.3d 357, 361 (10th Cir. 1995).

[44] Retirement community resident with disability (represented by US) unsuccessfully challenged a restriction on motorized carts in common areas during peak hours. *United States v. Hillhaven Corp*, 960 F. Supp. 259 (D. Utah 1997).

[45] A tenant with disabilities living in a mobile home park successfully claimed her landlord had refused to make reasonable accommodations for her disabilities. The court decided that the tenant had enough proof to show that her mobile home park had not allowed her a reasonable accommodation as she had her lawyer write requests to the park and had offered to buy extra insurance for risks involved with the accommodation. *Elliott v. Sherwood Manor Mobile Home Park*, 947 F. Supp. 1574 (M.D. Fla. 1996).

[46] An association wanted to enforce a deed that would prohibit people with disabilities from living together. *Advocacy Ctr. For Persons with Disabilities, Inc. v. Woodlands Estate Ass'n*., 192 F. Supp. 2d 1344 (M.D. Fla. 2002).

[47] After receiving an eviction notice for disturbing the peace and threatening another resident, the tenant requested a reasonable accommodation, claiming his outbursts were a result of mental illness. Discounting the tenant's request for a reasonable accommodation, the manager claimed the tenant fell under the "direct threat" exception of the FHA. The court held that the landlord must offer the tenant continued housing unless the landlord can show that the reasonable accommodations have failed. *Roe v. Sugar River Mills Assocs*., 820 F. Supp. 636, 638 (D.N.H. 1993).

[48] *Trovato v. City of Manchester*, 992 F. Supp. 493 (D.N.H. 1997).

[49] *Cobble Hill Apts. Co v. McLaughlin*, 1999 WL 788517 (Mass. App. Div. June 23, 1999).

[50] Tenant successfully filed a claim against management company after it refused the request of providing a free reserved parking space. The court disliked the company's offers to (1) provide a spot at a lower fee or (2) designate three free handicapped spots. However, the court stated that the company negotiated rather than discriminated against plaintiff. *Hubbard v. Samson Mgmt. Corp*., 994 F. Supp. 187, 192 (S.D.N.Y. 1998).

[51] *United States v. Freer*, 864 F. Supp. 324, 326 (W.D.N.Y. 1994).

[52] *Oxford House Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993).

[53] Four tenants with mobility impairments unsuccessfully pursued a reasonable accommodation claim. Specifically, the tenants wanted their landlord to install a ramp/lift in the entrance of the building as they could not enter or exit their building without assistance. *Rodriguez v. 551 West 157th St. Owners Corp*., 992 F. Supp. 385 (S.D.N.Y. 1998). The Rodriguez court stated that the plaintiffs presented woeful tales but no statement of material facts required by Local Civil Rule 56.1. *Id*. at 386-387.

[54] *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442 (3d Cir. 2002).

[55] *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996).

[56] *Fulciniti v. Village of Shadyside Condo Assoc*., No. 96-1825 (W.D. Pa. Nov. 20, 1998), *available at* "unreported cases" link on http://www.bazelon.org/housing.html.

[57] Foster care facility failed to show that the municipality had not made reasonable accommodations in its zoning policy when it issued the facility an alternative permit. The court allowed the municipality – rather than the facility – to choose the neighborhood because it decided people with disabilities do not comprise a protected class. *Thornton v. City of Allegan*, 863 F. Supp. 504 (W.D. Mich. 1993).

[58] Landlord met duty of reasonably accommodating tenant by soundproofing his door and contacting his therapist when management received noise complaints. *Groner v. Golden Gate Apartments*, 250 F.3d 1039 (6th Cir. 2001).

[59] *Oconomowoc Res. Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002).

[60] An elderly couple successfully challenged the village's refusal to grant a variance in zoning for a driveway in the front of their property. The village challenged the sufficiency of the evidence of whether the couple's impairments rendered them disabled and argued that the elderly woman posed a threat to the neighborhood. *Dadian v. Vill. of* Wilmette, 269 F.3d 831, 840 (7th Cir. 2001).

[61] A tenant with disabilities successfully challenged his landlord's refusal to designate a parking space. The Court upheld the administrative judge's decision. *Jankowski Lee & Assocs. v. Cisn*eros, 91 F.3d 891, 895-896 (7th Cir. 1996).

[62] *Fjellestad v. Pizza Hut of America, Inc*., 188 F.3d 944, 950 (8th Cir. 1999).

[63] *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

[64] *Green v. Housing Authority*, 994 F. Supp. 1253, 1255 (D. Or. 1998).

[65] *White v. York Int'l Corp*., 45 F.3d 357, 361 (10th Cir. 1995).

[66] A tenant in an apartment complex successfully challenged the landlord's eviction procedure. He had exhibited aggressive behavior towards other tenants due to his disability. *Roe v. Housing Authority of Boulder*, 909 F. Supp. 814, 822 (D. Colo. 1995).

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

Washington, D.C.
May 17, 2004

JOINT STATEMENT OF
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND THE DEPARTMENT OF JUSTICE

REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT

Introduction

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the federal Fair Housing Act[1] (the "Act"), which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.[2] One type of disability discrimination prohibited by the Act is the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.[3] HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities. This Statement provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the Act relating to

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[1] The Fair Housing Act is codified at 42 U.S.C. §§ 3601 - 3619.

[2] The Act uses the term "handicap" instead of the term "disability." Both terms have the same legal meaning. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

[3] 42 U.S.C. § 3604(f)(3)(B).

reasonable accommodations.[4]

Questions and Answers

1. What types of discrimination against persons with disabilities does the Act prohibit?

The Act prohibits housing providers from discriminating against applicants or residents because of their disability or the disability of anyone associated with them[5] and from treating persons with disabilities less favorably than others because of their disability. The Act also makes it unlawful for any person to refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling."[6] The Act also prohibits housing providers from refusing residency to persons with disabilities, or placing conditions on their residency, because those persons may require reasonable accommodations. In addition, in certain circumstances, the Act requires that housing providers allow residents to

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[4] Housing providers that receive federal financial assistance are also subject to the requirements of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. Section 504, and its implementing regulations at 24 C.F.R. Part 8, prohibit discrimination based on disability and require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Although Section 504 imposes greater obligations than the Fair Housing Act, (*e.g.*, providing and paying for reasonable accommodations that involve structural modifications to units or public and common areas), the principles discussed in this Statement regarding reasonable accommodation under the Fair Housing Act generally apply to requests for reasonable accommodations to rules, policies, practices, and services under Section 504. *See* U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2002-01(HA) (www.hud.gov/offices/fheo/disabilities/PIH02-01.pdf) and "Section 504: Frequently Asked Questions," (www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor272118).

[5] The Fair Housing Act's protection against disability discrimination covers not only home seekers with disabilities but also buyers and renters without disabilities who live or are associated with individuals with disabilities 42 U.S.C. § 3604(f)(1)(B), 42 U.S.C. § 3604(f)(1)(C), 42 U.S.C. § 3604(f)(2)(B), 42 U.S.C. § (f)(2)(C). *See also* H.R. Rep. 100-711 – 24 (reprinted in 1988 U.S.C.A.N. 2173, 2184-85) ("The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities."). *Accord*: Preamble to Proposed HUD Rules Implementing the Fair Housing Act, 53 Fed. Reg. 45001 (Nov. 7, 1988) (citing House Report).

[6] 42 U.S.C. § 3604(f)(3)(B). HUD regulations pertaining to reasonable accommodations may be found at 24 C.F.R. § 100.204.

make reasonable structural modifications to units and public/common areas in a dwelling when those modifications may be necessary for a person with a disability to have full enjoyment of a dwelling.[7] With certain limited exceptions (*see* response to question 2 below), the Act applies to privately and publicly owned housing, including housing subsidized by the federal government or rented through the use of Section 8 voucher assistance.

2. Who must comply with the Fair Housing Act's reasonable accommodation requirements?

Any person or entity engaging in prohibited conduct – *i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling – may be held liable unless they fall within an exception to the Act's coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. *See e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995); Project Life v. Glendening, 139 F. Supp. 703, 710 (D. Md. 2001), aff'd 2002 WL 2012545 (4th Cir. 2002). Under specific exceptions to the Fair Housing Act, the reasonable accommodation requirements of the Act do not apply to a private individual owner who sells his own home so long as he (1) does not own more than three single-family homes; (2) does not use a real estate agent and does not employ any discriminatory advertising or notices; (3) has not engaged in a similar sale of a home within a 24-month period; and (4) is not in the business of selling or renting dwellings. The reasonable accommodation requirements of the Fair Housing Act also do not apply to owner-occupied buildings that have four or fewer dwelling units.

3. Who qualifies as a person with a disability under the Act?

The Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

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[7] This Statement does not address the principles relating to reasonable modifications. For further information see the HUD regulations at 24 C.F.R. § 100.203. This statement also does not address the additional requirements imposed on recipients of Federal financial assistance pursuant to Section 504, as explained in the Introduction.

The term "substantially limits" suggests that the limitation is "significant" or "to a large degree."

The term "major life activity" means those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking.[8] This list of major life activities is not exhaustive. *See e.g.*, Bragdon v. Abbott, 524 U.S. 624, 691-92 (1998)(holding that for certain individuals reproduction is a major life activity).

4. Does the Act protect juvenile offenders, sex offenders, persons who illegally use controlled substances, and persons with disabilities who pose a significant danger to others?

No, juvenile offenders and sex offenders, by virtue of that status, are not persons with disabilities protected by the Act. Similarly, while the Act does protect persons who are recovering from substance abuse, it does not protect persons who are currently engaging in the current illegal use of controlled substances.[9] Additionally, the Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.

5. How can a housing provider determine if an individual poses a direct threat?

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. Consequently, in evaluating a recent history of overt acts, a provider must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat (*i.e.*, a significant risk of substantial harm). In such a situation, the provider may request that the individual document

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[8] The Supreme Court has questioned but has not yet ruled on whether "working" is to be considered a major life activity. See Toyota Motor Mfg, Kentucky, Inc. v. Williams, 122 S. Ct. 681, 692, 693 (2002). If it is a major activity, the Court has noted that a claimant would be required to show an inability to work in a "broad range of jobs" rather than a specific job. *See* Sutton v. United Airlines, Inc., 527 U.S. 470, 492 (1999).

[9] *See*, *e.g.*, United States v. Southern Management Corp., 955 F.2d 914, 919 (4th Cir. 1992) (discussing exclusion in 42 U.S.C. § 3602(h) for "current, illegal use of or addiction to a controlled substance").

how the circumstances have changed so that he no longer poses a direct threat. A provider may also obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy. The housing provider must have reliable, objective evidence that a person with a disability poses a direct threat before excluding him from housing on that basis.

> **Example 1**: A housing provider requires all persons applying to rent an apartment to complete an application that includes information on the applicant's current place of residence. On her application to rent an apartment, a woman notes that she currently resides in Cambridge House. The manager of the apartment complex knows that Cambridge House is a group home for women receiving treatment for alcoholism. Based solely on that information and his personal belief that alcoholics are likely to cause disturbances and damage property, the manager rejects the applicant. The rejection is unlawful because it is based on a generalized stereotype related to a disability rather than an individualized assessment of any threat to other persons or the property of others based on reliable, objective evidence about the applicant's recent past conduct. The housing provider may not treat this applicant differently than other applicants based on his subjective perceptions of the potential problems posed by her alcoholism by requiring additional documents, imposing different lease terms, or requiring a higher security deposit. However, the manager could have checked this applicant's references to the same extent and in the same manner as he would have checked any other applicant's references. If such a reference check revealed objective evidence showing that this applicant had posed a direct threat to persons or property in the recent past and the direct threat had not been eliminated, the manager could then have rejected the applicant based on direct threat.

> **Example 2**: James X, a tenant at the Shady Oaks apartment complex, is arrested for threatening his neighbor while brandishing a baseball bat. The Shady Oaks' lease agreement contains a term prohibiting tenants from threatening violence against other residents. Shady Oaks' rental manager investigates the incident and learns that James X threatened the other resident with physical violence and had to be physically restrained by other neighbors to keep him from acting on his threat. Following Shady Oaks' standard practice of strictly enforcing its "no threats" policy, the Shady Oaks rental manager issues James X a 30-day notice to quit, which is the first step in the eviction process. James X's attorney contacts Shady Oaks' rental manager and explains that James X has a psychiatric disability that causes him to be physically violent when he stops taking his prescribed medication. Suggesting that his client will not pose a direct threat to others if proper safeguards are taken, the attorney requests that the rental manager grant James X an exception to the "no threats" policy as a reasonable accommodation based on James X's disability. The Shady Oaks rental manager need only grant the reasonable accommodation if James X's attorney can provide satisfactory assurance that James X will receive appropriate counseling and

periodic medication monitoring so that he will no longer pose a direct threat during his tenancy. After consulting with James X, the attorney responds that James X is unwilling to receive counseling or submit to any type of periodic monitoring to ensure that he takes his prescribed medication. The rental manager may go forward with the eviction proceeding, since James X continues to pose a direct threat to the health or safety of other residents.

6. What is a "reasonable accommodation" for purposes of the Act?

A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling. The Act makes it unlawful to refuse to make reasonable accommodations to rules, policies, practices, or services when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling.

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability.

Example 1: A housing provider has a policy of providing unassigned parking spaces to residents. A resident with a mobility impairment, who is substantially limited in her ability to walk, requests an assigned accessible parking space close to the entrance to her unit as a reasonable accommodation. There are available parking spaces near the entrance to her unit that are accessible, but those spaces are available to all residents on a first come, first served basis. The provider must make an exception to its policy of not providing assigned parking spaces to accommodate this resident.

Example 2: A housing provider has a policy of requiring tenants to come to the rental office in person to pay their rent. A tenant has a mental disability that makes her afraid to leave her unit. Because of her disability, she requests that she be permitted to have a friend mail her rent payment to the rental office as a reasonable accommodation. The provider must make an exception to its payment policy to accommodate this tenant.

Example 3: A housing provider has a "no pets" policy. A tenant who is deaf requests that the provider allow him to keep a dog in his unit as a reasonable accommodation. The tenant explains that the dog is an assistance animal that will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. The housing

provider must make an exception to its "no pets" policy to accommodate this tenant.

7. Are there any instances when a provider can deny a request for a reasonable accommodation without violating the Act?

Yes. A housing provider can deny a request for a reasonable accommodation if the request was not made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable – *i.e.*, if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations. The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs.

When a housing provider refuses a requested accommodation because it is not reasonable, the provider should discuss with the requester whether there is an alternative accommodation that would effectively address the requester's disability-related needs without a fundamental alteration to the provider's operations and without imposing an undue financial and administrative burden. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it. An interactive process in which the housing provider and the requester discuss the requester's disability-related need for the requested accommodation and possible alternative accommodations is helpful to all concerned because it often results in an effective accommodation for the requester that does not pose an undue financial and administrative burden for the provider.

Example: As a result of a disability, a tenant is physically unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The tenant requests that the housing provider send a maintenance staff person to his apartment on a daily basis to collect his trash and take it to the dumpster. Because the housing development is a small operation with limited financial resources and the maintenance staff are on site only twice per week, it may be an undue financial and administrative burden for the housing provider to grant the requested daily trash pick-up service. Accordingly, the requested accommodation may not be reasonable. If the housing provider denies the requested accommodation as unreasonable, the housing provider should discuss with the tenant whether reasonable accommodations could be provided to meet the tenant's disability-related needs – for instance, placing an open trash collection can in a location that is readily accessible to the tenant so the tenant can dispose of his own trash and the provider's maintenance staff can then transfer the trash to the dumpster when they are on site. Such an accommodation would not involve a

fundamental alteration of the provider's operations and would involve little financial and administrative burden for the provider while accommodating the tenant's disability-related needs.

There may be instances where a provider believes that, while the accommodation requested by an individual is reasonable, there is an alternative accommodation that would be equally effective in meeting the individual's disability-related needs. In such a circumstance, the provider should discuss with the individual if she is willing to accept the alternative accommodation. However, providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable.

8. What is a "fundamental alteration"?

A "fundamental alteration" is a modification that alters the essential nature of a provider's operations.

Example: A tenant has a severe mobility impairment that substantially limits his ability to walk. He asks his housing provider to transport him to the grocery store and assist him with his grocery shopping as a reasonable accommodation to his disability. The provider does not provide any transportation or shopping services for its tenants, so granting this request would require a fundamental alteration in the nature of the provider's operations. The request can be denied, but the provider should discuss with the requester whether there is any alternative accommodation that would effectively meet the requester's disability-related needs without fundamentally altering the nature of its operations, such as reducing the tenant's need to walk long distances by altering its parking policy to allow a volunteer from a local community service organization to park her car close to the tenant's unit so she can transport the tenant to the grocery store and assist him with his shopping.

9. What happens if providing a requested accommodation involves some costs on the part of the housing provider?

Courts have ruled that the Act may require a housing provider to grant a reasonable accommodation that involves costs, so long as the reasonable accommodation does not pose an undue financial and administrative burden and the requested accommodation does not constitute a fundamental alteration of the provider's operations. The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident's disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative

burden.

10. What happens if no agreement can be reached through the interactive process?

A failure to reach an agreement on an accommodation request is in effect a decision by the provider not to grant the requested accommodation. If the individual who was denied an accommodation files a Fair Housing Act complaint to challenge that decision, then the agency or court receiving the complaint will review the evidence in light of applicable law- and decide if the housing provider violated that law. For more information about the complaint process, see question 19 below.

11. May a housing provider charge an extra fee or require an additional deposit from applicants or residents with disabilities as a condition of granting a reasonable accommodation?

No. Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.

> **Example 1**: A man who is substantially limited in his ability to walk uses a motorized scooter for mobility purposes. He applies to live in an assisted living facility that has a policy prohibiting the use of motorized vehicles in buildings and elsewhere on the premises. It would be a reasonable accommodation for the facility to make an exception to this policy to permit the man to use his motorized scooter on the premises for mobility purposes. Since allowing the man to use his scooter in the buildings and elsewhere on the premises is a reasonable accommodation, the facility may not condition his use of the scooter on payment of a fee or deposit or on a requirement that he obtain liability insurance relating to the use of the scooter. However, since the Fair Housing Act does not protect any person with a disability who poses a direct threat to the person or property of others, the man must operate his motorized scooter in a responsible manner that does not pose a significant risk to the safety of other persons and does not cause damage to other persons' property. If the individual's use of the scooter causes damage to his unit or the common areas, the housing provider may charge him for the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

> **Example 2:** Because of his disability, an applicant with a hearing impairment needs to keep an assistance animal in his unit as a reasonable accommodation. The housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal. However, if a tenant's assistance animal causes damage to the applicant's unit or the common areas of the dwelling, the housing provider may charge the tenant for

the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

12. When and how should an individual request an accommodation?

Under the Act, a resident or an applicant for housing makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability. She should explain what type of accommodation she is requesting and, if the need for the accommodation is not readily apparent or not known to the provider, explain the relationship between the requested accommodation and her disability.

An applicant or resident is not entitled to receive a reasonable accommodation unless she requests one. However, the Fair Housing Act does not require that a request be made in a particular manner or at a particular time. A person with a disability need not personally make the reasonable accommodation request; the request can be made by a family member or someone else who is acting on her behalf. An individual making a reasonable accommodation request does not need to mention the Act or use the words "reasonable accommodation." However, the requester must make the request in a manner that a reasonable person would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability.

Although a reasonable accommodation request can be made orally or in writing, it is usually helpful for both the resident and the housing provider if the request is made in writing. This will help prevent misunderstandings regarding what is being requested, or whether the request was made. To facilitate the processing and consideration of the request, residents or prospective residents may wish to check with a housing provider in advance to determine if the provider has a preference regarding the manner in which the request is made. However, housing providers must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests.

Example: A tenant in a large apartment building makes an oral request that she be assigned a mailbox in a location that she can easily access because of a physical disability that limits her ability to reach and bend. The provider would prefer that the tenant make the accommodation request on a pre-printed form, but the tenant fails to complete the form. The provider must consider the reasonable accommodation request even though the tenant would not use the provider's designated form.

13. Must a housing provider adopt formal procedures for processing requests for a reasonable accommodation?

No. The Act does not require that a housing provider adopt any formal procedures for reasonable accommodation requests. However, having formal procedures may aid individuals with disabilities in making requests for reasonable accommodations and may aid housing providers in assessing those requests so that there are no misunderstandings as to the nature of the request, and, in the event of later disputes, provide records to show that the requests received proper consideration.

A provider may not refuse a request, however, because the individual making the request did not follow any formal procedures that the provider has adopted. If a provider adopts formal procedures for processing reasonable accommodation requests, the provider should ensure that the procedures, including any forms used, do not seek information that is not necessary to evaluate if a reasonable accommodation may be needed to afford a person with a disability equal opportunity to use and enjoy a dwelling. See Questions 16 - 18, which discuss the disability-related information that a provider may and may not request for the purposes of evaluating a reasonable accommodation request.

14. Is a housing provider obligated to provide a reasonable accommodation to a resident or applicant if an accommodation has not been requested?

No. A housing provider is only obligated to provide a reasonable accommodation to a resident or applicant if a request for the accommodation has been made. A provider has notice that a reasonable accommodation request has been made if a person, her family member, or someone acting on her behalf requests a change, exception, or adjustment to a rule, policy, practice, or service because of a disability, even if the words "reasonable accommodation" are not used as part of the request.

15. What if a housing provider fails to act promptly on a reasonable accommodation request?

A provider has an obligation to provide prompt responses to reasonable accommodation requests. An undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation.

16. What inquiries, if any, may a housing provider make of current or potential residents regarding the existence of a disability when they have not asked for an accommodation?

Under the Fair Housing Act, it is usually unlawful for a housing provider to (1) ask if an applicant for a dwelling has a disability or if a person intending to reside in a dwelling or anyone associated with an applicant or resident has a disability, or (2) ask about the nature or severity of such persons' disabilities. Housing providers may, however, make the following inquiries, provided these inquiries are made of all applicants, including those with and without disabilities:

- An inquiry into an applicant's ability to meet the requirements of tenancy;

- An inquiry to determine if an applicant is a current illegal abuser or addict of a controlled substance;

- An inquiry to determine if an applicant qualifies for a dwelling legally available only to persons with a disability or to persons with a particular type of disability; and

- An inquiry to determine if an applicant qualifies for housing that is legally available on a priority basis to persons with disabilities or to persons with a particular disability.

Example 1: A housing provider offers accessible units to persons with disabilities needing the features of these units on a priority basis. The provider may ask applicants if they have a disability and if, in light of their disability, they will benefit from the features of the units. However, the provider may not ask applicants if they have other types of physical or mental impairments. If the applicant's disability and the need for the accessible features are not readily apparent, the provider may request reliable information/documentation of the disability-related need for an accessible unit.

Example 2: A housing provider operates housing that is legally limited to persons with chronic mental illness. The provider may ask applicants for information needed to determine if they have a mental disability that would qualify them for the housing. However, in this circumstance, the provider may not ask applicants if they have other types of physical or mental impairments. If it is not readily apparent that an applicant has a chronic mental disability, the provider may request reliable information/documentation of the mental disability needed to qualify for the housing.

In some instances, a provider may also request certain information about an applicant's or a resident's disability if the applicant or resident requests a reasonable accommodation. See Questions 17 and 18 below.

17. What kinds of information, if any, may a housing provider request from a person with an obvious or known disability who is requesting a reasonable accommodation?

A provider is entitled to obtain information that is necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information

about the requester's disability or the disability-related need for the accommodation.

If the requester's disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the accommodation.

> **Example 1:** An applicant with an obvious mobility impairment who regularly uses a walker to move around asks her housing provider to assign her a parking space near the entrance to the building instead of a space located in another part of the parking lot. Since the physical disability (*i.e.*, difficulty walking) and the disability-related need for the requested accommodation are both readily apparent, the provider may not require the applicant to provide any additional information about her disability or the need for the requested accommodation.

> **Example 2:** A rental applicant who uses a wheelchair advises a housing provider that he wishes to keep an assistance dog in his unit even though the provider has a "no pets" policy. The applicant's disability is readily apparent but the need for an assistance animal is not obvious to the provider. The housing provider may ask the applicant to provide information about the disability-related need for the dog.

> **Example 3:** An applicant with an obvious vision impairment requests that the leasing agent provide assistance to her in filling out the rental application form as a reasonable accommodation because of her disability. The housing provider may not require the applicant to document the existence of her vision impairment.

18. If a disability is not obvious, what kinds of information may a housing provider request from the person with a disability in support of a requested accommodation?

A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability (*see* Answer 16, above). However, in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (*i.e.*, has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual himself or herself (*e.g.*, proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits[10] or a credible statement by the individual). A doctor or other

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[10] Persons who meet the definition of disability for purposes of receiving Supplemental Security Income ("SSI") or Social Security Disability Insurance ("SSDI") benefits in most cases meet the definition of disability under the Fair Housing Act, although the converse may not be true. *See e.g.*, Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 797 (1999)

medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable accommodation is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information to make or assess a decision to grant or deny a reasonable accommodation request or unless disclosure is required by law (*e.g.*, a court-issued subpoena requiring disclosure).

19. If a person believes she has been unlawfully denied a reasonable accommodation, what should that person do if she wishes to challenge that denial under the Act?

When a person with a disability believes that she has been subjected to a discriminatory housing practice, including a provider's wrongful denial of a request for reasonable accommodation, she may file a complaint with HUD within one year after the alleged denial or may file a lawsuit in federal district court within two years of the alleged denial. If a complaint is filed with HUD, HUD will investigate the complaint at no cost to the person with a disability.

There are several ways that a person may file a complaint with HUD:

- By placing a toll-free call to 1-800-669-9777 or TTY 1-800-927-9275;

- By completing the "on-line" complaint form available on the HUD internet site: http://www.hud.gov; or

- By mailing a completed complaint form or letter to:

Office of Fair Housing and Equal Opportunity
Department of Housing & Urban Development
451 Seventh Street, S.W., Room 5204
Washington, DC 20410-2000

(noting that SSDI provides benefits to a person with a disability so severe that she is unable to do her previous work and cannot engage in any other kind of substantial gainful work whereas a person pursuing an action for disability discrimination under the Americans with Disabilities Act may state a claim that "with a reasonable accommodation" she could perform the essential functions of the job).

Upon request, HUD will provide printed materials in alternate formats (large print, audio tapes, or Braille) and provide complainants with assistance in reading and completing forms.

The Civil Rights Division of the Justice Department brings lawsuits in federal courts across the country to end discriminatory practices and to seek monetary and other relief for individuals whose rights under the Fair Housing Act have been violated. The Civil Rights Division initiates lawsuits when it has reason to believe that a person or entity is involved in a "pattern or practice" of discrimination or when there has been a denial of rights to a group of persons that raises an issue of general public importance. The Division also participates as *amicus curiae* in federal court cases that raise important legal questions involving the application and/or interpretation of the Act. To alert the Justice Department to matters involving a pattern or practice of discrimination, matters involving the denial of rights to groups of persons, or lawsuits raising issues that may be appropriate for *amicus* participation, contact:

U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section – G St.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

For more information on the types of housing discrimination cases handled by the Civil Rights Division, please refer to the Housing and Civil Enforcement Section's website at http://www.usdoj.gov/crt/housing/hcehome.html.

A HUD or Department of Justice decision not to proceed with a Fair Housing Act matter does not foreclose private plaintiffs from pursuing a private lawsuit. However, litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to Fair Housing Act disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, such as mediation. HUD attempts to conciliate all Fair Housing Act complaints. In addition, it is the Department of Justice's policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

6. If a disability is not obvious, what kinds of information may a housing provider request from the person with a disability in support of a requested reasonable modification?

A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability. However, in response to a request for a reasonable modification, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed modification, and (3) shows the relationship between the person's disability and the need for the requested modification. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual herself (e.g., proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits[8] or a credible statement by the individual). A doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable modification is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information to make or assess a decision to grant or deny a reasonable modification request or unless disclosure is required by law (e.g., a court-issued subpoena requiring disclosure).

7. What kinds of information, if any, may a housing provider request from a person with an obvious or known disability who is requesting a reasonable modification?

A housing provider is entitled to obtain information that is necessary to evaluate whether a requested reasonable modification may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the housing provider, and if the need for the requested modification is also readily apparent or known, then the provider may not request any additional information about the requester's disability or the disability-related need for the modification.

If the requester's disability is known or readily apparent to the provider, but the need for the modification is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the modification.

Example 1: An applicant with an obvious mobility impairment who uses a motorized scooter to move around asks the housing provider to permit her to install a ramp at the entrance of the apartment building. Since the physical disability (i.e., difficulty walking) and the disability-related need for the requested modification are both readily apparent, the provider may

not require the applicant to provide any additional information about her disability or the need for the requested modification.

[8] Persons who meet the definition of disability for purposes of receiving Supplemental Security Income ("SSI") or Social Security Disability Income ("SSDI") benefits in most cases meet the definition of a disability under the Fair Housing Act, although the converse may not be true. See, e.g., Cleveland v. Policy Management Systems Corp, 526 U.S. 795, 797 (1999) (noting that SSDI provides benefits to a person with a disability so severe that she is unable to do her previous work and cannot engage in any other kind of substantial gainful work whereas a person pursuing an action for disability discrimination under the Americans with Disabilities Act may state a claim that "with a reasonable accommodation" she could perform the essential functions of the job).