Walking a ¢ightrope – Regulating Group Homes Without Running Afoul of Federal and State Laws

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I. OVERVIEW

This paper focuses on the limits imposed by federal and California law upon the authority of local governments to regulate housing for disabled persons and other protected groups. Federal and California law recognize many types of disability and other protected classes and it is beyond the scope of this paper to discuss the particular statutes and cases addressing each one. The discussion below instead assumes that local regulation in some way affects a person with some type of disability, or who enjoys protected status, as defined in either federal or California law.

For purposes of brevity and analytical efficiency, this paper also will not focus on the subtle and nuanced differences between federal anti-discrimination laws and California anti-discrimination laws protecting disabled persons. The legal analysis of discrimination claims is substantively identical under the federal Fair Housing Act (including provisions of the Fair Housing Amendments Act), the Americans with Disabilitites Act, and California's Fair Employment and Housing Act. *See generally Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008); *Auburn Woods I Homeowners Assn. v. Fair Employment and Hous. Comm'n*, 121 Cal.App.4th 1578, 1591 (2004) (*Auburn Woods*). Accordingly, the principles and analysis set forth below apply to cases brought under both federal and California anti-discrimination laws.

The discussion is organized by the prevalent legal theories advanced in anti-discrimination lawsuits – (1) discriminatory treatment (also known as disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation. The cases featured are federal cases interpreting federal law and establishing limits on local regulation of housing for disabled persons. California law would, at a minimum, recognize the same limits and, in certain cases, recognize more stringent limits not discussed here. *See Auburn Woods*, 121 Cal.App.4th at p. 1591 (California's FEHA may be interpreted to confer rights greater than those conferred by the federal Fair Housing Act). Both federal and California law recognize the limits on local authority identified below.

Practical tips for local government officials, staff and attorneys follow parts of the discussion where appropriate.

II. DISCUSSION

A. Standing To Sue

Standing to sue under the FHA and ADA is broadly construed in a manner consistent with the constitutional limits of Article III. *See Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 47 (2nd Cir. 1997); *see also Jeffrey O v. City of Boca Raton*, 511 F.Supp.2d 1339, 1347 (S.D.Fla. 2007) (*Jeffrey O*).

In *Jeffrey O*, the District court held that current residents of a group home for persons recovering from substance abuse, and persons who testify that they would return to a group home if they relapsed, both have standing to sue under the FHA. *Id*. at 1347-48. The court also recognized that the FHA allows for the providers of housing for the disabled to sue on behalf of residents. *Id* at 1348. *See also Community House, Inc. v. City of Boise*, 490 F.3d 1041 (9th Cir. 2007).

Courts have also recognized that organizations that promote or advocate for fair housing may bring suit under the FHA if the challenged action or policy causes the organization to divert resources to combat the alleged discrimination. *See Nevada Fair Housing Center, Inc. v. Clark Co.*, 2007 U.S. Dist.LEXIS 12800, * 6 (D.Nev. 2007).

B. Analytical Framework of Anti-Discrimination Claims

A plaintiff may establish an FHA discrimination claim under three different theories: (1) discriminatory treatment; (2) disparate impact; and (3) failure to make a reasonable accommodation. *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1997) (*Gamble*). The same theories are available to vindicate a violation of California's FEHA. *See Auburn Woods*, 121 Cal.App.4th at p. 1591.

The three theories are discussed in order.

1. Discriminatory Treatment

a. Facial Challenge

In *Community House, Inc. v. City of Boise*, 490 F.3d 1041 (9th Cir. 2007) (*Community House*), the Ninth Circuit explained the standard for establishing a prima facie case of facial discrimination under the FHA. "[A] plaintiff makes out a prima facie case of intentional discrimination under the [Fair Housing Act] merely by showing that a protected group has been subjected to explicitly differential – i.e., discriminatory – treatment." *Id*. at 1050 (internal citation and quotation omitted). A defendant whose zoning rules are facially discriminatory "must show either: (1) that the restriction benefits the protected class or (2) that it responds to the legitimate safety concerns raised by the individuals affected, rather than based on stereotypes." *Id*. at 1050 (internal citation omitted).

A non-profit corporation in *Community House* had formerly managed a city-owned homeless shelter. The corporation sued the City under the FHA after a religious organization to which the City had later leased the shelter instituted a male-only policy. The complaint asserted that the male-only policy facially discriminated on the basis of gender and familial status, and sought a preliminary injunction. The Ninth Circuit held that plaintiff could likely establish a prima facie case of discrimination under the FHA. As justifications for the male-only policy, the City asserted general safety concerns and the need to house homeless men so that a second facility could be made available for women and children. *Community House*, 490 F.3d at 1051. The court held that the City might be able at a later stage of litigation to prove that safety concerns warranted a male-only policy, but that the plaintiff had raised questions that were serious enough to warrant the issuance of an injunction. *Id*. at 1052.

Community House was followed by the District Court in *Nevada Fair Housing Center, Inc. v. Clark Co.*, 2007 U.S.Dist.LEXIS 12800 (D.Nev. 2007) (*Nevada Fair Housing*). In that case, the County's group home ordinance prohibited group homes for the disabled that housed more than six persons. *Id.* at *18. The ordinance also required a special use permit for homes housing six or fewer persons to locate within 1500 feet of a similar home. *Id*. at *18. A non-profit corporation that advocated against housing discrimination filed suit under the FHA, claiming that the ordinance facially discriminated against the disabled. *Id*. at *1-*2. On a

motion for summary judgment brought by the plaintiff, the District court held that the County's ordinance was facially discriminatory and failed the test adopted by the Ninth Circuit in *Community House*. The County argued that the spacing requirement was necessary to comply with state law and to prevent the clustering of group homes in certain areas. *Id*. at *26. The court refrained from addressing whether the relevant state law violated the FHA; noting instead that the County's Ordinance "did not track the language of [the statute].") *Id*. at *27. The court also found that the County failed to provide any evidence that its Ordinance promoted deinstitutionalization. *Id*.

In *Jeffrey O*, persons recovering from alcoholism and substance abuse, and the operators of group homes for those persons, challenged a requirement that substance abuse treatment facilities operate only in a medical district or a motel/business district upon issuance of a conditional use permit. 511 F.Supp.2d at 1342-43. The District Court first held that the City had facially discriminated against disabled persons and that facial discrimination could be justified only by legitimate public safety concerns or by benefits conveyed to the protected class. *Id*. at 1350. The City argued that its zoning rules were necessary to keep group homes near other compatible uses, such as medical centers. *Id* at 1352. The court in general recognized preservation of a neighborhood's residential character as an additional justification for disparate treatment. *Id*. at 1357. The court noted, however, that the only distinguishing feature separating substance abuse treatment facilities from residential apartments was that the providers of treatment required tenants to undergo drug testing to ensure they remained clean and sober. *Id*. at 1354. The court found that this was insufficient grounds to segregate disabled residents. *Id*.

Local government may not defeat a facial challenge simply by implementing an approval procedure for group homes (e.g., reasonable accommodation program). In *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999), operators of a methadone clinic announced their plans to open in the City, which enacted a moratorium against substance abuse clinics in response to the proposal. *Id*. at 727-28. The basis for the moratorium was the City's finding that the clinic would attract drug dealers and lead to an increase in crime in the surrounding area. *Id* at 729. The clinic filed suit under the ADA and the Rehabilitation act, and asked for a preliminary injunction. The District Court denied the request for an injunction and the Ninth Circuit reversed and remanded the matter. The Ninth Circuit first held that the ADA and the Rehabilitation Act apply to local zoning controls. *Id*. at 730. The ADA in particular was intended to broadly prohibit discrimination by public entities, and zoning is a normal function of local government. *Id*. at 730-31. Because the clinic had alleged that the moratorium was facially discriminatory, the District Court had erred by requiring the clinic to show that the City had failed to provide a reasonable accommodation. *Id*. at 733-734. Facially discriminatory ordinances are not subject to a reasonable accommodation analysis, and the availability of a reasonable accommodation procedure cannot rescue a facially discriminatory ordinance.

A separate strand of facial challenge involves a facially valid regulation where the government uses a proxy (i.e. service dogs) as a substitute for identifying the protected class (handicapped). In *Children's Alliance v. City of Bellevue*, 950 F.Supp. 1491 (W.D.Wash. 1997) (*Children's Alliance*), an ordinance required group homes to be separated by 1000 feet and limited to six or fewer residents. The defining difference between a "family" and a group home under the ordinance was the addition of staff operating at the latter. *Id.* at 1493-94. The District

Court held "that this use of 'staff' was a proxy for a classification based on the presence of individuals under eighteen and the handicapped as both groups require supervision and assistance." *Id*. at 1496. Thus, the ordinance was facially discriminatory. The dispersal did not sufficiently benefit the handicapped by preventing the development of mini-institutional ghettos because the City then had no group homes. The court also remarked that any alleged benefit would be closely scrutinized and found sufficient only if the benefits of the regulation clearly outweighed its burdens. *Id.* at 1499 (internal citations omitted). The District Court also held that the City's repeated statements that it would be willing to reasonably accommodate the plaintiff's group home was insufficient to rebut a finding of facial discrimination. *Id*. at 1500.

Proxy cases are common. *See*, *e.g.*, *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (gray hair may be a proxy for age); *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 211 (3rd Cir. 2000) ("Medicare status is a direct proxy for age."); *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 179 (3d Cir. 2005) (service dogs or wheelchairs are a proxy for handicapped status).

PRACTICAL ADVICE:

- To survive a facial challenge under federal and California anti-discrimination laws, government must make a concrete evidentiary showing that the plaintiffs themselves pose a legitimate threat to public safety. It is not sufficient to rely upon stereotypes of unidentified people who share the same disability as plaintiffs.

- A generalized concern about retaining neighborhood character is likely insufficient to make the required showing of a legitimate threat to public safety.

- Any regulation which treats a protected class differently than others, no matter how seemingly innocuous, or even well-intentioned, is ill-advised. For example, persons in recovery are being harassed by residents who did not know that a sober living home was opening in the community. In response, the municipality adopts a neighbor notification law with the intent of diffusing the situation. That law is invalid because it treats sober living homes for persons who are legally disabled differently than it treats other residential uses.

- Rigid distancing requirements are facially invalid, but an unsettled question is whether distancing requirements may be considered with other factors when clustering of housing serving the disabled has occurred in one area.

b. As-Applied Challenge

At least as reflected in the published case law, as-applied discriminatory treatment challenges are far more common than facial discriminatory treatment challenges. As-applied challenges arise from the discriminatory application of a facially neutral regulation.

A plaintiff may establish a prima facie case of discriminatory application in one of two ways. A plaintiff may (1) satisfy the elements of the test set forth in *McDonnell Douglas Corp.*

v. Green, 411 U.S. 792 (1981) (*McDonnell Douglas*); or (2) produce evidence of discriminatory intent. *Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008) (*Budnick*).

Plaintiff establishes a prima facie case of discriminatory treatment under *McDonnell Douglas* by showing: (1) plaintiff is a member of a protected group, (2) plaintiff sought use and enjoyment of a particular dwelling (or type of dwelling, or housing in a particular zone) and was qualified to use and enjoy such dwelling; (3) plaintiff was denied the opportunity to use and enjoy such dwelling (or zoning) despite being qualified; and (4) defendant permitted use and enjoyment of such a dwelling (or zoning) by a similarly situated party during a period relatively near the time plaintiff was being denied use and enjoyment. *See Gamble*, 104 F.3d at 305. *Gamble* articulated this framework in the housing context, but it would apply in other contexts where a plaintiff brings an anti-discrimination claim.

Instead of satisfying the *McDonnell Douglas* factors, a plaintiff may establish a prima facie case of discriminatory treatment by simply producing "'direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated' the challenged decision." *Budnick*, 518 F.3d at 1114; *see also Lowe v. City of Monrovia,* 775 F.2d 998, 1006 (9th Cir. 1985), *amended on other grounds by* 784 F.2d 1407 (9th Cir. 1986) ("a plaintiff can establish a prima facie case of disparate treatment without satisfying the *McDonnell Douglas* test."). "[I]t is not particularly significant whether [a plaintiff] relies on the *McDonnell Douglas* [factors] or, whether he relies on direct or circumstantial evidence of discriminatory intent" to establish a prima facie case of discriminatory treatment. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1123 (9th Cir. 2004).

Once plaintiff establishes a prima facie case of discriminatory treatment, "the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action." *Gamble*, 104 F.3d at 305.

If the defendant articulates a legitimate, nondiscriminatory reason for its action, "the burden shifts to [plaintiff] to present evidence that [the] reason [asserted by defendant] is pretextual…." *Gamble*, 104 F.3d at 306. In other words, the factfinder must decide whether the defendant's action was taken for discriminatory reasons. Whether proceeding under the *McDonnell Douglas* framework, or the alternative of showing that discriminatory intent more likely than not motivated the challenged action, the plaintiff must respond to defendant's articulated reason by producing "some evidence suggesting that the challenged action 'was due in part or whole to discriminatory intent.' [Citation.]" *Budnick*, 518 F.3d at 1114.

A survey of the case law reveals that the zoning related decisions of local governments are more vulnerable to successful challenge under the "direct or circumstantial evidence of discriminatory intent" framework (hereafter "direct evidence test") than they are under the *McDonnell Douglas* factors. This appears to arise from differences between the two approaches with respect to the degree of focus on the reasons or motivations behind the challenged regulation or decision. At the stage of establishing a prima facie case, the "direct evidence test" focuses more on those reasons or motivations than does the *McDonnell Douglas* test, which focuses more on the mechanics of the challenged decision. One key and specific difference between the two approaches is that the *McDonnell Douglas* test requires a showing that the government treated the plaintiff less favorably than a similarly situated third party. The "direct

evidence test" does not require comparator evidence, and this may explain why plaintiffs in the case law have invoked this test alone, or at least as an alternative to the *McDonnell Douglas* framework. There are many hundreds of published decisions evaluating local regulations under one or both approaches, and this paper cannot possibly discuss or even identify a substantial number of them. Instead, this paper presents a number of those cases from which the reader may distill some general principles which local officials and staff should bear in mind when making decisions affecting persons whom the law recognizes to be disabled.

(i) Establishing a prima facie case under the direct evidence test.

The somewhat malleable factors comprising the direct evidence test flow from the seminal decision in *Village of Arlington Heights, et al. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (*Arlington Heights*). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Thus, the Supreme Court articulated several nonexclusive criteria which courts should evaluate in deciding whether the challenged action was motivated by discriminatory intent. "The historical background of the decision is one evidentiary source" to examine. *Id.* at 267. "The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Id.* at 267. "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant[.]" *Id.* at 267. "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268. *Arlington Heights* involved race-based discrimination, but its list of criteria has guided courts in evaluating claims brought by disabled persons, as set forth below.

Courts have applied the *Arlington Heights* criteria in various formulations. Some courts have invalidated regulations based on fewer than all of the criteria. In many cases, plaintiffs rely only upon one or two of the criteria, with mixed results. There is no bright-line rule articulating the number of *Arlington Heights* factors that must be satisfied to establish a prima facie case of discriminatory intent under the direct evidence test. Nor is there a rule establishing which particular factors must be satisfied. Courts enjoy considerable discretion in employing and weighing the factors in each case.

In *Budnick*, the Ninth Circuit looked to the legislative record and concluded that comments made by neighbors did not evince a discriminatory motive on the part of the town. The court explained:

> "[P]ermitting town councils, planning commissions, and the like to hear the views of concerned citizens and other interested parties about proposed projects is the essence of all zoning hearings. There is no evidence in the record to suggest that the cited comments or similar ones, which were a small part of the total comments, motivated the commissioners or Town Council members to vote against the [Special Use Permit], and we decline

to make such an inference based solely on the fact that the comments were made." *Budnick*, 518 F.3d at 1117-18.

In other circumstances, courts have attributed the discriminatory comments of members of the community, or their concerns, to the governing board of the local agency, and have found discrimination based in part on those comments or concerns. In *Stewart B. McKinney Foundation, Inc v. Town Plan and Zoning Com.*, 790 F.Supp. 1197 (D.Conn. 1992), the plaintiff, a nonprofit organization, sought to operate a group home for HIV-infected persons. The plaintiff intended only to house disabled persons at the residence and did not intend to provide any treatment or services. Upon learning of the plaintiff's intentions, the town sent a letter asking the plaintiff thirteen questions about the operational details of the house and the medical needs of its intended occupants. *Id*. at 1204-1205. The town zoning commission subsequently held a meeting at which it determined the plaintiff needed to obtain a "special exception" to its zoning requirements in order to operate the home in a residential neighborhood. But the plaintiff had not applied for a special exception. *Id.* at 1205-1206. The plaintiff nonetheless asked the commission to reverse its decision, arguing that its proposed group home complied with the town's definition of "family" for purposes of the zoning code. *Id*. at 1206. The Commission refused on the grounds that special exceptions are required for both "charitable uses" and "nursing homes." *Id.*

The plaintiff sued the zoning commission and sought a preliminary injunction to enjoin the special exception requirement. *Id*. at 1207. The District Court issued the injunction and found that plaintiff was likely to prevail on its discriminatory treatment claim under the FHA based on circumstantial evidence. The court relied heavily on the comments of persons in the community who opposed the plaintiff's plans. The court held that the comments were evidence that the commission acted with discriminatory intent. *Id*. at 1212-1213. The court also rejected as patently unreasonable the commission's interpretation of the definition of "family" in the town's regulations. The regulations defined "family" as including a group of five unrelated persons who live together as a single housekeeping unit, and the court found that plaintiff's proposed residents clearly would constitute a family. *Id.* at 1213. The commission's attempt to classify the plaintiff as a charitable use or nursing home was unreasonable and arbitrary because the plaintiff did not propose to provide any medical care or any other kinds of services. *Id*. at 1214. The court also found that the commission had discriminated because it had departed from its normal procedures by (1) requiring a special exception for a group that qualified as a "family," (2) requesting that the plaintiff answer the thirteen questions before any use was formally proposed; and (3) conducting a hearing in the absence of any application by the plaintiff. *Id*. at 1213.

In *Potomac Group Home Corp. v. Montgomery County*, 823 F.Supp. 1285 (D. Md. 1993), the District Court reviewed several aspects of a county's licensing program for group homes for the elderly. The County allowed such homes by right in all residential zones, but (1) required the operators of the group homes to send letters to each neighboring property owner setting forth their plans to operate, (2) subjected each proposed home to a program review board hearing; and (3) excluded from group homes persons who were emotionally, mentally, or socially incapable of taking action for self-preservation under emergency conditions, or who were insufficiently mobile to exit a building in an emergency. *Id.* at 1289-91. The District Court held that all three of these provisions violated the FHA. *Id.* at 1302. The neighbor notification

requirement was declared facially invalid because it applied to no other groups and was unsupported by any rational basis. *Id.* at 1296. The notification rule instead caused a great deal of harm by provoking a negative reaction from the community and stigmatizing the disabled. *Id.* Likewise, the program review board hearing was declared invalid because the County only selectively applied it to projects that had provoked community opposition. *Id.* Moreover, the review boards included neighborhood representatives, but no one from the group home community. *Id.* at 1297. Thus, the County had given undue weight to community concerns and prejudices. *Id.* at 1298. The court dismissed the County's argument that it was required to hold public meetings by state law. *Id.* at 1299. "To the extent that the state Open Meetings Act 'stands as an obstacle to the accomplishment of the full purposes and objectives' of the FHAA, it may not be enforced." *Id*. Finally, the exclusion from group homes of persons incapable of exiting a building during an emergency was declared invalid because it irrationally excluded disabled persons from group homes. *Id.* at 1300. Fire code regulations already addressed the emergency needs of disabled persons to such an extent that the exclusion lacked any rational basis. *Id*.

In *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 122 (N.D.N.Y. 1992), a non-profit corporation brought suit against the village, alleging discrimination against the disabled by refusing to allow a residence for HIV-infected homeless persons. Among other actions, the village had drafted Local Law No. 2 of 1990, which amended the zoning ordinance's definition of the term "boarding house" to exclude the relevant facility. *Id*. at 125. The ordinance was passed quickly during the time that the organization completed its purchase of the property, and there was no other indication that amending this definition was otherwise needed. *Id*. Moreover, plenty of other evidence, including comments of Village board members, indicated discriminatory animus. *See id*. at 123-28. The court found that plaintiffs established both discriminatory intent and disparate impact, stating, "[i]t is crystal clear that Local Law No. 2 of 1990 was enacted by the board members to prevent Support Ministries from establishing its adult home for homeless [individuals with AIDS] in Waterford." *Id*. at 133. The court held, "the HIV-positive status of the future residents of the Sixth Street house was at least one factor, and probably the primary factor, for the enactment and application of the new zoning law." *Id*. at 134. Furthermore, the court explained, "[d]efendants' actions were blatantly based on the community's unfounded fear of AIDS, their misperceptions of AIDS, and their prejudices against [persons with AIDS], and not on a legitimate zoning interest." *Id*. at 136. When defendants asserted that the facility would result in a potential risk of infection of the village residents, the court stated, "[d]efendants' argument merely repeats the uneducated, discriminatory beliefs that brought this case to the court. Their argument is totally unsupported by the medical evidence." *Id*. at 137. The court did not invalidate the ordinance, however. *Id*. at 139-40. The ordinance applied only to this facility, and the court enjoined the village from interfering with the facility, thereby effectively enjoining the ordinance as it then applied. *Id*. at 139.

In *Tsombanidis v. City of West Haven*, 129 F. Supp. 2d 136, 139-40, 147 (D. Conn. 2001), the owner and residents of an Oxford House (a provider of housing for persons in recovery from alcohol or substance abuse) brought suit against a city and its fire district, alleging violations of FHA amendments and the ADA. The court granted the fire district's motion for summary judgment regarding intentional discrimination but denied its motion regarding disparate impact, and the court denied the city's motions for summary judgment regarding

intentional discrimination and disparate impact. *Id*. at 162. Prompted by neighbors' complaints, the city inspected the property and found various violations of the property maintenance code. *Id*. at 141. Plaintiffs claimed this was a departure from normal procedures. *Id*. at 152. A group of concerned neighbors also met with the mayor, circulated a petition, and attended a city council meeting, asserting pressure on the city. *Id*. at 143-44. A fire inspector was sent to the property and later issued an abatement notice to correct violations. *Id*. at 145.

Regarding discriminatory intent, the court stated, "even where individual members of government are found not to be biased themselves, liability may still be imposed where discriminatory governmental actions are in response to significant community bias." *Id*. at 152. The court quoted *Innovative Health Systems, Inc. v. City of White Plains*, 117 F. 3d 37, 49 (2d Cir. 1997): "a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter." *Tsombanidis*, 129 F. Supp. at 152. Upon the city's declaration that "representative government requires that even arguably intolerant citizens have the right to have their complaints investigated," the court agreed but explained that the city's actions in response to these complaints must be examined and thus cannot be decided by a summary judgment motion. *Id*. at 153. As to the fire district, there was no evidence that community opposition played any role in its enforcement efforts, or even that the fire officials were aware of such opposition, thus the court granted summary judgment in favor of the fire district regarding intentional discrimination. *Id*. at 154-55.

The Second Circuit Court of Appeals affirmed in part and reversed in part in *Tsombanidis v. West Haven Fire Department*, 352 F. 3d 565, 581-82 (2d Cir. 2003). The court found as a matter of law that plaintiffs failed to establish a prima facie claim of disparate impact, questioning the district court's methodology in reaching this conclusion. *Id*. at 575-77. However, regarding discriminatory intent, the court reiterated that plaintiffs offered valid evidence that the city rarely took enforcement action against boarding houses in residential neighborhoods, the city ignored Oxford Houses' explanatory letters, and one of the property maintenance code officials was dissatisfied with Oxford House. *Id*. at 580. The appellate court affirmed the district court's holding on this claim because evidence supported the court's finding that the history of neighborhood hostility and pressure on city officials motivated the city in initiating and continuing its enforcement efforts. *Id*.

In *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987, 991-92, 999, 1006 (D. Minn. 2008), private owners of residential properties brought suit against a city, alleging illegal enforcement of the city's minimum residential property maintenance standards for violations on properties leased to low-income households. The court rejected a FHA discriminatory treatment claim. The city enforced its housing code by conducting proactive sweeps requested by city officials and responding to citizen complaints, but due to limited resources, housing inspectors had discretion in their application of the rules. *Id*. at 993. Plaintiffs alleged that neighboring properties also had code violations but did not receive enforcement orders, and they also claimed that the public housing agency received preferential treatment. *Id*. at 995. A legislative aide received a call from a resident who was concerned that her neighbors were submitting complaints about her due to her race. *Id*. at 1000. The aide relayed this call in an email, stating that there was a "very real possibility that people of color are unfairly targeted by the city's complaint[-]based system," and sought to set up a meeting with the neighbors to address this

concern. *Id*. The court held that the email chain demonstrates that the resident was concerned about the neighbors rather than the city targeting her and that the city took these concerns seriously and sought to resolve the matter. *Id*. Thus, the email chain was not evidence of discriminatory animus. *Id*. Furthermore, although there was testimony of the neighbors making false allegations to the police, the court held, "discriminatory animus on the part of the neighbors is not evidence of discriminatory animus on the part of [the city]." *Id*. at 1004. The Court of Appeals affirmed the District Court's decision. *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010).

The comments of local officials have also led to adverse results in court. In *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 419 (2d Cir. 1995), the federal government and private plaintiffs brought two suits against a village and its officers, alleging the village had been incorporated to exclude the Orthodox Jewish community through zoning restrictions on places of worship. The jury in the private plaintiffs' suit found the village had violated the FHA, but two days later, the district court found against the federal government. *Id*. at 422. The court then corrected what it considered two inconsistent judgments by concluding that the village was entitled to judgment as a matter of law. *Id*. at 423. On appeal, the Second Circuit held the village was liable. *Id*. at 435. First, the court noted "the plethora of statements in the record attributed to . . . leaders who became Village officials, expressing anti-Orthodox Jewish sentiments." *Id*. at 430. One official said, "the only reason we formed this village is to keep those Jews from Williamsburg out of here." *Id*. The mayor called the Orthodox Jews "foreigners and interlopers," "ignorant and uneducated," and "an insult to the people who lived there previously." *Id*. at 420. Another official said that the village did not have to pursue particular proceedings with respect to a home synagogue because "there are other ways we can harass them." *Id*. Second, the events cited by the officials as evidencing a need to incorporate as a village, along with the subsequent actions, demonstrated an animosity toward Orthodox Jews. *Id*. at 431. The pre-incorporation zoning was seen as leading to the "grim picture of a Hasidic belt." *Id*. The officials cited traffic and noise problems but only paid attention to those created by the Orthodox Jews. *Id*. The officials opposed slight variances for a synagogue's construction but unanimously allowed a Catholic mausoleum variance. *Id*.

In *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead*, 98 F. Supp. 2d 347, 349 (S.D.N.Y. 2000), a non-profit Orthodox Jewish organization and two ultra-Orthodox Jewish residents brought suit against the village and its officials, alleging religious discrimination in zoning ordinances and their enforcement. In addition to specifically restricting the plaintiff's use and occupancy of its property, the village zoning laws included a prohibition of multi-family housing and a requirement of a special permit to have two kitchens in one house, which plaintiffs claimed was discriminatory. *Id*. at 351. Affidavits were presented demonstrating allegedly discriminatory comments by the mayor in his recounting of a past history of intentional discrimination by the village. *Id*. at 355. The court denied defendants' summary judgment motion. *Id*. at 349. Regarding the FHA claims, the court stated that the plaintiffs had raised a triable issue of fact as to motivation. *Id*.

In *United States v. City of Parma*, 661 F.2d 562, 564-65 (6th Cir. 1981), the U.S. Attorney General brought suit seeking to enjoin the city from violating the FHA with a number of acts which had the purpose and effect of maintaining racial segregation. Among other actions, the city refused to enact a fair housing resolution welcoming "all persons of goodwill," passed

four land use ordinances imposing height, parking and voter approval limitations on housing developments, did not apply for federal funds, and rejected proposals for public or low-income housing. *Id*. at 566-67. The district court found for the federal government, holding that at least some of the city's actions "were motivated by a racially discriminatory and exclusionary intent" in order to "maintain the segregated 'character' of the City," and the Sixth Circuit Court of Appeals affirmed in relevant part. *Id*. at 568, 579. There was evidence of elected officials' public statements that were either overtly racist or found to have racist meanings, open hostility of both the residents and officials regarding low-income housing, and departures from normal practices by city employees in handling a subsidized housing project proposal, including unusually strict adherence to the planning and zoning code, and not accommodating the developer through informal negotiations. *Id*. at 566, 568, 575. There was also "ample testimony that Parma already had a reputation among black residents of the Cleveland area of hostility to racial minorities." *Id*. at 574.

In *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1572 (E.D. Mo. 1994), recovering alcoholics and drug abusers filed an action against a city, alleging FHA violations in the city's zoning and building code enforcement. The district court found the city liable for both discriminatory intent and disparate impact, and the court held that plaintiffs were entitled to a declaratory judgment and a permanent injunction enjoining the city from enforcing its zoning code to prohibit a recovery facility from operating with over eight persons. *Id*. at 1584. The city received a complaint about the facility, and thus sent its city inspector to investigate, which led to subsequent inspections and citations, including for at least one non-existent violation. *Id*. at 1565-66, 1576. According to a city employee, "the neighbors did not have complaints about specific problems, but 'concern for the idea that a drug rehab house was in their neighborhood.'" *Id*. at 1566. The decision to cite the facility for a violation of the zoning code was made by the city's zoning administrator, who testified in a deposition that he "'wouldn't want them living next door.'" *Id*. at 1566-67. Regarding a FHA discriminatory intent claim, the court explained, "[i]ntentional discrimination can include actions motivated by stereotypes, unfounded fears, misperceptions, and 'archaic attitudes', as well as simple prejudice about people with disabilities." *Id*. at 1575-76. The court further stated that demonstrating intentional discrimination does not require proof of a malicious desire to discriminate, but rather "[i]t is enough that the actions were motivated by or based on consideration of the protected status itself." *Id*. at 1576. In this instance, the court held:

> The evidence here showed that city officials responded to the presence of the Oxford Houses based on stereotypical fears of recovering addicts and alcoholics, and carried out their enforcement efforts in response to neighborhood and community fears and concerns about "some sort of drug rehab" house being in the two neighborhoods. In short, the evidence clearly showed that defendant's actions were motivated by consideration of plaintiffs' handicapped status.

Id. at 1576. The court explained that the city made no attempt to assuage the fears of its residents by explaining the benefits of the Oxford House program or the relevant non-discrimination laws and quoted *Association of Relatives and Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 104 (D. P.R. 1990): "a decisionmaker has a

duty not to allow illegal prejudices of the majority to influence the decision making process." *Id*. Plaintiffs presented evidence that the city had not prosecuted various religious orders that violated the ordinance. *Id*. at 1578. The city asserted that no one ever complained about the religious orders, but the court explained that this "supports the argument that defendant enforced the ordinance only against politically unpopular groups like the handicapped plaintiffs here," finding discriminatory impact. *Id*. at 1578 & n.17.

The Eighth Circuit Court of Appeals reversed in *Oxford House-C v. City of St. Louis*, 77 F. 3d 249, 250-51 (8th Cir. 1996), holding the city acted lawfully. The court explained, "[r]ather than discriminating against Oxford House residents, the City's zoning code favors them on its face. The zoning code allows only three unrelated, nonhandicapped people to reside together in a single family zone, but allows group homes to have up to eight handicapped residents." *Id*. at 251-52. Despite challenges that the eight-person limit would destroy the financial viability of many Oxford Houses and that the city had not asserted a specific reason for choosing eight as the limit, the court concluded that the rule was rational. *Id*. at 252. Regarding the finding that the city singled out the Oxford Houses for zoning inspections and enforcement, the appellate court found this clearly erroneous "because Oxford House did not show the City ignored zoning violations by nonhandicapped people." *Id*. The court noted that the city never received complaints about the other groups Oxford House alleged were violating the zoning code. *Id*. As to the city officials' opinions, the court stated, "we believe the City's enforcement actions were lawful regardless of whether some City officials harbor prejudice or unfounded fears about recovering addicts." *Id*. These "isolated comments" do not reveal a discriminatory application of the zoning code, especially when the Oxford Houses were "plainly in violation of a valid zoning rule and City officials have a duty to ensure compliance." *Id*. As to the officials' awareness of community opposition, the court held that these inspectors did not hold policymaking positions, and thus their commentary and actions did not impute to the city as evidence of discriminatory intent. *Id*.

PRACTICAL ADVICE:

- Local officials should refrain from affirming or agreeing with discriminatory comments made by members of the public.

--- Discriminatory comments from the public, which are shown to influence a local agency's decision adverse to a protected group, could form the basis for a successful challenge in court. Comments by members of the public alone, without agreement of the governing body, are unlikely to form the basis of a successful anti-discrimination lawsuit. Nevertheless, discriminatory comments on the record make for bad atmospherics and could taint an otherwise strong defense.

- Local officials should remind members of the public who make discriminatory comments that it is not permissible for government to discriminate based on a person's disabled or otherwise protected status.

--- This might not always be possible given that multiple concerns are often in play. If local officials feel they are not in a position to issue admonitions in an emotionally

charged environment, they should at the very least listen respectfully to everyone without expressly agreeing with anyone.

--- In a heated setting, it might be advisable for the Mayor or Chair to read a prepared statement at the outset of a public hearing, and before reconvening after each break, remind everyone of the governing law, and that disrespectful comments are inappropriate. This may help avoid one or more particular speakers feeling targeted if the Mayor or Chair reads a statement immediately after a speaker's comments.

- Local officials should refrain from making comments that could be perceived as discriminatory by others.

--- Discriminatory comments by local officials, depending on their frequency and severity, may lead to liability in an anti-discrimination lawsuit.

--- On some occasions, attorneys from the U.S. Department of Justice attend City Council or Planning Commission meetings unbeknownst to anyone else present, and City officials do not learn of this until much later. Comments by local officials during those meetings could trigger further investigation by the Department of Justice culminating in a lawsuit brought by the United States.

- Local officials should state the reasons for their decision in non-discriminatory terms.

--- Language matters. Depending upon context, terms such as "those people" or "you people" or "them" do not read well in a transcript. Avoid demeaning terms such as "addicts" or "drunks" and the like. Courts develop a feel for the backstory based on the terms used. The more neutral and professional the language and tone, the better. Where the evidence is such that the case is a close call, courts might be willing to give the benefit of the doubt to the government when the record reflects good behavior.

- Local officials and government staff members should not align themselves with a group, no matter how well-intentioned that group may be, that opposes housing for disabled persons.

--- Officials and staff should not attend private meetings of an opposition group.

--- If officials and staff conduct workshops or seminars in an effort to resolve community differences, they should invite people from all groups to participate instead of inviting only some of the interested parties.

- If any interested party circulates inaccurate information that appears to be fueling public opposition to a protected group, particularly where the inaccurate information involves the action or inaction of local officials and staff members, the local agency should attempt immediately to provide accurate information.

- If a particular project, or the implementation of a regulation, requires input or action from multiple departments within the local agency, ensure that all departments communicate with each other so that none takes action inconsistent with the others.

- Conform as much as possible to past practice. For example, if applications for use permits in a particular zone usually involve Planning Commission or City Council hearings over a period of a few hours on a single date, but an application involving a protected group involves hearings over multiple days where the same residents opposing a project speak more than once, or where the comments of a large number of residents opposing the project are repetitive, this could be considered evidence of discriminatory intent. Also, if the protected group is required to obtain a discretionary approval, ensure that the application process for that approval is not significantly more onerous than the process for any discretionary approval to which other groups may be eligible for the same purpose.

(ii) Articulating a legitimate nondiscriminatory reason for the regulation.

Courts view subjective explanations of regulations with skepticism. Objective evidence of asserted reasons leads to better results for the defendant agency. "In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members of protected groups. Our reasoning, in part, is that 'clever men may easily conceal their motivations,' *United States v. City of Black Jack,* 508 F.2d 1179, 1185 (8th Cir. 1974). There is less reason to be wary of subjective explanations, though, where a defendant provides objective evidence indicating that truth lies behind his assertions of nondiscriminatory conduct." *Soules v. U.S. Dep't of Housing & Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992).

Concern for the residential character of the neighborhood is a legitimate and nondiscriminatory goal. *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997). "Though [Plaintiff] made an effort to ensure that [the use] would aesthetically blend in with its surrounding neighborhood, [the use] nevertheless required a [use permit] because certain aspects of the [the use] did not meet all of the requirements of the residential zones in which it would have been located." *Budnick*, 518 F.3d at 1116. *See also Gamble*, 104 F.3d at 305 ("[W]e … conclude the reason the City advances for its decision, concern for the character of the neighborhood, is legitimate and nondiscriminatory."). Nonetheless, if a municipality has shown little regard for the character of the neighborhood by previously allowing other uses inconsistent with that asserted character, the court most likely will reject preservation of neighborhood character as a legitimate nondiscriminatory reason.

(iii) Showing the asserted reason for the regulation is a pretext for discrimination.

In direct evidence cases, courts decide the issue of pretext by examining the same factors that inform whether plaintiff has established at the outset a prima facie case of discriminatory treatment. In several of the cases discussed above, it was the gravity of plaintiff's evidence, or lack thereof, regarding legislative history, sequence of events, or departure from customary practice, that was outcome determinative on the issue of pretext.

In *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 1269 (10th Cir. 2001), a youth group homes operator brought suit against the city, alleging in relevant part that the denial of a special use permit (SUP) was a violation of the FHA. The district court ruled for Olathe on this claim. *Id*. at 1269-70. On appeal, Keys alleged that Olathe denied the SUP because of the children's disabilities, but Olathe responded that "it denied the permit because the troubled juveniles would pose a legitimate threat to neighborhood safety." *Id*. at 1273. The Tenth Circuit called this a legitimate nondiscriminatory basis for the decision. *Id*. Thus, "the sole issue for trial focused on whether Olathe's safety concerns were mere pretext for handicap discrimination." *Id*. The district court found this reason was not mere pretext, and the appellate court stated this inquiry was a factual issue. *Id*. at 1273-74. The home was for youths ages 12 to 17 who were abused, neglected, or abandoned, and whose scores were high on a rating scale of juvenile behavioral problems, meaning they were typically antisocial, aggressive, and engaged in violent crimes. *Id*. at 1274. Keys operated another such home that had a break-out in the past, and the juveniles went on a crime spree. *Id*. Although Keys showed that additional nighttime staff was hired after the break-out, which had prevented further break-outs, and the majority of police calls did not affect the neighbors, the court stated, "Olathe's fears are not groundless. . . . It is not unreasonable to think that [these juveniles] are capable of causing similar problems in the future." *Id*. at 1274-75. It then affirmed the district court's holding that this reason was not mere pretext. *Id*. at 1275.

2. Disparate Impact

NOTE: Many published federal decisions analyze whether a challenged regulation is invalid under the FHA and other anti-discrimination laws on the theory that the regulation has an adverse disparate impact on a protected group. Recently, however, the very existence of the disparate impact theory under federal law has been challenged. The question of whether a disparate impact claim even is cognizable under the FHA is presented in a Petition for a Writ of Certiorari pending before the U.S. Supreme Court in *Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.* (Docket No. 11-1507). The Supreme Court is expected to consider the petition at its opening conference on September 24, 2012. The high court is very likely to take the case because it granted certiorari last term in a case that presented the same question. *Magner v. Gallagher* (Docket No. 10-1032). The *Magner* case was not decided, however, because one week before the scheduled oral argument the parties stipulated to dismissal of the writ of certiorari, and the Court subsequently dismissed the case.

"To establish a prima facie case of disparate impact under the FHA, 'a plaintiff must show at least that the defendant's actions had a discriminatory effect.'" *Budnick*, 518 F.3d at 1118. "'Discriminatory effect' describes conduct that actually or predictably resulted in discrimination." *Pfaff v. U.S. Dept. of Housing and Urban Development*, 88 F.3d 739, 745 (9th Cir. 1996) (*Pfaff*). "[P]laintiff must establish '(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.'" *Budnick*, 518 F.3d at 1118 (citing *Pfaff*, 88 F.3d at 745) (alterations in original) (citations omitted). "[A]n inference of discriminatory impact is not sufficient." *Budnick*, 518 F.3d at 1118; *Pfaff*, 88 F.3d at 745 ("To establish a prima facie case of discrimination without intent, the charging party must 'prove the discriminatory impact at issue; raising an inference of discriminatory impact is insufficient.'").

"We have previously recognized the necessity of statistical evidence in disparate impact cases." *Budnick*, 518 F.3d at 1118-19 citing *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) ("Summary judgment is appropriate when statistics do not support a disparate impact analysis" (citation omitted)). "The farther removed from local statistics the plaintiffs venture, the weaker their evidence becomes." *Budnick*, 518 F.3d at 1119 citing *Mountain Side Mobile Estates P'ship v. Sec. of Hous. and Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995). "[T]he focus in a disparate impact case is usually 'on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.'" *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (*Rose*) quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 108 S.Ct. 2777, 2784-85, 101 L.Ed.2d 827 (1988).

In *Rose*, the Ninth Circuit explained, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the [disparate impact]. The statistical disparities must be sufficiently substantial that they raise such an inference of causation." 902 F.2d at 1424. "A defendant may rebut a plaintiff's proof of disparate impact by 'supply[ing] a legally sufficient, nondiscriminatory reason.'" *Budnick*, 518 F.3d at 1118 (quoting *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194 (9th Cir. 2006). After the defendant articulates a legitimate nondiscriminatory reason, plaintiff may rebut that reason by showing that it is a pretext for discrimination.

3. Reasonable Accommodation

"A municipality commits discrimination under section 3604(f)(3(B) of the FHA if it refuses 'to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the physically disabled] equal opportunity to use and enjoy a dwelling.'" *Gamble*, 104 F.3d at 307. "To prove that an accommodation is necessary, plaintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice. Put another way, without a causal link between defendants' policy and the plaintiff's injury, there can be no obligation on the part of defendants to make a reasonable accommodation." *Giebeler v. M & B Associates*, 343 F.3d 1143, 1155 (9th Cir. 2003) (*Giebeler*) (internal quotations and citations omitted).

Under federal anti-discrimination laws, an accommodation is not reasonable if it imposes an undue financial or administrative hardship on the agency or fundamentally changes an agency's regulatory program. *Giebeler*, 343 F.3d at 1157. Thus, in the zoning context, a necessary accommodation is reasonable unless it requires a fundamental alteration in zoning regulations or imposes an undue financial or administrative burden. The answers to these questions "will vary depending on the facts of a given case." *City of Edmonds v. Washington State Bldg. Code Council,*18 F.3d 802, 806 (9th Cir.1994). "The requirement of reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost (to the defendant) and benefit (to the plaintiff) merit consideration as well." *Bronk v. Ineichen,* 54 F.3d 425, 429 (7th Cir.1995).

A reasonable accommodation claim is not ripe unless the unsuccessful applicant has exhausted its administrative remedies in seeking the accommodation. In *U.S. v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994) (*Village of Palatine*), the court analyzed a FHA housing discrimination claim on behalf of persons in recovery. 37 F.3d at 1233-34. The claim alleged

that the Village failed to make a reasonable accommodation that would allow a group home to continue operating in its then-current location. *Id*. at 1233. It appeared that the Village's zoning ordinance would have allowed the sober living home to continue in its then-current location as a special use. *Id*. However, the special use process involved public notice and hearing, and because of this plaintiff refused to invoke it. *Id*. "On appeal the Village argue[d], among other things, that it [could not] be found to have failed in its obligation to make a reasonable accommodation necessary to afford the [group home residents] an equal opportunity to use and enjoy their dwelling because the [sober living home] never invoked the procedures that would allow the Village to make such an accommodation." *Id.* at 1233. The Seventh Circuit agreed. *Id*. The Village could not have authorized the use sought by plaintiff until plaintiff requested authorization. *Id*. The court found, to the extent that the sober living home's claim was based on the Village's failure to make a reasonable accommodation, the issue was not ripe. *Id.* "The zoning process, including the hearings on applications for conditional use permits, serves the purpose of enabling a city to make a reasonable accommodation in its rules, policies, and practices. The city must be afforded the opportunity to make such an accommodation." *Id.* (internal quotations and citations omitted).

Other cases are in agreement. *See Oxford House-A v. City of University City*, 87 F.3d 1022, 1024-25 (8th Cir. 1996) (citing *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996) ("The Oxford Houses must give the City a chance to accommodate them through the City's established procedures for adjusting the zoning code."); *Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597, 602 (4th Cir. 1997) ("Under the Fair Housing Act, however, a violation occurs when the disabled resident is first denied a reasonable accommodation…."); *Enriching, Inc. v. City of Fountain Valley*, 151 Fed.Appx. 523, 525 (9th Cir. 2005) [unpublished] (citing *Village of Palatine*'s holding that a city "must be afforded an opportunity to make such an accommodation pursuant to its own lawful procedures.")

Village of Palatine identified two exceptions where the claim would be ripe even if the plaintiff had not exhausted administrative remedies: (1) if the claim were a challenge to the application procedure itself; and (2) if the application process was demonstrably futile. *Id.* at 1234. The court also limited the ripeness rule to reasonable accommodation claims and noted that "if plaintiff's claim were of discriminatory intent, rather than failure to make a reasonable accommodation, th[e] claim might well be presently ripe even though [the plaintiff] has not sought a special use approval." *Id.* at 1233, fn.3. The Eighth Circuit has followed the Seventh Circuit's ripeness rule for FHA reasonable accommodations claims. *See Oxford House-A v. City of Univ. City,* 87 F.3d 1022, 1024-25 (8th Cir.1996).

Following is a brief discussion, divided into two groups, of federal cases evaluating reasonable accommodation claims. The government lost each case presented in the first group, and won each case presented in the second group.

Cases The Government Lost

In *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004), a man with AIDS was cited by the City for maintaining a nuisance for failure to maintain his yard free of garbage and debris. *Id*. at 1260. After receiving an order to clean the property, the man asked for additional time due to his health (he had AIDS-related meningitis). *Id*. The City ignored the request, hired a contractor to clean the property, and sent the man a bill for the cost. *Id*. The Ninth Circuit held

that the man had stated a reasonable accommodation claim under the FHA and the ADA. *Id*. at 1264, 1268. The City argued that it had not denied the man the use and enjoyment of his home because it had neither excluded him from his home nor created less of an opportunity for him to live in the neighborhood of his choice. *Id*. at 1262. The court disagreed, holding that the imposition of a financial burden can sufficiently interfere with the use and enjoyment of a disabled person's home so as to require a reasonable accommodation. *Id*. at 1262-1263. The court did not pass on whether the proposed accommodation was reasonable, but remanded the matter back to the district court. *Id.* at 1264, 1270. In doing so, it stated that "what constitutes a reasonable accommodation … requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards." *Id*. at 1270 (internal quotation and citation omitted).

In *U.S. v. City of Chicago Heights*, 161 F.Supp.2d 819 (N.D.Ill. 2001), the federal government alleged under the FHA that the City failed to provide mentally disabled persons a reasonable accommodation from the City's requirement that group homes be separated from each other by 1000 feet. *Id*. at 821. The District Court held that the proposed accommodations had to be both necessary *and* reasonable. *Id*. at 833-834. Moreover, the court held that the FHA requires only a showing that the requested accommodation is one way of ameliorating the plaintiff's disability. *Id*. at 836. Thus, the court rejected the City's argument that the government had failed to show that a particular location was necessary. *Id*. With respect to the reasonableness requirement, the court held that a necessary accommodation is reasonable unless it requires a fundamental alteration in the nature of the zoning scheme, or imposes undue financial or administrative burdens. *Id*. The City argued that exempting the group home in question would fundamentally alter its spacing requirement which was intended to prevent clustering and facilitate normalization for disabled residents. *Id*. at 837. The court rejected this argument, expressing great skepticism regarding anti-clustering justifications. *Id*. at 838. The court nonetheless left open the possibility that under different facts, a waiver of a spacing requirement could be unreasonable. *Id*. at 840. In this case, however, the court determined that granting a special use permit despite the spacing requirement would not result in clustering that would prevent the integration of disabled persons or change the residential character of a neighborhood. *Id*. Thus, it would not result in a fundamental alteration of the zoning scheme. *Id*.

In *Sharpvisions, Inc. v. Borough of Plum*, 475 F.Supp.2d 514 (W.D.Pa. 2007) the Borough allowed single family homes as a matter of right in an residential zone but required group homes to obtain a CUP. *Id*. at 518. The Borough cited a group home for the disabled for operating without the necessary CUP, and the operator appealed the enforcement notice to the Borough Zoning Hearing Board. *Id*. at 519. The operator argued that its residents should be treated as a "family" for purposes of the zoning code and thus did not require a CUP. *Id*. The Borough denied the appeal and the operator sued under the FHA, asserting a failure to provide a reasonable accommodation. *Id*. at 520. The District Court held that the Borough had failed to provide a reasonable accommodation. *Id*. at 526. The operator sufficiently demonstrated that classifying the residents as a family was necessary to provide them an equal opportunity to enjoy the housing of their choice. *Id*. At the same time, the Borough failed to meet its burden to show that the requested accommodation was unreasonable. *Id*.

In *Community Services, Inc. v. Heidelberg Township*, 439 F.Supp.2d 380 (M.D.Pa. 2006), a healthcare company sought a variance to operate a group home for the mentally disabled, and sought a variance to classify the residents as a "family" for purposes of the Town's zoning code. *Id*. at 384. The variance would have allowed the group home to operate as a single-family residence as a matter of right in an agricultural zone. *Id*. The town denied the variance request and the operator sued on behalf of the patients under the FHA and sought a preliminary injunction against the Town. *Id*. at 391. The District Court held that the operator had a substantial likelihood of success on its reasonable accommodation claim. *Id*. at 398. The record showed that the plaintiffs required around-the-clock care to help them with their everyday living and that assisted living facilities were not allowed anywhere in the Town as a matter of right. *Id*. at 398-399. Thus, the operator was likely to meet its initial burden of showing that the variance was necessary to allow the residents an equal opportunity to live in the Town. *Id*. at 399. At the same time, there was nothing in the record to suggest that the requested variance was unreasonable. *Id*.

In *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996) a town failed to reasonably accommodate a nursing home by denying it a variance to operate in a rural residential district. *Id*. at 1103. Granting the variance would not have imposed undue financial or administrative burdens because the residents would have become new taxpayers and would not impose any special burdens on municipal services. *Id.* at 1105. At the same time, granting the variance would not have fundamentally undermined the Town's zoning scheme because residential retirement communities were allowed in the same zone and are similar in nature to a nursing home. *Id*.

In *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781 (6th Cir. 1996), operators of a residential home for the elderly and disabled sought to rezone its property to enable its expansion from 6 to 9 residents. *Id*. at 788. The Sixth Circuit held that the City failed to provide a reasonable accommodation when it denied the request. *Id*. at 795. The expanded facility was necessary because (1) disabled seniors cannot live in residential areas without assistance; and (2) there was an insufficient supply of assisted living facilities in the area. *Id*. at 796. The accommodation was reasonable because the additional residents would not significantly increase traffic and parking problems. *Id*.

Cases The Government Won

In *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997), the plaintiff sought a conditional permit to construct a residential facility for the elderly and disabled, which would also contain a health care facility that would be open to the general public. *Id*. at 303-304. The Ninth Circuit held that the City's affirmative duty under the FHA to provide a reasonable accommodation did not require it to allow a health care facility in a residential area. *Id*. at 307. This case is perhaps best read as being consistent with the requirement that the requested accommodation not fundamentally alter the jurisdiction's zoning scheme.

In *Howard v. City of Beavercreek*, 108 F.Supp.2d 866 (S.D.Ohio 2000), a man who suffered from post traumatic stress disorder requested a variance to erect a fence which exceeded the City's height limit so as to block his neighbor's view onto his property. *Id*. at 869. (The man believed that the neighbors were spying on him, which contributed to his stress and heart

condition.) *Id*. The City denied the variance and the man sued claiming the City failed to reasonably accommodate his disability. *Id*. The District Court held that the height variance for the fence was not a necessary accommodation because the plaintiff had lived in his home for 15 years without the fence and only stated that he might be forced to move from his home if he could not build the fence. *Id*. at 873. The court also held in the alternative that the denial of the requested variance was justified under the public safety exemption found in 42 U.S.C. § 3604(f)(9), which states: "Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." The court found that the fence would pose a direct threat to pedestrians and vehicular traffic by blocking sight lines at an intersection. *Id*. at 875.

In *Means v. City of Dayton*, 111 F.Supp. 2d 969 (S.D. Ohio 2000), a residential care facility for the mentally disabled was granted a CUP to operate in a residential area subject to provision of additional off-street parking that was not required of other residential uses. *Id*. at 974. The operator claimed that these conditions caused her to incur additional expenses and should have been eliminated as a reasonable accommodation. *Id*. The District Court disagreed, holding that the Fair Housing Act does not override local zoning controls merely because they might make housing more expensive for the disabled, absent a showing that the expense actually prevents the disabled from living in a residence. *Id*. at 978-979.

In *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437 (7th Cir. 1999), a developer proposed two 4-unit buildings, where the units on the first floor would be built to meet the needs of wheelchair bound persons. *Id*. at 438. The Village offered to rezone the property to allow a total of 3 units, but the developer rejected this offer because it would result in more expensive units that would be harder to sell. *Id*. at 439. The Seventh Circuit held that the Village had not failed to make a reasonable accommodation. *Id*. The only burden placed on the disability was added expense, and this is a burden that all bear regardless of disability. *Id*. at 440.

In *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597 (4th Cir. 1997), a group home for elderly and infirm requested a variance from the County to expand from 8 to 15 disabled and elderly residents. *Id*. at 599. The County denied the variance and the operator sued, claiming intentional discrimination and failure to make a reasonable accommodation. *Id*. The Fourth Circuit held that the plaintiff did not carry its burden to show that the requested accommodation was necessary to provide the disabled with an equal opportunity to use and enjoy a dwelling. *Id*. at 606. The County's zoning code already allowed group homes, and 30 other facilities were already operating in the County. *Id*. at 605. The plaintiff failed to present any evidence that the requested expansion was necessary to make the home economically viable or that the expansion would be therapeutically meaningful. *Id*. The case is also notable because the Fourth Circuit expressly held that the plaintiff's failure to exhaust its administrative remedies gave preclusive effect to the County Planning Board's factual findings. *Id*. at 601.

In *Erdman v. City of Fort Atkinson*, 84 F.3d 960 (7th Cir. 1996), the operator of a proposed group home for persons who were elderly and disabled requested a CUP to operate in a residential zone. *Id*. at 962. The City denied the request on grounds that the application failed to show development plans for the entire 9-acre parcel and showed a cul-de-sac that was

inconsistent with the City's master zoning plan. *Id*. The Seventh Circuit held that the City did not fail to make a reasonable accommodation because requiring complete plans that are consistent with the master zoning plan was not necessary to provide the disabled with an equal opportunity to enjoy a dwelling. *Id*. at 963.

In *U.S. v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994), the Seventh Circuit held that the Village did not fail to provide a reasonable accommodation when it subjected a group home for persons recovering from substance abuse to a special use permit requirement. *Id*. at 1232. The residents had argued that the SUP process would subject them to public hearings, vocal opposition, and unfair scrutiny based on their disability. *Id*. at 1233. The Seventh Circuit refuted this argument: "Public input is an important aspect of municipal decision making; we cannot impose a blanket requirement that cities waive their public notice and hearing requirements in all cases involving the handicapped." *Id*. at 1234.

In *Thornton v. City of Allegan*, 863 F.Supp. 504 (W.D.Mich. 1993), operators of a proposed adult foster care facility sought a CUP to operate in the City's central business district. *Id*. at 506. The city denied the request based on inconsistent land uses and the operators sued, claiming failure to make a reasonable accommodation. *Id*. at 507. The District Court held that the City had made a reasonable accommodation by offering to assist the plaintiff in finding an alternate location. *Id*. at 510. The city held meetings with realtors and rezoned the alternate site to allow for the proposed use with a CUP. *Id*. Moreover, the court held in the alternative, the City did not fail to reasonably accommodate even without its efforts to find an alternate site because the CUP denial was neither unduly burdensome nor otherwise discriminatory. *Id*. at 510-511.

PRINCIPLES DISTILLED FROM REASONABLE ACCOMMODATION CASES:

- In evaluating a reasonable accommodation request, local governments bear the burden of demonstrating that the request, if granted, would result in a fundamental alteration of a regulatory program, or in an undue financial or administrative burden on the local agency.

- If a zoning regulation is itself invalid, courts will reject a municipality's argument that a reasonable accommodation will generate a fundamental alteration of that regulation.

- In the uncommon and extreme case where a protected use is altogether banned by a municipality, courts will reject the position that allowing the use will result in a fundamental alteration of the municipality's regulations.

- An accommodation that would otherwise be reasonable may become unreasonable if a municipality attaches invalid conditions to the accommodation.

- Local agencies may show that a reasonable accommodation would result in a fundamental alteration of its regulatory program if admissible evidence shows that the accommodation would pose a concrete threat to public safety.