CITY OF YPSILANTI
Planning Commission MEETING
Wednesday, January 18, 2023 @ 7:00 PM
Council Chambers
One South Huron, Ypsilanti, MI 48197

Page

I. CALL TO ORDER

II. ROLL CALL

Matt Dunwoodie, Chair
Michael Simmons, Vice-Chair
Eric Bettis
Amanda Smith
Mike Davis Jr.
Jessica Donnelly
Phil Hollifield
Carl Schier
Brian Jones-Chance

III. AGENDA APPROVAL

A. January 2023 Agenda

IV. APPROVAL OF MINUTES

3 - 5 A. December 2022 Minutes DRAFT
PC 21 Dec 2022 MINUTES

V. AUDIENCE PARTICIPATION

VI. COMMITTEE REPORTS

A. Non-Motorized Committee Report

1. January 2023 NMAC Meeting Minutes (Pending)
2. Committee Chair Recommendation to Planning Commission
3. NMAC Bylaws | Add Transition Time for New Committee Chair
4. Appointment of Jessica (Jessi) Kwek

VII. PRESENTATIONS AND PUBLIC HEARING ITEMS

7 - 121 A. Zoning Text Amendment | Supportive Housing

(Public Hearing)
ZTA Packet
ZTA Supportive Housing Review
FHA Zoning Fact Sheet WMFH
HUD DOJ FHA Joint 2016
Discriminatory Zoning FHA 2018 PA
APA Draft Equity Zoning Policy Guide Oct 2022

VIII. OLD BUSINESS

IX. NEW BUSINESS

Regular Planning Commission Meetings

123 A. 2023 Calendar

X. ADJOURNMENT

MINUTES
CITY OF YPSILANTI
Planning Commission MEETING
Wednesday, December 21, 2022 @ 7:00 PM
Council Chambers
One South Huron, Ypsilanti, MI 48197

Page

I. CALL TO ORDER

II. ROLL CALL

Present: Dunwoodie, Bettis, Davis Jr, Donnelly, Hollifield, Schier, Jones-Chance
Absent: Simmons, Davis Jr, Smith

III. AGENDA APPROVAL

Motion to approve the agenda.
Offered By: Commissioner Donnelly; Seconded By: Commissioner Jones-Chance
Approved: Yes – 7; No – 0; Absent – 3 (Simmons, Davis Jr., Smith)

IV. APPROVAL OF MINUTES

Motion to approve the November 16, 2022 Minutes
Offered By: Commissioner Hollifield.; Seconded By: Commissioner Donnelly
Approved: Yes – 7; No – 0; Absent – 3 (Simmons, Davis Jr., Smith)

V. AUDIENCE PARTICIPATION

Motion to open the audience participation.
Offered By: Commissioner Hollifield.; Seconded By: Commissioner Donnelly
Approved: Yes – 7; No – 0; Absent – 3 (Simmons, Davis Jr., Smith)
Commissioner Smith and Davis Jr. spoke via zoom.
Motion to close the audience participation.
Offered By: Commissioner Donnelly; Seconded By: Commissioner Hollifield
Approved: Yes – 7; No – 0; Absent – 3 (Simmons, Davis Jr., Smith)

VI. COMMITTEE REPORTS

A. Non-Motorized Committee Report
Commissioner Davis Jr. gave an update from the committee via zoom. Nonmotorized has been meeting, focusing on vision zero plan, a priority list and a membership list,

B. Reappointment of Dylan Goings
Motion to reappoint Dylan Goings to the Non-Motorized Committee
Offered By: Commissioner Hollifield; Seconded By: Commissioner Donnelly
Approved: Yes – 7; No – 0; Absent – 3 (Simmons, Davis Jr., Smith)

VII. PRESENTATIONS AND PUBLIC HEARING ITEMS

Zoning Text Amendment 1) Section 122-451 to allow for "Roominghouses" in the

Historic Corridor as a principal or special use; and 2) Add Section to Chapter 122, Article V, Division 1 | Specific Standards for Certain Uses ("Roominghouses)
Commissioner Donnelly Recused herself.
Fred Lucas – on behalf of applicant, spoke about the zoning text and the case for it to be changed. He compared rooming houses to bed and breakfasts.

Motion to open the Public Hearing
Offered By: Commissioner Bettis; Seconded By: Commissioner Hollifield
Approved: Yes – 6; No – 0; Recused – 1 (Donnelly); Absent – 3 (Simmons, Davis Jr., Smith)
George Hagenauer- City Resident. Spoke about his experience living in a rooming house. He understands that resident managers are unaffordable, but splitting up historic properties have safety issues. He does not support adding roominghouses to the Historic District unless they are required to be owner occupied.
Amanda Smith – Speaking as a City Resident. Supports the text amendment. Stated that rooming houses are historic as well.
Letter from residents John and Patricia Harrington – 209 N. Huron: Believes that landlords are just trying to maximize on their investments with this amendment and does not support the amendment. "Let's not undo what has taken years to fix and change."
Letter from Resident, Cheryl Farmer- Opposed to the text amendment. Stated parking concerns. Believes that it would only serve the interests of bad landlords and not the community.

Motion to close the Public Hearing
Offered By: Commissioner Bettis; Seconded By: Commissioner Jones-Chance
Approved: Yes – 6; No – 0; Recused – 1 (Donnelly); Absent – 3 (Simmons, Davis Jr., Smith)

Motion the approve the proposed text amendment with the following findings:
1. The amendment is consistent with the following guiding values of the Master Plan. Anyone, no matter what age or income, can find a place to call home in Ypsilanti, and housing options should match the needs of the people.
2. The amendment is consistent with the description and purpose of the district.
3. Adding roominghouses as a use in the Historic Corridor, it may be considered consistent with the description and purpose of the proposed district.

Conditions:
1. Change the reference to Sec.122-5XX instead of referencing the existing part of the ordinance Sec. 122-530.

Friendly amendment by Commissioner Dunwoodie: Allowance by special use permit and that the amendment has modified with discussion. Commissioner Bettis approved the friendly amendment.
Offered By: Commissioner Bettis; Seconded By: Commissioner Hollifield
Approved: Yes – 6; No – 0; Recused – 1 (Donnelly); Absent – 3 (Simmons, Davis Jr., Smith)

VIII. OLD BUSINESS

IX. NEW BUSINESS

X. FUTURE BUSINESS DISCUSSIONS/UPDATES

XI. ADJOURNMENT

Motion to adjourn at 8:19pm

Offered By: Commissioner Jones-Chance; Seconded By: Commissioner Donnelly

Approved: Yes – 7; No – 0; Absent – 3 (Simmons, Davis Jr., Smith)

City of Ypsilanti

Community and Economic Development Department

January 3, 2023

Text Amendment Staff Review
Article II, Section 122-203 Supportive Housing Definition;
Article V, Division 1, Section 122-557 Supportive Housing Conditions

GENERAL INFORMATION

Applicant	City of Ypsilanti Planning Department
Action Requested	Applicant requests zoning text amendment to remove from the Zoning Ordinance – Article II, Section 122-203 Supportive Housing Definition; Article V Division 1, Section 122-557 Supportive Housing Conditions.

SUMMARY

The City of Ypsilanti is committed to improving the equity of our zoning systems. It is the purpose of this zoning text amendment to update Ypsilanti's zoning ordinance sections on "supportive housing," including definition, conditions and permissible uses – in order to treat supportive housing the same as other residential dwellings, and as dictated by the Fair Housing Amendments Act laws that apply to zoning and planning.

BACKGROUND

In November and December of 2022, the City of Ypsilanti's Planning Department, Planning Commission and Zoning Board of Appeals reviewed and approved the following variances, in order to make possible the construction of supportive housing at 206-210 N Washington Street in the core neighborhood (CN) zoning district –

1. 122-556, Supportive Housing. The approved variance removes the limit of 8 occupants and the requirement for an on-site resident manager, due to low-income development fiscal budget feasibility.
2. 122-685, Parking dimensions. For 90-degree parking, this would require a 22' drive aisle width. The variance grants a 12' drive aisle width.
3. 122-691, Minimum and maximum number of parking spaces. This would require 1.5 spaces for each dwelling unit, plus guest spaces (1 per 10 units) which would require (35) parking spaces. The variance grants 2 parking spaces and one van accessible space.

During the process of granting these variances, the Office of Community and Economic Development concluded that the rules surrounding supportive housing may violate FHAA laws pertaining to zoning. The definition and conditions appeared to be discriminatory.

OTHER COMMUNITIES

Staff has researched other municipalities to find that cities like Ferndale and Grand Rapids do not delineate supportive housing apart from any other type of housing. After consulting with the City of Ferndale, Michigan

Association of Planners and Fair Housing Washtenaw County, staff has concluded that amending our zoning ordinance is necessary to eliminate discrimination and promote equity in zoning for the City of Ypsilanti.

This action is guided by the FHAA and the U.S. Department Of Housing and Urban Development. It is also reinforced by the American Planning Association's Equity in Zoning Policy Initiative.

Attachments –

- Fair Housing of West Michigan, "Fact Sheet: Fair Housing, Zoning & Land Use."
- Disability Rights Pennsylvania, "Discriminatory Zoning and the Fair Housing Act."
- "Joint Statement of the Department of Housing and Urban Development and the Department of Justice | State and Local Land Use Laws and Practices and the Application of the Fair Housing Act."
- DRAFT | APA Equity in Zoning Policy Guide (October 2022)

DISCUSSION

Staff recommends that the amended zoning shall treat supportive housing the same as other residential dwellings. The goal of this amendment is to "dismantle the barriers that perpetuate the segregation of historically disadvantaged and vulnerable communities."

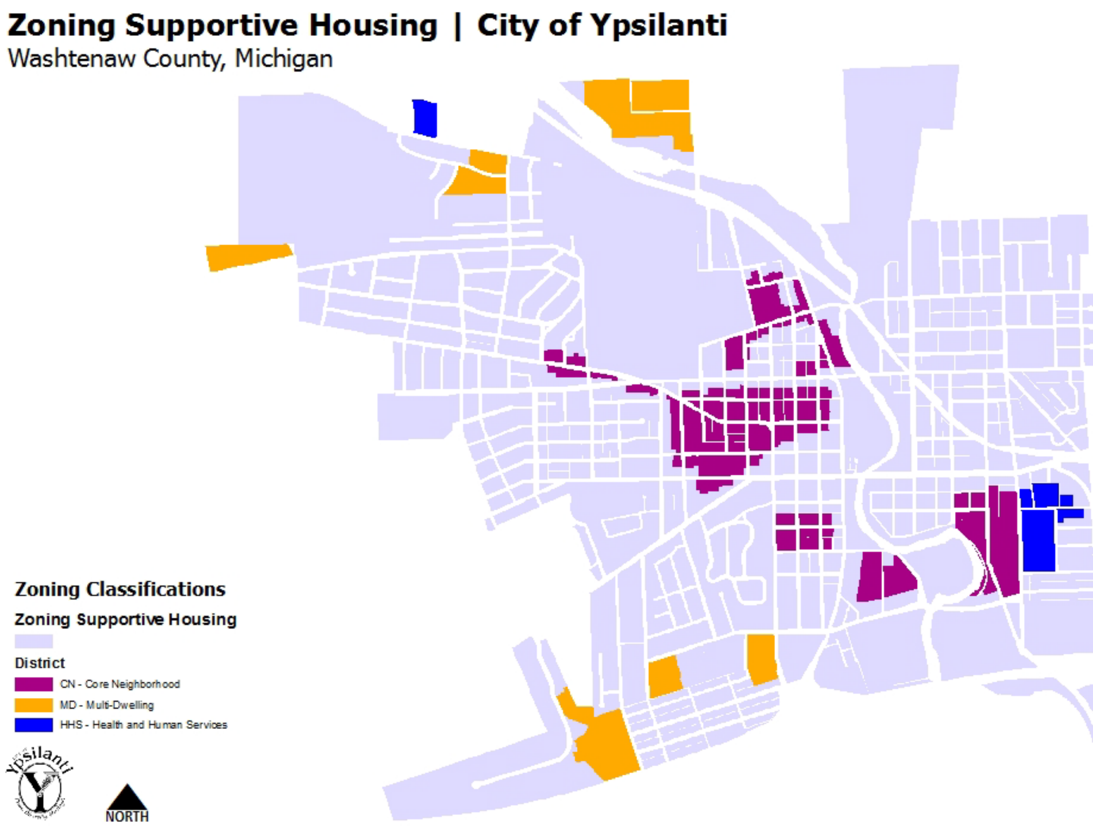
This discussion is supported by the following permitted use and standards recommendations in the APA's "Equity in Zoning Policy Guide" –

- Treat assisted living facilities, congregate care communities, retirement villages, and supportive housing types as residential and not commercial uses and allow them in a wide variety of residential zoning districts.
- Treat housing with supportive services for people with disabilities the same as similarly sized residential uses. Group homes or supportive housing for those with physical and mental disabilities are protected by the federal Fair Housing Amendments Act (FHAA), and the required broad reading of the FHAA means that zoning should not treat group homes any differently than similar sized homes for people without disability. Ensure that the zoning regulations allow small group homes wherever single-household homes are permitted and allow large group homes wherever multi-family housing of the same size is permitted.
- Allow a wider mix of uses in existing zoning districts to increase opportunities for historically disadvantaged and vulnerable populations to live closer to sources of employment and needed services.
- Eliminate or reduce minimum off-street parking requirements in areas where those requirements serve as significant barriers to investment and are not necessary to protect public health and safety or pedestrians, bicyclists, or motorists using the facility. Because minimum off-street parking regulations result in raising the cost of housing and other development, they often make redevelopment of older infill sites difficult or impossible – which likely has a disproportionately negative impact on historically disadvantaged and vulnerable neighborhoods.

Figure 1: Where Supportive Housing is currently allowed as Principal, Special, or Accessory in the City of Ypsilanti Zoning Ordinance

District	Permissible Use
Parks	--
R1	--
Multifamily Residential	S
Production, Manufacturing, /Distribution	--
Center	--
Core Neighborhoods (CN)	S
Core Neighborhood-Mid (CN-Mid)	--
Core Neighborhood-Single Family (CN-SF)	--
Historic Corridor	--
Neighborhood Corridor	--
General Corridor	--
Health & Human Services	P

Figure 2: Current Map of Supportive Housing Zoning Districts



PROPOSED CHANGED TEXT

1) Staff recommends that we remove the definition of Supportive Housing from the zoning ordinance in order to promote fair housing and prevent discriminatory stereotypes, fears and comments about residents and prospective residents of certain dwellings or areas.

2) Staff recommends the removal of Supportive Housing conditions, in order to eliminate regulations that contain special rules or restrictions for housing that only apply to individuals in a discriminatory manner.

3) Staff recommends removing Supportive Housing references from Permissible Uses tables for zoning districts CN, MD and HHS.

Removals are noted in strikethrough (~~strikethrough~~); additions are noted by underline (underline).

~~**Supportive Housing | Ypsilanti Zoning Ordinance**~~
~~122-203 Definition~~

~~**Supportive housing** means a facility that provides housing for 24 hours per day and supportive services designed to assist residents with improving daily living skills, securing employment, rehabilitation, or obtaining permanent, independent housing. Supportive housing is not intended for short-term, emergency housing and care, but rather longer periods ranging from a few months to a few years. Supportive housing is distinguished from a hospital or other health care environment, and facilities regulated by the State of Michigan as State licensed residential facilities. This definition shall not include fraternities, sororities, dormitories, adult foster care facilities, group homes, nursing homes, substance abuse treatment facilities, emergency shelters, individuals utilizing tenant-based or homeownership-based voucher funding through the U.S. Department of Housing and Urban Development, community correctional facilities, and housing for the rehabilitation of former occupants of correctional facilities.~~

~~Supportive services are services provided to residents of supportive housing for the purpose of facilitating the independence of residents, and may be provided on the premises, or off-site. Some examples are case management, medical or psychological counseling and supervision, childcare, transportation, and job training.~~

~~**Conditions**~~
~~Sec. 122-557. - Supportive housing.~~
~~Supportive housing shall be subject to the conditions hereinafter imposed:~~

(a) ~~The maximum number of persons served per the facility shall not exceed 8.~~

(b) ~~On-site services shall be for residents of the facility only.~~

(c) ~~If the owner of the property does not reside on the premises, the owner must appoint a resident manager who resides on the premises. The property owner must provide the name and contact information of this person upon request by the City.~~

(d) ~~For each adult cared for, the square footage of outdoor recreation or relaxation area required by the Building Code must be provided in the rear, side, or street side yard. Such outdoor space must be fenced and screened from any adjacent lot.~~

(e) ~~All new construction or additions to existing buildings shall be compatible with the scale and character of the surroundings, and exterior building materials shall be harmonious with other buildings in the neighborhood.~~

(f) ~~Screening in accordance with §122-634 shall be provided along all rear and side yard boundaries between the proposed use and property either zoned or used for single-family and two-family purposes.~~

Multiple Dwellings (MD)

USES	MD	NOTES	SPECIFIC REGULATIONS
Group Residences	S		Single-family building type only.
Townhomes/Rowhomes	P		
Two-Family Dwelling	P		
Multiple Family Dwellings, maximum of 6 units per building	P		Responsible party for management must be on file with the City.
Multiple Family Dwellings, more than 6 units per building	S		Responsible party for management must be on file with the City.
Home Occupation	A		Section 122-531
Family Child Care Home	A	1—6 children	Must be licensed by the state and must comply with the minimum state standards for such facilities.
Group Child Care Home	S	Up to 12 children	Section 122-521
Group living with support staff, not licensed by State of Michigan	S	~~Includes supportive housing, rehabilitation housing, or dormitories.~~	

Core Neighborhood (CN, CN-Mid, CN-SF)

USES	CN-SF	CN-MID	CN	NOTES	SPECIFIC REGULATIONS
Single-Family Detached Dwelling	P	P	P		
Single-Family Attached Dwellings	P	P	P	In CN-SF: only permitted on corner lots, otherwise prohibited.	In "townhome" building type only. In the case of CN-SF corner lots the corner lot must contain at least 30′ of frontage on two or more street sides.
Accessory Dwelling Unit	A	A	A		
Two-family dwelling units	P	P	P	In CN-SF: only permitted on corner lots, otherwise prohibited.	In the case of CN-SF corner lots the corner lot must contain at least 30′ of frontage on two or more street sides.
Multiple Family Dwellings, maximum of 4 units per building	—	S	P		
Multiple Family Dwellings, more than 4 units per building	—	—	S		
Apartments located above ground floor of permitted nonresidential uses	—	—	P		
Home Occupation	A	A	A		Section 122-531
Family Child Care Home	A	A	A	1—6 children	Must be licensed by the state and must comply with the minimum state standards for such facilities.
Group Child Care Home	S	S	S	Up to 12 children	Section 122-521
Adult foster care family homes	A	A	A	1—6 adults, day care and 24-hour care	Must be licensed by the state and must comply with the minimum state standards for such facilities.

USES	CN-SF	CN-MID	CN	NOTES	SPECIFIC REGULATIONS
Group residences and roominghouses	—	—	S		Section 122-530
Group living with support staff, not licensed by State of Michigan	—	—	S	~~Includes supportive housing, rehabilitation housing or dormitories.~~	~~Section 122-557~~

Health and Human Services District

USES	HHS	NOTES	SPECIFIC REGULATIONS
RESIDENTIAL			
Single-Family Attached Dwelling	P		In "Townhome" building type only
Two-family dwelling	P		
Multiple Family Dwellings, maximum of 6 units per building	P		
Multiple Family Dwellings, more than 6 units per building	S		Section 122-541
Apartments located above ground floor of permitted nonresidential uses	P		
Home Occupation	A		Section 122-531
Group living with support staff, not licensed by State of Michigan	P	~~Includes supportive housing, rehabilitation housing or dormitories.~~	~~Section 122-557~~

STANDARDS FOR AMENDMENTS **§122-362(a)**

(a) ***Text Amendment.*** *For a change to the text of the Zoning Ordinance, the Planning Commission shall consider and the City Council may consider, whether the proposed amendment meets the following standards:*

(1) The proposed amendment is consistent with the guiding values of the Master Plan; and

Applicable guiding values of the Master Plan include:

- *Diversity is our strength*. This proposed amendment promotes mixed-income development and results in many benefits for communities. Neighborhoods which are ethnically and economically integrated provide greater opportunity for creating a diverse work force and more diverse and vibrant communities. Eliminating discrimination whether through intent or effect underscores the City's reverence for this guiding value.
- *Ypsilanti is sustainable*. This proposed amendment brings Ypsilanti closer to this standard by removing discriminatory zoning that would inhibit or prevent a mix of incomes, opportunities and social capital across the spectrum of our communities who together help the city grow and flourish.
- *Great place to do business, especially green and creative*. This equity in zoning action supports a better way for creating a diverse market that supports small businesses, industries and services dispersed throughout the City of Ypsilanti.

(2) The rezoning is consistent with description and purpose of the proposed district; and

All housing, including the currently classified Supportive Housing will be regarded in a manner that is consistent with the description and purpose of zoning districts that permit residential land use.

(3) The proposed amendment is consistent with the intent of this Zoning Ordinance; and

The proposed amendment is consistent by establishing that the currently classified Supportive Housing will adhere to residential zoning standards.

(4) The proposed amendment will enhance the functionality, transportation network or character of the future development in the City; and

The amendment serves to enhance these standards by ensuring that equity in residential zoning promotes fair housing near employment opportunities and in desirable places that offer connectivity to work, goods, services, education, community and alternative/affordable transportation choices.

(5) The proposed amendment will preserve the historic nature of the surrounding area and of the City; and

The proposed amendment does not remove or modify any HDC regulations, nor does it change building form or design standards.

(6) The proposed amendment will enhance the natural features and environmental sustainability of the City; and

The amendment neither improves nor impacts the natural features and environmental sustainability of the City.

(7) The proposed amendment will protect the health, safety, and general welfare of the public; or

Because the foundation for amending is based on zoning for equity, the proposed amendment is intended to improve the health, safety and general welfare across all Ypsilanti communities by removing discriminatory effect and barriers.

(8) The proposed amendment is needed to correct an error or omission in the original text; or

The proposed amendment is needed to increase equity in zoning by eliminating the potential for adverse impacts or harm to a community as a result of discriminatory language and / or the perpetuation of segregation.

(9) The proposed amendment will address a community need in physical or economic conditions or development practices; and

It is reasonable to believe that access and connectivity standards for a broader range of people will be improved – especially concerning reliance on getting to work and other places via public transit, walking and biking as alternatives to vehicles. Additionally, those who rely on mobility aids, strollers for small kids, and children who need safe routes to school will benefit as the area for housing choices is increased through equity in zoning and removing discriminatory regulations and barriers.

(10) The proposed amendment will not result in the creation of significant nonconformities in the City.

The proposed amendment will not result in the creation of significant nonconformities in the City.

STAFF RECOMMENDATION

Staff recommends the Planning Commission ***approve*** the proposed text amendment to remove Article V Division 1, Section 122-557 Supportive Housing Conditions and Permissible Uses; and to remove Article II, Section 122-203 Supportive Housing Definition to City Council, with the following findings –

1. The proposed amendment is consistent with the guiding values of the Master Plan;
2. The rezoning is consistent with description and purpose of the proposed district;
3. The proposed amendment is consistent with the intent of this Zoning Ordinance;
4. The proposed amendment will enhance the functionality, transportation network or character of the future development in the City;
5. The proposed amendment will enhance the character of the future development in the City;
6. The proposed amendment is needed to correct an error or omission in the original text;
7. The proposed amendment will address a community need in physical or economic conditions or development practices.
8. The proposed amendment promotes fair housing, improves equity in zoning, and aligns with the Fair Housing Amendments Act that apply to zoning and planning.

Holli Andrews, MCPD
City Planner
City of Ypsilanti

c.c. File
Katie Jones, City of Ypsilanti Economic Development and Equity Coordinator
Leah DuMouchel, AICP | Director of Programs and Communications, Michigan Association of Planning

FACT SHEET: FAIR HOUSING, ZONING & LAND USE

Fair Housing Center of West Michigan
20 Hall Street SE
Grand Rapids, MI 49507
616-451-2980 phone
616-451-2657 fax
866-389-FAIR
fhcwm.org

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

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

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

What is a reasonable accommodation?
Reasonable accommodations, as defined by the FHAct, are changes in rules, policies, or practices that are necessary to afford persons or groups of persons with disabilities equal opportunity to use and enjoy housing. The FHAct requires municipalities to make reasonable accommodations in land use and zoning policies and procedures. Reasonable accommodations provide a means of requesting from the local government flexibility in the application of land use and zoning regulations, or, in some instances, even a waiver of certain restrictions or requirements.
For example: a zoning board grants an accommodation to designate a group of individuals with disabilities who intend to live together in a group or recovery home as a "family" so as to allow more unrelated adults in a single family home than normally permitted under zoning restrictions.

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

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

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

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

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

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

Affirmatively Furthering Fair Housing

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

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

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

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Washington, D.C.
November 10, 2016

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

STATE AND LOCAL LAND USE LAWS AND PRACTICES AND THE APPLICATION OF 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 ("the Act"),[1] which prohibits discrimination in housing on the basis of race, color, religion, sex, disability, familial status (children under 18 living with a parent or guardian), or national origin.[2] The Act prohibits housing-related policies and practices that exclude or otherwise discriminate against individuals because of protected characteristics.

The regulation of land use and zoning is traditionally reserved to state and local governments, except to the extent that it conflicts with requirements imposed by the Fair Housing Act or other federal laws. This Joint Statement provides an overview of the Fair Housing Act's requirements relating to state and local land use practices and zoning laws, including conduct related to group homes. It updates and expands upon DOJ's and HUD's Joint

[1] The Fair Housing Act is codified at 42 U.S.C. §§ 3601–19.
[2] The Act uses the term "handicap" instead of "disability." Both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of "disability" in the Americans with Disabilities Act

Statement on Group Homes, Local Land Use, and the Fair Housing Act, issued on August 18, 1999. The first section of the Joint Statement, Questions 1–6, describes generally the Act's requirements as they pertain to land use and zoning. The second and third sections, Questions 7–25, discuss more specifically how the Act applies to land use and zoning laws affecting housing for persons with disabilities, including guidance on regulating group homes and the requirement to provide reasonable accommodations. The fourth section, Questions 26–27, addresses HUD's and DOJ's enforcement of the Act in the land use and zoning context.

This Joint Statement focuses on the Fair Housing Act, not on other federal civil rights laws that prohibit state and local governments from adopting or implementing land use and zoning practices that discriminate based on a protected characteristic, such as Title II of the Americans with Disabilities Act ("ADA"),[3] Section 504 of the Rehabilitation Act of 1973 ("Section 504"),[4] and Title VI of the Civil Rights Act of 1964.[5] In addition, the Joint Statement does not address a state or local government's duty to affirmatively further fair housing, even though state and local governments that receive HUD assistance are subject to this duty. For additional information provided by DOJ and HUD regarding these issues, see the list of resources provided in the answer to Question 27.

Questions and Answers on the Fair Housing Act and State and Local Land Use Laws and Zoning

1. How does the Fair Housing Act apply to state and local land use and zoning?

The Fair Housing Act prohibits a broad range of housing practices that discriminate against individuals on the basis of race, color, religion, sex, disability, familial status, or national origin (commonly referred to as protected characteristics). As established by the Supremacy Clause of the U.S. Constitution, federal laws such as the Fair Housing Act take precedence over conflicting state and local laws. The Fair Housing Act thus prohibits state and local land use and zoning laws, policies, and practices that discriminate based on a characteristic protected under the Act. Prohibited practices as defined in the Act include making unavailable or denying housing because of a protected characteristic. Housing includes not only buildings intended for occupancy as residences, but also vacant land that may be developed into residences.

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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. §12132.

[4] 29 U.S.C. § 794.

[5] 42 U.S.C. § 2000d.

2. **What types of land use and zoning laws or practices violate the Fair Housing Act?**

Examples of state and local land use and zoning laws or practices that may violate the Act include:

- Prohibiting or restricting the development of housing based on the belief that the residents will be members of a particular protected class, such as race, disability, or familial status, by, for example, placing a moratorium on the development of multifamily housing because of concerns that the residents will include members of a particular protected class.
- Imposing restrictions or additional conditions on group housing for persons with disabilities that are not imposed on families or other groups of unrelated individuals, by, for example, requiring an occupancy permit for persons with disabilities to live in a single-family home while not requiring a permit for other residents of single-family homes.
- Imposing restrictions on housing because of alleged public safety concerns that are based on stereotypes about the residents' or anticipated residents' membership in a protected class, by, for example, requiring a proposed development to provide additional security measures based on a belief that persons of a particular protected class are more likely to engage in criminal activity.
- Enforcing otherwise neutral laws or policies differently because of the residents' protected characteristics, by, for example, citing individuals who are members of a particular protected class for violating code requirements for property upkeep while not citing other residents for similar violations.
- Refusing to provide reasonable accommodations to land use or zoning policies when such accommodations may be necessary to allow persons with disabilities to have an equal opportunity to use and enjoy the housing, by, for example, denying a request to modify a setback requirement so an accessible sidewalk or ramp can be provided for one or more persons with mobility disabilities.

3. **When does a land use or zoning practice constitute intentional discrimination in violation of the Fair Housing Act?**

Intentional discrimination is also referred to as disparate treatment, meaning that the action treats a person or group of persons differently because of race, color, religion, sex, disability, familial status, or national origin. A land use or zoning practice may be intentionally discriminatory even if there is no personal bias or animus on the part of individual government officials. For example, municipal zoning practices or decisions that reflect acquiescence to community bias may be intentionally discriminatory, even if the officials themselves do not personally share such bias. (See Q&A 5.) Intentional discrimination does not require that the decision-makers were hostile toward members of a particular protected class. Decisions motivated by a purported desire to benefit a particular group can also violate the Act if they result in differential treatment because of a protected characteristic.

A land use or zoning practice may be discriminatory on its face. For example, a law that requires persons with disabilities to request permits to live in single-family zones while not requiring persons without disabilities to request such permits violates the Act because it treats persons with disabilities differently based on their disability. Even a law that is seemingly neutral will still violate the Act if enacted with discriminatory intent. In that instance, the analysis of whether there is intentional discrimination will be based on a variety of factors, all of which need not be satisfied. These factors include, but are not limited to: (1) the "impact" of the municipal practice, such as whether an ordinance disproportionately impacts minority residents compared to white residents or whether the practice perpetuates segregation in a neighborhood or particular geographic area; (2) the "historical background" of the action, such as whether there is a history of segregation or discriminatory conduct by the municipality; (3) the "specific sequence of events," such as whether the city adopted an ordinance or took action only after significant, racially-motivated community opposition to a housing development or changed course after learning that a development would include non-white residents; (4) departures from the "normal procedural sequence," such as whether a municipality deviated from normal application or zoning requirements; (5) "substantive departures," such as whether the factors usually considered important suggest that a state or local government should have reached a different result; and (6) the "legislative or administrative history," such as any statements by members of the state or local decision-making body.[6]

4. **Can state and local land use and zoning laws or practices violate the Fair Housing Act if the state or locality did not intend to discriminate against persons on a prohibited basis?**

Yes. Even absent a discriminatory intent, state or local governments may be liable under the Act for any land use or zoning law or practice that has an unjustified discriminatory effect because of a protected characteristic. In 2015, the United States Supreme Court affirmed this interpretation of the Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[7] The Court stated that "[t]hese unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[8]

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[6] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).
[7] ___ U.S. ___, 135 S. Ct. 2507 (2015).
[8] *Id.* at 2521–22.

A land use or zoning practice results in a discriminatory effect if it caused or predictably will cause a disparate impact on a group of persons or if it creates, increases, reinforces, or perpetuates segregated housing patterns because of a protected characteristic. A state or local government still has the opportunity to show that the practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. These interests must be supported by evidence and may not be hypothetical or speculative. If these interests could not be served by another practice that has a less discriminatory effect, then the practice does not violate the Act. The standard for evaluating housing-related practices with a discriminatory effect are set forth in HUD's Discriminatory Effects Rule, 24 C.F.R § 100.500.

Examples of land use practices that violate the Fair Housing Act under a discriminatory effects standard include minimum floor space or lot size requirements that increase the size and cost of housing if such an increase has the effect of excluding persons from a locality or neighborhood because of their membership in a protected class, without a legally sufficient justification. Similarly, prohibiting low-income or multifamily housing may have a discriminatory effect on persons because of their membership in a protected class and, if so, would violate the Act absent a legally sufficient justification.

5. Does a state or local government violate the Fair Housing Act if it considers the fears or prejudices of community members when enacting or applying its zoning or land use laws respecting housing?

When enacting or applying zoning or land use laws, state and local governments may not act because of the fears, prejudices, stereotypes, or unsubstantiated assumptions that community members may have about current or prospective residents because of the residents' protected characteristics. Doing so violates the Act, even if the officials themselves do not personally share such bias. For example, a city may not deny zoning approval for a low-income housing development that meets all zoning and land use requirements because the development may house residents of a particular protected class or classes whose presence, the community fears, will increase crime and lower property values in the surrounding neighborhood. Similarly, a local government may not block a group home or deny a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities or a particular type of disability. Of course, a city council or zoning board is not bound by everything that is said by every person who speaks at a public hearing. It is the record as a whole that will be determinative.

6. **Can state and local governments violate the Fair Housing Act if they adopt or implement restrictions against children?**

Yes. State and local governments may not impose restrictions on where families with children may reside unless the restrictions are consistent with the “housing for older persons” exemption of the Act. The most common types of housing for older persons that may qualify for this exemption are: (1) housing intended for, and solely occupied by, persons 62 years of age or older; and (2) housing in which 80% of the occupied units have at least one person who is 55 years of age or older that publishes and adheres to policies and procedures demonstrating the intent to house older persons. These types of housing must meet all requirements of the exemption, including complying with HUD regulations applicable to such housing, such as verification procedures regarding the age of the occupants. A state or local government that zones an area to exclude families with children under 18 years of age must continually ensure that housing in that zone meets all requirements of the exemption. If all of the housing in that zone does not continue to meet all such requirements, that state or local government violates the Act.

Questions and Answers on the Fair Housing Act and Local Land Use and Zoning Regulation of Group Homes

7. **Who qualifies as a person with a disability under the Fair Housing Act?**

The Fair Housing 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, diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV infection, developmental disabilities, mental illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance), and alcoholism.

The term “major life activity” includes activities such as seeing, hearing, walking breathing, performing manual tasks, caring for one’s self, learning, speaking, and working. This list of major life activities is not exhaustive.

Being regarded as having a disability means that the individual is treated as if he or she has a disability even though the individual may not have an impairment or may not have an impairment that substantially limits one or more major life activities. For example, if a landlord refuses to rent to a person because the landlord believes the prospective tenant has a disability, then the landlord violates the Act's prohibition on discrimination on the basis of disability, even if the prospective tenant does not actually have a physical or mental impairment that substantially limits one or more major life activities.

Having a record of a disability means the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

8. What is a group home within the meaning of the Fair Housing Act?

The term "group home" does not have a specific legal meaning; land use and zoning officials and the courts, however, have referred to some residences for persons with disabilities as group homes. The Fair Housing Act prohibits discrimination on the basis of disability, and persons with disabilities have the same Fair Housing Act protections whether or not their housing is considered a group home. A household where two or more persons with disabilities choose to live together, as a matter of association, may not be subjected to requirements or conditions that are not imposed on households consisting of persons without disabilities.

In this Statement, the term "group home" refers to a dwelling that is or will be occupied by unrelated persons with disabilities. Sometimes group homes serve individuals with a particular type of disability, and sometimes they serve individuals with a variety of disabilities. Some group homes provide residents with in-home support services of varying types, while others do not. The provision of support services is not required for a group home to be protected under the Fair Housing Act. Group homes, as discussed in this Statement, may be opened by individuals or by organizations, both for-profit and not-for-profit. Sometimes it is the group home operator or developer, rather than the individuals who live or are expected to live in the home, who interacts with a state or local government agency about developing or operating the group home, and sometimes there is no interaction among residents or operators and state or local governments.

In this Statement, the term "group home" includes homes occupied by persons in recovery from alcohol or substance abuse, who are persons with disabilities under the Act. Although a group home for persons in recovery may commonly be called a "sober home," the term does not have a specific legal meaning, and the Act treats persons with disabilities who reside in such homes no differently than persons with disabilities who reside in other types of group homes. Like other group homes, homes for persons in recovery are sometimes operated by individuals or organizations, both for-profit and not-for-profit, and support services or supervision are sometimes, but not always, provided. The Act does not require a person who resides in a home for persons in recovery to have participated in or be currently participating in a substance abuse treatment program to be considered a person with a disability. The fact that a resident of a group home may currently be illegally using a controlled substance does not deprive the other residents of the protection of the Fair Housing Act.

9. In what ways does the Fair Housing Act apply to group homes?

The Fair Housing Act prohibits discrimination on the basis of disability, and persons with disabilities have the same Fair Housing Act protections whether or not their housing is considered a group home. State and local governments may not discriminate against persons with disabilities who live in group homes. Persons with disabilities who live in or seek to live in group homes are sometimes subjected to unlawful discrimination in a number of ways, including those discussed in the preceding Section of this Joint Statement. Discrimination may be intentional; for example, a locality might pass an ordinance prohibiting group homes in single-family neighborhoods or prohibiting group homes for persons with certain disabilities. These ordinances are facially discriminatory, in violation of the Act. In addition, as discussed more fully in Q&A 10 below, a state or local government may violate the Act by refusing to grant a reasonable accommodation to its zoning or land use ordinance when the requested accommodation may be necessary for persons with disabilities to have an equal opportunity to use and enjoy a dwelling. For example, if a locality refuses to waive an ordinance that limits the number of unrelated persons who may live in a single-family home where such a waiver may be necessary for persons with disabilities to have an equal opportunity to use and enjoy a dwelling, the locality violates the Act unless the locality can prove that the waiver would impose an undue financial and administrative burden on the local government or fundamentally alter the essential nature of the locality's zoning scheme. Furthermore, a state or local government may violate the Act by enacting an ordinance that has an unjustified discriminatory effect on persons with disabilities who seek to live in a group home in the community. Unlawful actions concerning group homes are discussed in more detail throughout this Statement.

10. What is a reasonable accommodation under the Fair Housing Act?

The Fair Housing 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. 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 may sometimes deny them an equal opportunity to use and enjoy a dwelling.

Even if a zoning ordinance imposes on group homes the same restrictions that it imposes on housing for other groups of unrelated persons, a local government may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. What constitutes a reasonable accommodation is a case-by-case determination based on an individualized assessment. This topic is discussed in detail in Q&As 20–25 and in the HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act.

11. Does the Fair Housing Act protect persons with disabilities who pose a "direct threat" to others?

The Act does not allow for the exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. Nevertheless, the Act does not protect 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 unless the threat or risk to property can be eliminated or significantly reduced by reasonable accommodation. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (for example, 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 or significantly reduce the direct threat. See Q&A 10 for a general discussion of reasonable accommodations. Consequently, in evaluating an individual's recent history of overt acts, a state or local government must take into account whether the individual has received intervening treatment or medication that has eliminated or significantly reduced the direct threat (in other words, significant risk of substantial harm). In such a situation, the state or local government may request that the individual show how the circumstances have changed so that he or she no longer poses a direct threat. Any such request must be reasonable and limited to information necessary to assess whether circumstances have changed. Additionally, in such a situation, a state or local government may obtain satisfactory and reasonable assurances that the individual will not pose a direct threat during the tenancy. The state or local government must have reliable, objective evidence that the tenancy of a person with a disability poses a direct threat before excluding him or her from housing on that basis, and, in making that assessment, the state or local government may not ignore evidence showing that the individual's tenancy would no longer pose a direct threat. Moreover, the fact that one individual may pose a direct threat does not mean that another individual with the same disability or other individuals in a group home may be denied housing.

12. Can a state or local government enact laws that specifically limit group homes for individuals with specific types of disabilities?

No. Just as it would be illegal to enact a law for the purpose of excluding or limiting group homes for individuals with disabilities, it is illegal under the Act for local land use and zoning laws to exclude or limit group homes for individuals with specific types of disabilities. For example, a government may not limit group homes for persons with mental illness to certain neighborhoods. The fact that the state or local government complies with the Act with regard to group homes for persons with some types of disabilities will not justify discrimination against individuals with another type of disability, such as mental illness.

13. Can a state or local government limit the number of individuals who reside in a group home in a residential neighborhood?

Neutral laws that govern groups of unrelated persons who live together do not violate the Act so long as (1) those laws do not intentionally discriminate against persons on the basis of disability (or other protected class), (2) those laws do not have an unjustified discriminatory effect on the basis of disability (or other protected class), and (3) state and local governments make reasonable accommodations when such accommodations may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling.

Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act. For example, suppose a city's zoning ordinance defines a "family" to include up to a certain number of unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission from the city. If that ordinance also prohibits a group home having the same number of persons with disabilities in a certain district or requires it to seek a use permit, the ordinance would violate the Fair Housing Act. The ordinance violates the Act because it treats persons with disabilities less favorably than families and unrelated persons without disabilities.

A local government may generally restrict the ability of groups of unrelated persons to live together without violating the Act as long as the restrictions are imposed on all such groups, including a group defined as a family. Thus, if the definition of a family includes up to a certain number of unrelated individuals, an ordinance would not, on its face, violate the Act if a group home for persons with disabilities with more than the permitted number for a family were not allowed to locate in a single-family-zoned neighborhood because any group of unrelated people without disabilities of that number would also be disallowed. A facially neutral ordinance, however, still may violate the Act if it is intentionally discriminatory (that is, enacted with discriminatory intent or applied in a discriminatory manner), or if it has an unjustified discriminatory effect on persons with disabilities. For example, an ordinance that limits the number of unrelated persons who may constitute a family may violate the Act if it is enacted for the purpose of limiting the number of persons with disabilities who may live in a group home, or if it has the unjustified discriminatory effect of excluding or limiting group homes in the jurisdiction. Governments may also violate the Act if they enforce such restrictions more strictly against group homes than against groups of the same number of unrelated persons without disabilities who live together in housing. In addition, as discussed in detail below, because the Act prohibits the denial of reasonable accommodations to rules and policies for persons with disabilities, a group home that provides housing for a number of persons with disabilities that exceeds the number allowed under the family definition has the right to seek an exception or waiver. If the criteria for a reasonable accommodation are met, the permit must be given in that instance, but the ordinance would not be invalid.[9]

14. How does the Supreme Court's ruling in *Olmstead* apply to the Fair Housing Act?

In *Olmstead v. L.C.*,[10] the Supreme Court ruled that the Americans with Disabilities Act (ADA) prohibits the unjustified segregation of persons with disabilities in institutional settings where necessary services could reasonably be provided in integrated, community-based settings. An integrated setting is one that enables individuals with disabilities to live and interact with individuals without disabilities to the fullest extent possible. By contrast, a segregated setting includes congregate settings populated exclusively or primarily by individuals with disabilities. Although *Olmstead* did not interpret the Fair Housing Act, the objectives of the Fair Housing Act and the ADA, as interpreted in *Olmstead*, are consistent. The Fair Housing Act ensures that persons with disabilities have an equal opportunity to choose the housing where they wish to live. The ADA and *Olmstead* ensure that persons with disabilities also have the option to live and receive services in the most integrated setting appropriate to their needs. The integration mandate of the ADA and *Olmstead* can be implemented without impairing the rights protected by the Fair Housing Act. For example, state and local governments that provide or fund housing, health care, or support services must comply with the integration mandate by providing these programs, services, and activities in the most integrated setting appropriate to the needs of individuals with disabilities. State and local governments may comply with this requirement by adopting standards for the housing, health care, or support services they provide or fund that are reasonable, individualized, and specifically tailored to enable individuals with disabilities to live and interact with individuals without disabilities to the fullest extent possible. Local governments should be aware that ordinances and policies that impose additional restrictions on housing or residential services for persons with disabilities that are not imposed on housing or

[9] Laws that limit the number of occupants per unit do not violate the Act as long as they are reasonable, are applied to all occupants, and do not operate to discriminate on the basis of disability, familial status, or other characteristics protected by the Act.
[10] 527 U.S. 581 (1999).

residential services for persons without disabilities are likely to violate the Act. In addition, a locality would violate the Act and the integration mandate of the ADA and *Olmstead* if it required group homes to be concentrated in certain areas of the jurisdiction by, for example, restricting them from being located in other areas.

15. Can a state or local government impose spacing requirements on the location of group homes for persons with disabilities?

A “spacing” or “dispersal” requirement generally refers to a requirement that a group home for persons with disabilities must not be located within a specific distance of another group home. Sometimes a spacing requirement is designed so it applies only to group homes and sometimes a spacing requirement is framed more generally and applies to group homes and other types of uses such as boarding houses, student housing, or even certain types of businesses. In a community where a certain number of unrelated persons are permitted by local ordinance to reside together in a home, it would violate the Act for the local ordinance to impose a spacing requirement on group homes that do not exceed that permitted number of residents because the spacing requirement would be a condition imposed on persons with disabilities that is not imposed on persons without disabilities. In situations where a group home seeks a reasonable accommodation to exceed the number of unrelated persons who are permitted by local ordinance to reside together, the Fair Housing Act does not prevent state or local governments from taking into account concerns about the over-concentration of group homes that are located in close proximity to each other. Sometimes compliance with the integration mandate of the ADA and *Olmstead* requires government agencies responsible for licensing or providing housing for persons with disabilities to consider the location of other group homes when determining what housing will best meet the needs of the persons being served. Some courts, however, have found that spacing requirements violate the Fair Housing Act because they deny persons with disabilities an equal opportunity to choose where they will live. Because an across-the-board spacing requirement may discriminate against persons with disabilities in some residential areas, any standards that state or local governments adopt should evaluate the location of group homes for persons with disabilities on a case-by-case basis.

Where a jurisdiction has imposed a spacing requirement on the location of group homes for persons with disabilities, courts may analyze whether the requirement violates the Act under an intent, effects, or reasonable accommodation theory. In cases alleging intentional discrimination, courts look to a number of factors, including the effect of the requirement on housing for persons with disabilities; the jurisdiction’s intent behind the spacing requirement; the existence, size, and location of group homes in a given area; and whether there are methods other than a spacing requirement for accomplishing the jurisdiction’s stated purpose. A spacing requirement enacted with discriminatory intent, such as for the purpose of appeasing neighbors’ stereotypical fears about living near persons with disabilities, violates the Act. Further, a neutral spacing requirement that applies to all housing for groups of unrelated persons may have an unjustified discriminatory effect on persons with disabilities, thus violating the Act. Jurisdictions must also consider, in compliance with the Act, requests for reasonable accommodations to any spacing requirements.

16. Can a state or local government impose health and safety regulations on group home operators?

Operators of group homes for persons with disabilities are subject to applicable state and local regulations addressing health and safety concerns unless those regulations are inconsistent with the Fair Housing Act or other federal law. Licensing and other regulatory requirements that may apply to some group homes must also be consistent with the Fair Housing Act. Such regulations must not be based on stereotypes about persons with disabilities or specific types of disabilities. State or local zoning and land use ordinances may not, consistent with the Fair Housing Act, require individuals with disabilities to receive medical, support, or other services or supervision that they do not need or want as a condition for allowing a group home to operate. State and local governments' enforcement of neutral requirements regarding safety, licensing, and other regulatory requirements governing group homes do not violate the Fair Housing Act so long as the ordinances are enforced in a neutral manner, they do not specifically target group homes, and they do not have an unjustified discriminatory effect on persons with disabilities who wish to reside in group homes.

Governments must also consider requests for reasonable accommodations to licensing and regulatory requirements and procedures, and grant them where they may be necessary to afford individuals with disabilities an equal opportunity to use and enjoy a dwelling, as required by the Act.

17. Can a state or local government address suspected criminal activity or fraud and abuse at group homes for persons with disabilities?

The Fair Housing Act does not prevent state and local governments from taking nondiscriminatory action in response to criminal activity, insurance fraud, Medicaid fraud, neglect or abuse of residents, or other illegal conduct occurring at group homes, including reporting complaints to the appropriate state or federal regulatory agency. States and localities must ensure that actions to enforce criminal or other laws are not taken to target group homes and are applied equally, regardless of whether the residents of housing are persons with disabilities. For example, persons with disabilities residing in group homes are entitled to the same constitutional protections against unreasonable search and seizure as those without disabilities.

18. Does the Fair Housing Act permit a state or local government to implement strategies to integrate group homes for persons with disabilities in particular neighborhoods where they are not currently located?

Yes. Some strategies a state or local government could use to further the integration of group housing for persons with disabilities, consistent with the Act, include affirmative marketing or offering incentives. For example, jurisdictions may engage in affirmative marketing or offer variances to providers of housing for persons with disabilities to locate future homes in neighborhoods where group homes for persons with disabilities are not currently located. But jurisdictions may not offer incentives for a discriminatory purpose or that have an unjustified discriminatory effect because of a protected characteristic.

19. Can a local government consider the fears or prejudices of neighbors in deciding whether a group home can be located in a particular neighborhood?

In the same way a local government would violate the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities (see Q&A 5), a local government violates the law if it blocks a group home or denies a reasonable accommodation request because of neighbors' stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers themselves do not have biases against persons with disabilities.

Not all community opposition to requests by group homes is necessarily discriminatory. For example, when a group home seeks a reasonable accommodation to operate in an area and the area has limited on-street parking to serve existing residents, it is not a violation of the Fair Housing Act for neighbors and local government officials to raise concerns that the group home may create more demand for on-street parking than would a typical family and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the requested accommodation, if a similar dwelling that is not a group home or similarly situated use would ordinarily be denied a permit because of such parking concerns. If, however, the group home shows that the home will not create a need for more parking spaces than other dwellings or similarly-situated uses located nearby, or submits a plan to provide any needed off-street parking, then parking concerns would not support a decision to deny the home a permit.

20. When does a state or local government violate the Fair Housing Act by failing to grant a request for a reasonable accommodation?

A state or local government violates the Fair Housing Act by failing to grant a reasonable accommodation request if (1) the persons requesting the accommodation or, in the case of a group home, persons residing in or expected to reside in the group home are persons with a disability under the Act; (2) the state or local government knows or should reasonably be expected to know of their disabilities; (3) an accommodation in the land use or zoning ordinance or other rules, policies, practices, or services of the state or locality was requested by or on behalf of persons with disabilities; (4) the requested accommodation may be necessary to afford one or more persons with a disability an equal opportunity to use and enjoy the dwelling; (5) the state or local government refused to grant, failed to act on, or unreasonably delayed the accommodation request; and (6) the state or local government cannot show that granting the accommodation would impose an undue financial and administrative burden on the local government or that it would fundamentally alter the local government's zoning scheme. A requested accommodation may be necessary if there is an identifiable relationship between the requested accommodation and the group home residents' disability. Further information is provided in Q&A 10 above and the HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act.

21. Can a local government deny a group home's request for a reasonable accommodation without violating the Fair Housing Act?

Yes, a local government may deny a group home's request for a reasonable accommodation if the request was not made by or on behalf of persons with disabilities (by, for example, the group home developer or operator) or if there is no disability-related need for the requested accommodation because there is no relationship between the requested accommodation and the disabilities of the residents or proposed residents.

In addition, a group home's request for a reasonable accommodation may be denied by a local government if providing the accommodation is not reasonable—in other words, if it would impose an undue financial and administrative burden on the local government or it would fundamentally alter the local government's zoning scheme. The determination of undue financial and administrative burden must be decided on a case-by-case basis involving various factors, such as the nature and extent of the administrative burden and the cost of the requested accommodation to the local government, the financial resources of the local government, and the benefits that the accommodation would provide to the persons with disabilities who will reside in the group home.

When a local government refuses an accommodation request because it would pose an undue financial and administrative burden, the local government should discuss with the requester whether there is an alternative accommodation that would effectively address the disability-related needs of the group home's residents without imposing an undue financial and administrative burden. This discussion is called an "interactive process." If an alternative accommodation would effectively meet the disability-related needs of the residents of the group home and is reasonable (that is, it would not impose an undue financial and administrative burden or fundamentally alter the local government's zoning scheme), the local government must grant the alternative accommodation. An interactive process in which the group home and the local government discuss the disability-related need for the requested accommodation and possible alternative accommodations is both required under the Act and helpful to all concerned, because it often results in an effective accommodation for the group home that does not pose an undue financial and administrative burden or fundamental alteration for the local government.

22. What is the procedure for requesting a reasonable accommodation?

The reasonable accommodation must actually be requested by or on behalf of the individuals with disabilities who reside or are expected to reside in the group home. When the request is made, it is not necessary for the specific individuals who would be expected to live in the group home to be identified. The Act does not require that a request be made in a particular manner or at a particular time. The group home does not need to mention the Fair Housing Act or use the words "reasonable accommodation" when making a reasonable accommodation request. The group home must, however, make the request in a manner that a reasonable person would understand to be a disability-related request for an exception, change, or adjustment to a rule, policy, practice, or service. When making a request for an exception, change, or adjustment to a local land use or zoning regulation or policy, the group home should explain what type of accommodation is being requested and, if the need for the accommodation is not readily apparent or known by the local government, explain the relationship between the accommodation and the disabilities of the group home residents.

A request for a reasonable accommodation can be made either orally or in writing. It is often helpful for both the group home and the local government if the reasonable accommodation request is made in writing. This will help prevent misunderstandings regarding what is being requested or whether or when the request was made.

Where a local land use or zoning code contains specific procedures for seeking a departure from the general rule, courts have decided that these procedures should ordinarily be followed. If no procedure is specified, or if the procedure is unreasonably burdensome or intrusive or involves significant delays, a request for a reasonable accommodation may, nevertheless, be made in some other way, and a local government is obligated to grant it if the requested accommodation meets the criteria discussed in Q&A 20, above.

Whether or not the local land use or zoning code contains a specific procedure for requesting a reasonable accommodation or other exception to a zoning regulation, if local government officials have previously made statements or otherwise indicated that an application for a reasonable accommodation would not receive fair consideration, or if the procedure itself is discriminatory, then persons with disabilities living in a group home, and/or its operator, have the right to file a Fair Housing Act complaint in court to request an order for a reasonable accommodation to the local zoning regulations.

23. Does the Fair Housing Act require local governments to adopt formal reasonable accommodation procedures?

The Act does not require a local government to adopt formal procedures for processing requests for reasonable accommodations to local land use or zoning codes. DOJ and HUD nevertheless strongly encourage local governments to adopt formal procedures for identifying and processing reasonable accommodation requests and provide training for government officials and staff as to application of the procedures. Procedures for reviewing and acting on reasonable accommodation requests will help state and local governments meet their obligations under the Act to respond to reasonable accommodation requests and implement reasonable accommodations promptly. Local governments are also encouraged to ensure that the procedures to request a reasonable accommodation or other exception to local zoning regulations are well known throughout the community by, for example, posting them at a readily accessible location and in a digital format accessible to persons with disabilities on the government's website. If a jurisdiction chooses to adopt formal procedures for reasonable accommodation requests, the procedures cannot be onerous or require information beyond what is necessary to show that the individual has a disability and that the requested accommodation is related to that disability. For example, in most cases, an individual's medical record or detailed information about the nature of a person's disability is not necessary for this inquiry. In addition, officials and staff must be aware that any procedures for requesting a reasonable accommodation must also be flexible to accommodate the needs of the individual making a request, including accepting and considering requests that are not made through the official procedure. The adoption of a reasonable accommodation procedure, however, will not cure a zoning ordinance that treats group homes differently than other residential housing with the same number of unrelated persons.

24. What if a local government fails to act promptly on a reasonable accommodation request?

A local government has an obligation to provide prompt responses to reasonable accommodation requests, whether or not a formal reasonable accommodation procedure exists. A local government's undue delay in responding to a reasonable accommodation request may be deemed a failure to provide a reasonable accommodation.

25. Can a local government enforce its zoning code against a group home that violates the zoning code but has not requested a reasonable accommodation?

The Fair Housing Act does not prohibit a local government from enforcing its zoning code against a group home that has violated the local zoning code, as long as that code is not discriminatory or enforced in a discriminatory manner. If, however, the group home requests a reasonable accommodation when faced with enforcement by the locality, the locality still must consider the reasonable accommodation request. A request for a reasonable accommodation may be made at any time, so at that point, the local government must consider whether there is a relationship between the disabilities of the residents of the group home and the need for the requested accommodation. If so, the locality must grant the requested accommodation unless doing so would pose a fundamental alteration to the local government's zoning scheme or an undue financial and administrative burden to the local government.

Questions and Answers on Fair Housing Act Enforcement of Complaints Involving Land Use and Zoning

26. How are Fair Housing Act complaints involving state and local land use laws and practices handled by HUD and DOJ?

The Act gives HUD the power to receive, investigate, and conciliate complaints of discrimination, including complaints that a state or local government has discriminated in exercising its land use and zoning powers. HUD may not issue a charge of discrimination pertaining to "the legality of any State or local zoning or other land use law or ordinance." Rather, after investigating, HUD refers matters it believes may be meritorious to DOJ, which, in its discretion, may decide to bring suit against the state or locality within 18 months after the practice at issue occurred or terminated. DOJ may also bring suit by exercising its authority to initiate litigation alleging a pattern or practice of discrimination or a denial of rights to a group of persons which raises an issue of general public importance.

If HUD determines that there is no reasonable cause to believe that there may be a violation, it will close an investigation without referring the matter to DOJ. But a HUD or DOJ decision not to proceed with a land use or zoning matter does not foreclose private plaintiffs from pursuing a claim.

Litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and DOJ encourage parties to land use disputes to explore reasonable alternatives to litigation, including alternative dispute resolution procedures, like mediation or conciliation of the HUD complaint. HUD attempts to conciliate all complaints under the Act that it receives, including those involving land use or zoning laws. In addition, it is DOJ's policy to offer prospective state or local governments the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

27. How can I find more information?

For more information on reasonable accommodations and reasonable modifications under the Fair Housing Act:

- HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act, *available at* https://www.justice.gov/crt/fair-housing-policy-statements-and-guidance-0 or http://www.hud.gov/offices/fheo/library/huddojstatement.pdf.

- HUD/DOJ Joint Statement on Reasonable Modifications under the Fair Housing Act, *available at* https://www.justice.gov/crt/fair-housing-policy-statements-and-guidance-0 or http://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf.

For more information on state and local governments' obligations under Section 504:

- HUD website at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/sect504.

For more information on state and local governments' obligations under the ADA and *Olmstead*:

- U.S. Department of Justice website, www.ADA.gov, or call the ADA information line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).
- Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, *available at* http://www.ada.gov./olmstead/q&a_olmstead.htm.
- Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of *Olmstead*, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf.

For more information on the requirement to affirmatively further fair housing:

- Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).
- U.S. Department of Housing and Urban Development, Version 1, Affirmatively Furthering Fair Housing Rule Guidebook (2015), *available at* https://www.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf.
- Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Vol. 1, Fair Housing Planning Guide (1996), *available at* http://www.hud.gov/offices/fheo/images/fhpg.pdf.

For more information on nuisance and crime-free ordinances:

- Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf.

(800) 692-7443 (Voice)
(877) 375-7139 (TDD)
www.disabilityrightspa.org

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")[i] and, in particular, its impact on state and local zoning laws and land use regulations.[ii] 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.[iii]

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."[iv] 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."[v] Given the broad remedial goals of the FHAA, courts have held that its provisions should be broadly construed.[vi] Courts have also rejected constitutional challenges to the application of the FHAA to local zoning laws and decisions.[vii]

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.[viii] "Major life activities" include, but are not limited to, caring for one's self, walking, seeing, hearing, speaking, breathing, learning, and working.[ix] 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).[x] 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.[xi]

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).[xii]

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.[xiii]

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.[xiv]

- 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.[xv]

- 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).[xvi]

- 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.[xvii]

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.[xviii]

The FHAA also makes it unlawful "to coerce, intimidate, threaten, or interfere with" a person's right to enjoy fair housing.[xix] For example, attempts by municipalities to interfere with group homes may give rise to liability under the Act.[xx] 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.[xxi] It is more difficult, however, to impose liability for interference under the FHAA against neighbors for opposition to group homes.[xxii] 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.[xxiii]

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.[xxiv]

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."[xxv] 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.[xxvi] 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.[xxvii]
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 ...."[xxviii]

Generally, in an FHAA case alleging intentional discrimination, courts apply the burden-shifting framework for proof established in *McDonnell Douglas Corp. v. Green*[xxix] (concerning employment discrimination based on race and gender),[xxx] at least when there is no direct proof of discriminatory intent.[xxxi] 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.[xxxii] The fourth element alternatively may be established by showing that the rejection occurred in circumstances that gave rise to an inference of unlawful discrimination.[xxxiii] 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.[xxxiv] 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.[xxxv]

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.'"[xxxvi] 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.[xxxvii] 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.[xxxviii]

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.[xxxix]

- 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.[xl]

- 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.[xli]

- 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.[xlii]

- 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.[xliii]

- 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.[xliv]

- 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.[xlv]

- 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.[xlvi]

- 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.[xlvii]

- 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.[xlviii]

- 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.[xlix]

- 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.[l]

- 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 than only if it received a special exception may reflect intentional discrimination when such limitations were not required by the county's zoning law.[li]

- 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.[lii]

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.[liii]

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.[liv] Proof that the laws were motivated by discriminatory animus is unnecessary.[lv]

If a zoning law is discriminatory on its face,[lvi] the burden is on the defendant to justify the discriminatory classification.[lvii] 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.'"[lviii] 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.[lix] 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.[lx]

- 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.[lxi]

- 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.[lxii]

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

- 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.[lxiv]

- 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.[lxv]

- 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.[lxvi]

- 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.[lxvii]

- 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.[lxviii]

- 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.[lxix]

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.'"[lxx] 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.[lxxi]

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.[lxxii] 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.[lxxiii]

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.[lxxiv] 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.[lxxv]

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).[lxxvi] 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.[lxxvii]

- 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.[lxxviii]

- 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.[lxxix]

- 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.[lxxx]

- 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.[lxxxi]

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.[lxxxii] The failure to provide a reasonable accommodation is an independent form of discrimination under the FHAA.[lxxxiii] 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.'"[lxxxiv] A reasonable accommodation claim does not require proof that the defendant's actions were motivated by animus.[lxxxv]

There are three elements to a reasonable accommodation claim. The requested accommodation must be (1) reasonable and (2) necessary (3) to provide equal opportunity.[lxxxvi] 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.[lxxxvii] 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.[lxxxviii] An accommodation is "reasonable" if it does not impose an undue financial or administrative burden and does not undermine the zoning scheme.[lxxxix] Whether an accommodation is reasonable is a highly fact-specific inquiry.[xc] Speculation concerning potential burdens resulting from the accommodation is insufficient to render a requested accommodation unreasonable.[xci]

It is increasingly important that any evidence in support of a reasonable accommodation request be presented to local zoning officials.[xcii] 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.[xciii] However, this does not mean that the decisions of local zoning officials are entitled to deference.[xciv]

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 the 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.[xcv]

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.[xcvi]

- 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.[xcvii]

- 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.[xcviii]

- 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.[xcix]

- 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.[c]

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

- 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.[ciii]

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.[civ]

- 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.[cv]

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

- 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.[cvii]

- 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.[cviii]

- 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.[cix]

- 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.[cx]

- 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.[cxi]

- 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.[cxii]

- 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.[cxiii]

- 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.[cxiv]

- 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.[cxv]

- 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.[cxvi]

- 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.[cxvii]

IV. ENFORCEMENT OF THE FHAA

Who Can Complain of FHAA Violations?

The FHAA permits any "aggrieved party" to complain of violations.[cxviii] 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.[cxix] 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.[cxx]

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.[cxxi] 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
451 Seventh Street, S.W., Room 5204
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.[cxxii] In addition, HUD may seek to resolve the matter through "conciliation."[cxxiii] 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,[cxxiv] either administratively or in court,[cxxv] and pay all litigation expenses that may be incurred.[cxxvi] 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.[cxxvii]

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.[cxxviii] You do *not* need to file a complaint with HUD before filing suit.[cxxix] Since the FHAA allows, but does not require, the court to appoint a lawyer to represent persons who are unable to afford counsel,[cxxx] 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 Disability Rights Pennsylvania at (800) 692-7443 (voice) or 877-375-7139 (TDD) or intake@disabilityrightspa.org.

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.[cxxxi] 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.[cxxxii] A prevailing party under the FHAA also may recover his attorneys' fees and costs.[cxxxiii]

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."[cxxxiv] 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).[cxxxv] 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."[cxxxvi] This exception to the FHAA's prohibition on discrimination must be narrowly construed.[cxxxvii] 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."[cxxxviii] 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.[cxxxix]

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.[cxl] If the individual has filed a HUD complaint, however, the two-year statute of limitations does not run while the HUD proceedings are pending.[cxli]

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.[cxlii] 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.[cxliii]

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."[cxliv] Undue delay in consideration of an application may be sufficient to make a case ripe.[cxlv] 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.[cxlvi] 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.[cxlvii]

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

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.[cxlix]

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.[cl] 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.[cli]

Contact Information

If you need more information or need help, please contact Disability Rights Pennsylvania (DRP) at 800-692-7443 (voice) or 877-375-7139 (TDD). The email address is: intake@disabilityrightspa.org.

The mission of Disability Rights Pennsylvania is to advance, protect, and advocate for the human, civil, and legal rights of Pennsylvanians with disabilities. Due to our limited resources, Disability Rights Pennsylvania cannot provide individual services to every person with advocacy and legal issues. Disability Rights Pennsylvania prioritizes cases that have the potential to result in widespread, systemic changes to benefit persons with disabilities. While we cannot provide assistance to everyone, we do seek to provide every individual with information and referral options.

IMPORTANT: This publication is for general informational purposes only. This publication is not intended, nor should be construed, to create an attorney-client relationship between Disability Rights Pennsylvania and any person. Nothing in this publication should be considered to be legal advice.

PLEASE NOTE: For information in alternative formats or a language other than English, contact Disability Rights Pennsylvania at 800-692-7443, Ext. 400, TDD: 877-375-7139 or intake@disabilityrightspa.org.

NOTES

i. 42 U.S.C. §§ 3601-3631.

ii. 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.

iii. 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).

iv. 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)).

v. 24 C.F.R. §§ 100.50(b), 100.70(a).

vi. *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).

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

viii. 42 U.S.C. § 3602(h).

ix. 24 C.F.R. § 100.201.

x. *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.

xi. 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).

xii. 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).

xiii. *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).

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

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

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

xvii. 42 U.S.C. § 3604(f)(3)(B).

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

xix. 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).

xx. *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).

xxi. *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).

xxii. 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).

xxiii. *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).

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

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

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

xxvii. *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).

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

xxix. 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).

xxx. *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).

xxxi. 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).

xxxii. *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).

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

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

xxxv. *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).

xxxvi. *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)).

xxxvii. *Tsombanidis v. West Haven Fire Dept'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).

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

xxxix. *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).

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

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

xlii. *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).

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

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

xlv. *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).

xlvi. *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).

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

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

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

l. *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).

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

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

liii. *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).

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

lv. *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).

lvi. 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).

lvii. *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)).

lviii. *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'").

lix. *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).

lx. *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).

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

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

lxiii. *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).

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

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

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

lxvii. *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).

lxviii. *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).

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

lxx. *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).

lxxi. *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).

lxxii. *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).

lxxiii. *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).

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

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

lxxvi. *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).

lxxvii. *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).

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

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

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

lxxxi. *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).

lxxxii. 42 U.S.C. § 3604(f)(3)(B).

lxxxiii. *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).

lxxxiv. *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.

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

lxxxvi. *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).

lxxxvii. *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).

lxxxviii. *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.

lxxxix. *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).

xc. *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).

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

xcii. *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.

xciii. *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).

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

xcv. *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).

xcvi. *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).

xcvii. *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).

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

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

c. *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).

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

cii. *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).

ciii. *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).

civ. *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).

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

cvi. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462-

66 (3d Cir. 2002).

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

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

cix. *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).

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

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

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

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

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

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

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

2004).

cxvii. *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).

cxviii. 42 U.S.C. § 3613(a)(1)(A).

cxix. *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).

cxx. *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).

cxxi. 42 U.S.C. § 3610(a)(1)(A)(i).

cxxii. 42 U.S.C. § 3610(g)(1).

cxxiii. 42 U.S.C. § 3610(b)(1).

cxxiv. 42 U.S.C. § 3610(g)(2).

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

cxxvi. 42 U.S.C. § 3612.

cxxvii. 24 C.F.R. § 103.400(a)(3).

cxxviii. 42 U.S.C. § 3613(a)(1).

cxxix. 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).

cxxx. 42 U.S.C. § 3613(b).

cxxxi. 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).

cxxxii. *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).

cxxxiii. 42 U.S.C. § 3613(c)(2).

cxxxiv. 42 U.S.C. § 3607(b)(1).

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

cxxxvi. 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).

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

cxxxviii. *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).

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

cxl. 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).

cxli. 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).

cxlii. *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).

cxliii. *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).

cxliv. *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).

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

cxlvi. 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).

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

cxlviii. *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).

cxlix. *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).

cl. *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).

cli. *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.

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APA Equity in Zoning Policy Guide

October 4, 2022

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1. Introduction and Overview

1.1 Goals of the Policy Guide

In 2019, after an inclusive two-year effort by its members, the American Planning Association (APA) adopted its Planning for Equity Policy Guide, which articulates the organization's advocacy positions on that topic. That Policy Guide reviews the pervasive impacts of both overt and unintended planning practices that result in racial, ethnic, and gender bias and exclusion in many plans and policies adopted by local governments throughout America. It also reviews the complex web of institutional practices beyond the planning profession that reinforce the inequitable outcomes of these practices, and the ways in which they collectively disadvantage large segments of the American populace. It addresses the serious lack of diversity and inclusion in the planning and zoning professions, along with the role and responsibility of planners to undo the unfairness woven into many current planning practices. Every planner, planning official, or elected official interested in making their communities more equitable should carefully read and follow that Policy Guide and implement its recommendations.

In addition, APA has adopted recent Policy Guides that set forth its advocacy positions on Hazard Mitigation (2020), Housing (2019), Surface Transportation (2019), and Healthy Communities (2017), each of which recommends changes that would improve equitable practices and outcomes in our profession.

The goal of this Policy Guide is not to repeat and restate any of that work, but to build on it and to focus on the ways in which planning bias is reinforced and implemented through zoning. Equitable planning is essential to eliminate those zoning and design regulations that disproportionately burden by Black, Latino, Indigenous, and other communities of color, the elderly, persons experiencing disabilities, persons of different national origins or religious faiths, and the lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual/aromantic/agender (LGBTQIA) community — which are often referred to in this document as "historically disadvantaged and vulnerable " communities and individuals. Where zoning rules or procedures have a particularly negative impact on one or more of the communities included in that phrase, they are sometimes identified separately.

In many states, however, plans are only advisory – while zoning is the law. Even in those states that mandate comprehensive or land use planning and require that zoning be consistent with those plans, there is always a gap between the aspirational and inspirational language of the plan and what parts of that vision become the law governing development and redevelopment of property.

The goal of this Policy Guide is to identify specific ways in which the drafting, public engagement, administration, mapping, and enforcement of zoning regulations can be changed to dismantle the barriers that perpetuate the separation of historically disadvantaged and vulnerable communities. While acknowledging the importance of dramatic changes in plans and policies, this Policy Guide focuses on identifying and removing those (often facially neutral) zoning laws and regulations that implement and perpetuate inequitable planning policies, including but not limited to the pervasive and continuing effects of "Redlining", particularly on the Black community. It sets forth APA's advocacy positions to improve equity in zoning, and calls on all practicing planners and planning officials to support these positions.

1.2 The Need for Local, State, and National Action

Because most zoning decisions are made by local governments, this Policy Guide focuses on actions that could and should be taken by city and county governments to improve the equity of their zoning systems. However, local zoning authority sometimes operates within a regional governance structure, and in those cases the changes recommended in this document are addressed to those regional entities.

More importantly, local zoning authority almost always operates within the limits established in state constitutions and zoning enabling legislation. In many cases, the changes recommended in this Policy Guide would be accelerated if state governments acted to prohibit the exclusionary use of zoning powers, and some states have already moved in that direction. In addition, or as an alternative, states could offer financial incentives or condition access to other state funds on local government implementation of some or all of these recommended changes.

The federal government also has an important role in promoting more equitable zoning. Congress should authorize the U.S. Department of Housing and Urban Development to take a closer look at the exclusionary and discriminatory zoning rules of those local governments to which it allocates funds, and to condition receipt of HUD funds on actions taken to remove the barriers to equitable housing and economic opportunity identified in this Policy Guide. Congress should also allocate additional funds to help local governments revise their local zoning controls, and should incentivize local efforts to better align land use, transit, housing, and jobs – particularly in historically disadvantages and vulnerable neighborhoods.

1.3 Cross-Cutting Issues That Compound the Impacts of Zoning

Before focusing on how to make zoning more equitable, it is important to acknowledge the many systems that reinforce discrimination and systems of privilege, and that thwart better opportunities and outcomes for many American households. The intertwined impacts of these systems all tend to compound the unfair impacts of zoning—and will continue to do so even if zoning is "fixed." While better zoning alone cannot end systemic racial and ethnic segregation, prevent the erosion of cultural communities that wish to remain intact, or dismantle long-established systems of privilege, it can be used as a tool to help achieve all of those goals. In fact, it is a particularly important tool, because it is the law, and many other financial and economic institutions point to and use the exercise of the "police power" through zoning as the reason why they cannot or need not reform their own practices. Fixing zoning can have a "trickle-up" effect to promote broader change to reduce the human costs of impacts of racist practices throughout the economy and the nation.

A. Lack of Diversity in the Profession

Like other parts of the planning profession, the drafting, application, mapping, and enforcement of zoning regulations remains an overwhelmingly white and largely male occupation. This means that most of the people determining what types of development, housing, and other land uses are allowed in different parts of the community often have little experience living or working in historically disadvantaged and vulnerable communities and little understanding of how zoning might impact them differently. Members of these communities remain significantly underrepresented in all aspects of zoning practice, and until that changes, many zoning rules will be crafted and decisions will be made without due regard for the interests of those highly diverse communities. This problem is so serious that in some communities the current planning and zoning staff and officials may not be the best persons to decide which sources of inequity to tackle and how to address them. It may be necessary to appoint a more representative group with significant representation from historically disadvantaged and vulnerable communities to make these threshold decisions. APA's Equity, Diversity, and Inclusion Steering Committee, Advisory Committee, and its Population-Based Divisions and Interest Groups are pursuing a number of strategies to increase the visibility of the profession and access to the profession within under-represented populations. Ideally, the local government staff and consultants engaged in drafting, applying, and enforcing zoning should reflect the demographic makeup of the neighborhoods where the zoning will be applied.

B. Real Estate and Lending Practices

For generations, some portions of the real estate and banking industries have favored lending to, constructing, and selling properties in whiter and wealthier neighborhoods while discouraging those activities in communities with more Black, Latino, or other non-white households. Close relationships between a predominantly white development and banking industries and local governments administering zoning regulations compound these impacts. The federal government has systematically supported those efforts through a variety of mechanisms, including FHA regulations favoring single-household suburban housing "occupied by the same racial and social classes," funding highways and other public improvements that made it easier for households to segregate by income, locating interstate highways to divide neighborhoods based on race or ethnicity, making it difficult or impossible for returning Black soldiers to qualify for the G.I Bill, and making mortgage interest deductible for those favored buyers who were able to buy homes. These practices have led to vast disparities in income and wealth through appreciation in property values. While the federal government has taken some steps to mitigate some of the impacts of past decisions through legislation like the Fair Housing Act or the Community Reinvestment Act, current lending and sales practices will continue to make it more difficult for historically disadvantaged and vulnerable communities to access some of the increased opportunities that better zoning can create. Working together, these practices are a very important form of embedded racism.

C. Infrastructure and Public Facility Location and Financing

The equity and opportunity available in America's neighborhoods are heavily influenced by the location of infrastructure, streets, sidewalks, schools and pre-schools, parks, trails, and open spaces, which are largely determined not by zoning but by local government and school district decisions about where to spend their available discretionary funds. While developers can be required to mitigate their impacts on each of these public facilities, individual developers generally cannot be legally required to do "more than their fair share" through zoning to make up for systemic injustices of the past. Where strong market forces support development developers are often willing to do more than what the law requires through a Community Benefits Agreement (CBA), and zoning can encourage or require these types of agreements. Importantly, zoning generally cannot be used to force the replacement or upgrading of infrastructure or amenities unrelated to a proposed development, or to force the local government to allocate discretionary funding in specific neighborhoods.

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D. Private Covenants

Many neighborhoods in America have a second level of legal protection against types of structures and land uses that they do not want to see in their neighborhoods – restrictive covenants that buyers agree to when they purchase their homes, and that are enforced by Homeowner's Associations that may not share the goals of equitable zoning reform. Covenants are "private law" among the property owners (and sometimes the developer) to which the city or county government is often not a party. Local governments generally do not enforce restrictive covenants, and do not modify their zoning to match private covenants. Although enforced through private lawsuits, covenants can be and often are just as effective as zoning in preventing affordable housing, innovative types of housing, rental units, Accessory Dwelling Units (ADUs), or social services from entering a neighborhood. Zoning does not have the power to rescind private covenants; that generally requires the action of the state or federal government to declare specific types of covenants unenforceable. In addition, private covenants often include private assessments that result in their communities having streets, sidewalks, open space, and recreational facilities far better than those in other neighborhoods. For all of these reasons, the aims of equitable zoning reforms are often thwarted by private covenants.

E. Serious Income Disparities

One of the most important structural challenges that leads to racially or ethnically segregated communities is the fact that American law does not prohibit many forms of discrimination against low-income populations. Since a disproportionate percentage of low-income households are headed by Blacks, Latinos, Indigenous, or other communities or color, or by women, the elderly, or persons experiencing disabilities, laws and regulations that tend to make land and houses and other goods more expensive have especially harmful impacts on the very groups we try to protect through anti-discrimination laws. While federal laws like the Fair Housing Amendments Act and the Americans with Disabilities Act prevent some forms of discrimination, they do not require that equivalent housing or facilities be made equally available to the poor who are not part of a protected class of citizens at prices they can afford.

As Richard Rothstein demonstrates in The Color of Law, when the Supreme Court invalidated overt racial zoning, many communities realized that zoning based on permitted forms of housing or minimum lot size could achieve the same result by making many neighborhoods less affordable to less white, less abled, and less wealthy households. While originally adopted as a successor to overtly racial exclusion targeting Blacks and Asians, zoning has had the effect of excluding much broader segments of the American population from many residential areas and job opportunities. Zoning cannot change the fact that anything that makes housing, education, transportation, health care, or childcare more expensive will tend to perpetuate the disadvantages faced by historically disadvantaged and vulnerable communities as well as other low-income Americans.

While zoning regulations do not grant or withhold development permission based on the race, ethnicity, color, national origin, or religious faith (and only rarely based on the gender, age, or disability) of the property owner or occupant, they often have disparate impacts based on the income of the occupant. Larger lots, bigger houses, bigger parking lots, and higher open space requirements make property more expensive and limit the number of low-income households who can afford to use, own, or occupy neighborhoods with those benefits.

Over the last 70 years, the combination of zoning, banking and real estate practices, infrastructure decisions, and private covenants have tended to reinforce each other in ways that have created vast disparities in wealth between households headed by persons of color, women, the disabled, the elderly, and other American households. The generational impacts on wealth between Non-Latino White, Black, and Latino households has been particularly well documented. Zoning has been a complicit – and in some cases intentional – part of the systemic reinforcement of inequity and should be reformed to remove the rules and practices that create and perpetuate it. Zoning reform alone cannot "fix" the overlapping institutions that reinforce racism and segregation, but that is not a reason for inaction — it just highlights the importance of fixing the part of the problem that is within our control through better zoning regulations.

F. The Need for Complementary Non-Zoning Solutions

Many of the impacts of zoning on historically disadvantaged and vulnerable communities can only be mitigated by actions that are not part of zoning regulations. Effective mitigation of negative zoning impacts may require the execution of Community Benefit Agreements obligating the developer to employ persons or provide services or resources directly benefitting the neighborhood where development occurs. While complementary agreements often accompany zoning actions, they are contracts that are distinct from the zoning approvals that allow a project to happen. Alternately, mitigation may take the form of a decision by the local government to build or repair or upgrade a neighborhood park or other facility. Or mitigation could include a developer offering compensation for or providing a right-of-return for residents displaced by new development at prices those residents can afford, or other benefits that are also generally documented in contracts separate from the zoning approvals themselves. Or mitigation may come in the form of a land bank or land trust created to give the local government or a non-profit new ways to stabilize and reinforce the existing culture and economy of a neighborhood without gentrification. Because the specific impacts of each development on each neighborhood are different, it is difficult to agree in advance about what types of offsets or benefits need to be offered, but it does seem clear that there is a growing need for non-zoning agreements and commitments to accompany zoning actions if the equity of zoning outcomes is going to improve.

2. What is Equity in Zoning?

At the start, it is important to define what is meant by "zoning equity"—and that requires revisiting the difference between "equity" and "equality." Simply put, equality requires that everyone be given the same opportunities to participate and benefit from a project or program. But different people have different abilities to participate in or influence zoning rules and procedures. Equal opportunity often leads to unequal outcomes—and in America those outcomes are often disproportionately felt by Blacks, Latinos, women, those experiencing disabilities, and other historically disadvantaged and vulnerable individuals. Equity in zoning means that those who write, administer, or enforce zoning regulations take clear steps to avoid or "undo" the unfair outcomes compounded by unequal ability to participate in all parts of the zoning process. The AICP Code of Ethics and Professional Conduct underscores this duty, and this Policy Guide identifies specific steps to do that.

The job is difficult because zoning is inherently designed to exclude. Zoning is very good at preventing individual property owners from making investments in property, building structures, or engaging in activities that the local government has decided should not occur in a certain location because potential harm to the public health, safety, and welfare. While it can prevent money from being spent in ways that are not in the community's interest, zoning is much less effective in making investors build things they do not want to build or to use properties in ways they do not want to use them. It can seldom force investors to invest where they do not want to invest--unless it subsidizes that development. Zoning can condition permission to do something an investor wants on their willingness to do some things the community wants, but if those conditions make the investment uneconomic, and the local government does not agree to make up the difference, the investor can decide to walk away.

While the exclusionary nature of zoning is simply a fact, the impacts of that fact harm historically disadvantaged or vulnerable communities more than others. Often, the most serious impacts are on households headed by Blacks, Latinos, women, or those experiencing disabilities . As zoning is used to selectively exclude unwanted types of buildings and land uses from some neighborhoods (or to allow them in some neighborhoods while excluding them from others), some areas become more attractive to investors than others, and the same is true for residents and business owners. Those with more time to participate in the system have more ability to influence the rules, and those with more money have more ability to buy property, operate businesses, and live in the neighborhoods that best meet their needs.

2.1 Ending Disproportionate Exclusionary Impacts

To identify those specific steps to end disproportionate exclusionary impacts, this Policy Guide focuses on the substantive zoning rules about what can be built or not built, what activities can be conducted or not conducted, what incentives the community offers builders to build what it prefers, how it drafts those rules and incentives, how it drafts maps to apply those rules, who participates in drafting the rules or changing the rules, how well they know the likely impacts of those rules and changes in those rules on their neighborhoods, how the rules are enforced, and how all of those decisions are made.

Because the Planning for Equity Policy Guide addresses the drafting and implementation of more equitable plans, this Policy Guide assumes that plans consistent with those policies are already under discussion or have already been adopted, and zeroes in on how zoning rules, maps, and procedures can be changed to implement those more equitable plans. More specifically, this document identifies ways in which planners can look beyond the facially-neutral text of zoning rules to focus on the disproportionate impacts of those rules on some individuals and neighborhoods, and then redraft and remap zoning to reduce those impacts.

While zoning can be revised to be less exclusive, the impacts of those changes may be very different when mapped in different neighborhoods. A change that could allow new types of housing that reduce exclusion from wealthy residential neighborhoods (for example, removing a ban "Missing Middle" housing or rental housing) could open new opportunities for speculators to build the same types of housing in low-income neighborhoods, often leading to displacement and gentrification. For that reason alone, zoning needs to be better tailored based on its human impacts in different neighborhoods, and may need to include stronger anti-displacement conditions than it has in the past. It also needs to carefully consider whether each zoning change will increase or decrease opportunities or protection for historically disadvantaged or vulnerable populations.

This Policy Guide also addresses how apparently neutral zoning rules may need to be carefully tailored and mapped to avoid unintended consequences. In many cases, this will require different zoning tools to be applied in different neighborhoods of similar size, scale, and character, opening some neighborhoods to new types of development while protecting others from the same type of development. In many cases, these distinctions may need to be based largely on whether the change will have a positive or negative impact on those most seriously harmed by past zoning practices and decisions, and to prevent similar practices from arising in new forms in the future.

2.2 Three Kinds of Equity in Zoning

Removing the disproportionate impacts of zoning on historically disadvantaged and vulnerable communities involves close examination of three different aspects of zoning:

1. Equity in the “Rules” of zoning – what the substantive rules of zoning allow, prohibit, or incentivize in different parts of the community.
2. Equity in the “People” in zoning – who is involved in drafting the rules and incentives, who is notified and engaged in whether to change those rules for different areas of the community and who is involved in enforcement.
3. Equity in the “Map” of zoning districts – where the rules are applied through zoning maps and whether that reduces or reinforces exclusion and segregation in America.

Each of these topics is addressed in the next three chapters of this Policy Guide.

3. The Rules – Equity in Substantive Zoning Regulations

This chapter addresses the “substantive” rules and incentives in zoning regulations—as distinguished from the “procedural” rules about how zoning is drafted, applied, and enforced, (addressed in Chapter 4) and the “map” that applies zoning rules to geographic areas of a community (addressed in Chapter 5). Substantive rules include all the complex and cross-cutting land use regulations limiting the size and shape of lots and buildings, how those lots and buildings can be used, and the physical design of those lots and buildings.

In many cases, a change that could be achieved by changing the rules could also be achieved by remapping lands into a different zoning district where different rules apply (as discussed in Chapter 5). For most communities, there is no “right’ way. A change to the zoning ordinance text that would allow more diverse housing in a given zoning district (a rule change) could also be achieved by adopting an remapping the area to allow those same types of housing in a specific area (a map change). The right way is the one that produces outcomes that undo past harms and avoid creating new harms to historically disadvantaged and vulnerable communities, and for which planners can gain the political support necessary to make the change. While each community will need to identify its historically disadvantaged and vulnerable communities based on its unique context, some relevant factors may include race and ethnicity, and: household composition and size, average median income, concentrations of substandard public facilities and infrastructure, poor access to good jobs and services, and other available historical data.

There are five major equity concerns directly impacted by substantive zoning regulations:

1. **Public Health.** Land use patterns are linked to public health by influencing the provision of green open space, the distribution and quality of health care and rehabilitation services, the walkability and "bike-ability" of neighborhoods, the availability of affordable, healthy, and culturally appropriate food, and access to places of nature, recreation, and physical activity.
2. **Environmental Justice.** According to the EPA, environmental justice is achieved when all residents maintain "the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work." Communities of color, in particular, have long been exposed to higher levels of environmental and health hazards due to zoning that permits housing near pollution from major highways and waterways, as well as regulations that permit or concentrate industries and facilities that create those risks in certain neighborhoods. Climate change will exacerbate these impacts by increasing the frequency and intensity of flood and fire events.
3. **Fair Access to Housing.** Fair access to housing goes beyond the ability for any resident, regardless of income, to afford the mortgage or rent payments required for the available housing in their community; it also considers the ability for residents to live near their place of employment, in their preferred housing and ownership type, and in communities with a shared culture or identity if they so choose. The APA Housing Policy Guide provides much more detailed policy guidance on this topic.
4. **Fair Access to Economic Opportunity and Services.** The ability to use, create, or reach a place to earn a living, to form and expand a business, and to access quality education and necessary civic institutions and public services are also strongly influenced by zoning through use controls, design controls, and the length and complexity of administrative procedures.
5. **Aging in Place.** As the share of adults who are 65 or older increases, the accessibility, affordability, functionality, and safety of the built environment becomes increasingly important. The types and mix of uses allowed in a zoning district, maximum residential densities, development standards related to universal design, and connectivity requirements are all components of standard zoning regulations that effectively determine if an adult can stay in the same community as they age.

For purposes of this Policy Guide, the recommendations have been organized to follow the structure of a traditional zoning ordinance. Due to the interwoven nature of zoning regulations, many recommendations are intended to address more than one of the larger "themes" described above, even if only one particular theme is highlighted.

Although the rules discussed in this chapter often appear in the zoning ordinance, some of the rules may instead appear in design standards or guidelines in separate documents. Often these documents are referred to in the zoning ordinance, and property owners are required to comply with them just as if they were part of the zoning ordinance. To fully

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remove the sources of zoning inequities, they will need to be addressed in both the zoning ordinance itself and in related development and design standards and guidelines.

3.1 ZONING DISTRICTS

Most zoning ordinances divide their communities into districts based on the forms of buildings permitted (“form-based” zoning), based on mitigating the specific impacts of proposed development or matching community character (“performance” zoning), or based on the uses of land and buildings in the district (“use-based” or “Euclidean” zoning), or a mix of the three. In many communities, this blend of controls is approved as a negotiated “Planned Unit Development” unique to a specific property. While the labels “form-based” or “use-based” generally describe the primary focus of the regulations, in practice almost all zoning districts regulate both the form and use of land and buildings within their boundaries. While form-based districts often have more flexible regulations on the use of property and eliminate or minimize the need for public hearings on the use of land, many retain use controls very similar to those in use-based zoning (particularly for lower density residential neighborhoods). Similarly, while use-based zoning districts often have relatively simple building form controls (e.g., maximum heights and minimum/maximum building setbacks), others include much more detailed building design standards. The regulation of both building forms, performance, and permitted uses can create barriers to opportunities for historically disadvantaged and vulnerable communities, and overly detailed controls of any type should be avoided. The discussion in this chapter will address sources of inequitable zoning arising from both building form and building use regulations, regardless of the “Euclidean,” “performance-based,” “form-based,” “Planned Unit Development” or other label attached to the zoning district.

In most communities, implementation of the policies described below will require careful consideration of the demographics, economics, social and physical vulnerability, and potential for displacement of the existing population. The same zoning change that may open up opportunities for better housing, livelihoods, and services in one part of the community may lead to speculative investments and displacement of historically disadvantaged and vulnerable households and businesses in another. New zoning rules must be tailored and applied so that they increase opportunities rather than leading to speculative displacement of these households and businesses, and must be applied carefully to avoid being co-opted as tools to further protect wealth and privilege.

A. Base Zoning Districts

- **Zoning District Policy 1. Establish new residential zoning districts or amend existing residential districts to allow more types of housing types, and avoid districts limited to only single-household detached dwellings.** History shows that single-household residential zoning has a disproportionate impact on the ability of historically disadvantaged and vulnerable groups to access both housing and the wealth accumulation that has often accompanied housing ownership. If maximum residential densities are regulated, they should accommodate the revised broader menu of housing options. This often means allowing a broader range of building forms, lot sizes, and residential uses in low-density residential neighborhoods. More information on policies to create more affordable housing are available in the APA Housing Policy Guide.

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- Zoning District Policy 2. Establish new mixed-use zoning districts or allow a wider mix of uses in existing zoning districts to increase opportunities for historically disadvantaged and vulnerable populations to live closer to sources of employment and needed services. Cities and counties should consider existing conditions and demographics and identify neighborhoods that have traditionally been separated from employment opportunities and that would benefit from additional permitted uses. Take care to avoid introducing new uses that could significantly increase land values and lead to forced displacement of existing residents.

B. Overlay Zones

- Zoning District Policy 3. Where supported by a historically disadvantaged or vulnerable business community, consider establishing specialized or overlay zones to help preserve business districts that have historically served and been focused on the needs of these communities. In many communities, traditional business, entertainment, or service centers serve as sources of jobs, revenue, and pride for the historically disadvantaged and vulnerable areas they serve. This is particularly true when businesses serve a racial, ethnic, or religious groups or the LGBTQIA community that want specific goods and services in a context not often provided by the broader economy. An overlay district can be used to recognize and preserve their cultural and economic contribution to the community, as well as allowing the additional flexibility in building forms and uses needed to accommodate current activities and to strengthen the image of the area for the future. These types of overlay districts acknowledge that it is not always a unique building or architectural style that fosters a unique sense of place, but rather a collection of businesses, residential dwellings, and/or civic uses that establish a shared community identity.
- Zoning District Policy 4. Where supported by a historically disadvantaged or vulnerable residential neighborhood, consider establishing specialized or overlay zones to help protect "Naturally Occurring Affordable Housing" (residential properties that are affordable to low- and moderate- income, but are unsubsidized or protected by any local, state, or federal program) from speculative development pressures. This can be done by defining and protecting established building forms, by prohibiting the demolition of more affordable types of housing, or by limiting the amount by which existing single-family homes can be expanded within a given time period. Preserving the existing scale and fabric of smaller and more affordable housing can help slow the replacement of smaller, affordable housing with much larger and more expensive homes in those neighborhoods that want to preserve current levels of affordability. This tool should be used only with the clear understanding that restricting private investment will mean that the existing housing stock may age and may remain substandard compared to surrounding areas without a similar overlay district. In addition, this tool should be clearly limited to disadvantaged and vulnerable neighborhoods, and should not be used to protect islands of protected housing in neighborhoods of wealth and privilege.
- Zoning District Policy 5. Establish specialized or overlay zones to improve health outcomes and environmental justice by preventing concentrations of polluting or harmful facilities and activities near historically disadvantaged and vulnerable communities. A key element of pursuing environmental justice is balancing preventative and mitigative strategies. An overlay zone can accomplish both by severely restricting the expansion of

existing harmful industrial uses or requiring environmental remediation for redevelopment. These types of zoning districts should be developed in close collaboration with the surrounding BIPOC and other disadvantaged communities so that concerns about health, the environment, and employment reflect the values of the community.

3.2 Lot and Building Form and Design Standards

Building form and design standards were first established to advance public health, safety, and welfare during a time when overcrowded urban housing was spreading disease and increasing fire risk. Early zoning ordinances focused on setbacks between buildings to limit the spread of fire, ensuring access to clean air and sanitation to slow the spread of disease, and protecting public space and streets from overcrowding and congestion. More recently, building form and design standards have focused on public welfare (rather than health and safety) with regulations that protect neighborhood character, advance sustainability, and improve development quality. Each of these regulations has impacts on both development and human opportunities, and some of those negative impacts are disproportionately borne by historically disadvantaged and vulnerable communities. Cities and counties should consider how building form and design standards may increase the cost of building and maintaining a property, create barriers to access, and encourage or discourage investment and livelihoods in these communities.

A. Lot and Building Dimensional Standards

The most common form of zoning regulation influencing building form are those establishing minimum lot sizes, minimum setbacks from streets and other buildings, maximum building coverage, and maximum building heights.

- **Form and Design Policy 1. Reduce or eliminate single home residential minimum lot size requirements and eliminate minimum dwelling size standards and maximum Floor Area Ratio limits that effectively require construction of more expensive homes**. While large minimum lot sizes are often defended on the basis of neighborhood character, their impact has been to perpetuate patterns of economic and demographic segregation of historically disadvantaged and vulnerable communities. There are many examples of neighborhoods with broad mixes of lot sizes and housing that maintain very high qualities of life without perpetuating those exclusionary impacts. Allowing a greater diversity of housing through changes to both form and use regulations is a key to allowing less expensive “missing middle” housing (a range multiple units housing types similar in scale and from with detached single-family homes, such as townhouses, cottage housing developments, manufactured housing, and accessory dwelling units) in more locations.
- **Form and Design Policy 2. Reduce or remove limits on multi-household development density, minimum dwelling unit sizes, or maximum dwelling units per acre that tend to force the construction of fewer, larger, more expensive dwelling units within these buildings**. In addition to limiting the ability of households to live closer to needed schooling, child care, employment, and services, these types of artificial limits make it difficult for America’s aging population to “age in place” in the neighborhoods they love. Regulations that focus on the form, size, and placement of these types of buildings, rather than the number of dwelling units in them, should be considered. If larger units

are needed to accommodate growing populations of larger families, regulations may better promote the needed housing by requiring more units with more bedrooms.

B. Lot and Building Form and Design Standards

As noted earlier, form-based zoning regulations generally focus more on ensuring that building forms fit their context while offering increased flexibility for the permitted uses of those buildings. While careful building form and design controls can help ensure that new development preserves traditional patterns of development in historically disadvantaged and vulnerable neighborhoods these standards do not make it difficult and expensive to develop and redevelop properties.

- **Form and Design Policy 3. Avoid adopting building form and design standards that significantly or unnecessarily increase the costs of development, and avoid those that could prevent historically disadvantaged and vulnerable households from moving into a neighborhood, creating or growing a business in that neighborhood, or from making improvements to their property**.
- **Form and Design Policy 4. Add standards to allow those with reduced mobility or without access to a motor vehicle to easily access and circulate in all neighborhoods.** These include standards requiring Universal Design or other accessibility programs that go beyond the minimum requirements of the Americans with Disabilities Act, in order to ensure that our neighborhoods function for the elderly as well as those experiencing disabilities.
- **Form and Design Policy 5. Avoid drafting or allowing the use of architectural style design standards that have negative connotations among communities of color and vulnerable populations.** For example "Antebellum" and "Spanish-Colonial" styles may discourage Black, Latino, or Native American households from feeling welcome in a neighborhood or community due to the historical use of these architectural styles to assert power over these communities. Other defined styles may create similar reactions from Asian or Pacific Islander communities.
- **Form and Design Policy 6. Remove or modify restrictions on specific building or site features that are commonly found in historically disadvantaged and vulnerable neighborhoods.** Examples of development standards that place disparate burdens include bans on window-mounted air-conditioning units, outdoor clothes lines, parking of a single commercial vehicle, basketball hoops, or carports. Limits or prohibitions on these types of typical site features should only be developed in collaboration with those neighborhoods most likely to be affected by them.

3.3 Property Use Regulations

Use regulations identify the types of uses allowed by-right, conditionally, with discretionary review, or as accessory or temporary uses in different zoning districts and often include standards to mitigate potential impacts of those uses. Whether they appear in form-based or use-based zoning districts, use regulations can disproportionately affect historically disadvantaged and vulnerable populations in several ways. Narrowly defined uses that focus on the name of the activity rather than its land use, traffic, or environmental impacts sometimes single out additional restrictions for unpopular forms of retail, sales, or production activities that are frequent sources of employment for these communities. The

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same is true for strict limits on home occupations based on their names rather than their impacts on the neighborhood, since these communities are more likely to need to use their homes to generate income to live and raise their families. Requirements for public hearings and discretionary approvals for specific uses also tend to have disproportionate impacts on these households, since they are often less able to invest the time and energy necessary to complete those procedures. The large number of use-related recommendations in this portion of the Policy Guide is indicative of the wide range of ways in which permitted use controls have created inequitable zoning results.

A. Residential Uses

Most of the land in most American communities is zoned for residential development and use. Historically, many zoning districts are grounded in idealized concepts of a small, nuclear, two-generation family that is no longer the norm. Many of these districts permitted only single-household, detached houses (and sometimes supporting civic uses like schools and places of worship). The wide use of these practices has contributed significantly to rising housing prices and the inability of historically disadvantaged and vulnerable households to find quality affordable housing in areas with quality schools and services, as well as demographic and income segregation in many communities. In many cities and counties, making a wider range of diverse forms of housing available will require changes to both building form and use controls.

- **Permitted Use Policy 1. Where supported by historically disadvantaged and vulnerable populations, expand the list of allowed residential use types to include one or more of the following "non-traditional" and "missing middle" housing that is more available to America's diverse, aging population.** Types of housing that are missing from many zoning ordinances—or only available following a public hearing—include cottage or courtyard dwellings, duplexes, triplexes, fourplexes, attached single-household homes (townhouses or stacked townhouses), co-housing, tiny houses, live-work dwellings, single-room occupancy (SRO), and both attached and detached accessory dwelling units (ADUs). By including appropriate standards on these uses, they can often be made available in a wide range of residential zoning districts without the need for a public hearing or negotiated approval. To support the viability of ADUs, co-housing, and multi-generational living, a second kitchen should generally be permitted.
- **Permitted Use Policy 2. Allow accessory dwelling unit (ADUs) without the need for a public hearing, subject to only those conditions needed to mitigate potential impacts on neighboring properties**. ADUs are complete, smaller, secondary dwelling units that are located within a principal dwelling or in a detached accessory structure, and administrative approval of ADUs significantly decreases the time, cost, and risk of the development review process for applicants and encourages property owners to use their own resources to increase housing diversity. While ADUs may support the stability of existing neighborhoods by accommodating extended families or creating an opportunity to generate revenue from tenants, they can also spur speculative investment that displaces current residents – and that is particularly true when ADUs are used as short-term rentals -- so this tool should only be used in historically disadvantaged and vulnerable communities when supported by those communities.
- **Permitted Use Policy 3. Allow manufactured homes in many residential districts, protect existing manufactured housing parks, and allow the creation of new manufactured**

housing parks with quality common open space and amenities. While the redevelopment of older or underused properties for higher intensity uses is part of a healthy local economy, redevelopment of manufactured or housing parks can create unusual hardships if the residents cannot afford to pay to move their units or cannot find affordable replacement housing. Cities and counties should allow the installation of individual manufactured homes in a variety of residential districts, as well as the creation of new manufactured home parks in desirable residential areas. They should protect existing manufactured housing parks from predatory redevelopment and displacement of residents by limiting options for redevelopment without the approval of the governing body.

- Permitted Use Policy 4. Treat assisted living facilities, congregate care communities, retirement villages, and supportive housing types as residential and not commercial uses and allow them in a wide variety of residential zoning districts. Although supportive housing facilities often include commercial activities such as providing healthcare or other support services, they function as residential facilities and should be treated as such. Classifying supportive housing types as residential uses also expands opportunities for existing, elderly residents to "age in place."
- Permitted Use Policy 5. Treat housing with supportive services for people with disabilities the same as similarly sized residential uses. Group homes or supportive housing for those with physical and mental disabilities are protected by the federal Fair Housing Amendments Act (FHAA), and the required broad reading of the FHAA means that zoning should not treat group homes any differently than similar sized homes for people without disability. Under court decisions interpreting the FHAA, this approach needs to extend to residential facilities for those in programs to address substance abuse and addiction, which is a recognized form of disability. Ensure that the zoning regulations allow small group homes wherever single-household homes are permitted and allow large group homes wherever multi-family housing of the same size is permitted.
- Permitted Use Policy 6. Replace zoning references to "family" with a definition of "household" that includes all living arrangements that function as a household living unit. The definition of "family" is an important, and often overlooked, part of zoning regulations when it comes to disproportionate impacts on historically disadvantaged and vulnerable communities. Many definitions related to household composition are based on outdated concepts of small, nuclear families and a largely white cultural-specific concept of family live that excludes other ways of living (for example. South Asian joint families or Latino multi-generational living). Ensure that the definition includes people related by adoption, guardianship, or foster placement, and accommodates larger groups of unrelated individuals living as single households in a cooperative community. If the definition includes a maximum number of unrelated persons, ensure that it is no lower than the number of related persons that would be permitted in the same size residential home.
- Permitted Use Policy 7. Allow administrative approval of "Reasonable Accommodation" for persons experiencing disabilities. The FHAA requires that requests for reasonable variations and exceptions to zoning rules to accommodate persons experiencing disabilities (such as a request that a wheelchair ramp that extends into a required setback) be considered and that decisions on those requests be reasonable. Establish a

clearly defined administrative process for approval of requests for Reasonable Accommodation (perhaps in consultation with a caretaker or representative of persons experiencing disabilities). As opposed to the typical and sometimes lengthy variance process, an administrative process avoids a public hearing that will call attention to the disability of the applicant and may create public pressure on decision-makers to deny or condition approval of the request in ways that place an additional burden on the person experiencing disability.

- **Permitted Use Policy 8. Consider adopting Universal Design requirements for a significant portion of new housing construction to better accommodate the needs of the elderly and those persons experiencing disabilities.** While the Americans with Disabilities Act (ADA) generally does not require accessible design for single-household homes, Universal Design requirements ensure that some key accessibility provisions (like doorways wide enough to accommodate wheelchairs and at least one at-grade entrance) are incorporated into single-household dwellings. Requiring these elements in a portion of new homes constructed can substantially expand the ability to "age in place."

B. Commercial Uses

Commercial uses, including retail, personal, and medical services, are not only a large source of employment, but they also provide necessary goods and services for community residents and drive many local and regional economies. Historical practices in commercial zoning have resulted in inequitable patterns of development and a lack of fair access to employment and basic necessities. The recommendations below are intended to dismantle the negative stereotypes of some commercial uses, expand the provision of essential goods and services into historically disadvantaged and vulnerable neighborhoods, and increase access to employment opportunities.

- **Permitted Use Policy 9. Evaluate the permitted uses regulations applied to small-scale commercial uses and eliminate any restrictions and standards that are not based on documented public health, safety, economic, or other land use impacts of the use on surrounding areas**. Businesses such as check cashing, massage parlors, plasma clinics, nail salons, and tattoo parlors are often limited or prohibited in most commercial zoning districts despite the fact that they have similar operating characteristics and land use impacts as other commercial uses like banks, personal services, and urgent care clinics. In many communities, these uses serve as significant providers of goods, services, and employment in the surrounding areas. Any restrictions on commercial uses should be based on documented land use impacts and should be adopted only after consultation with the business communities that will be affected to balance those impacts with potential employment opportunities and to avoid over-concentration of those uses in historically disadvantaged and vulnerable neighborhoods.

- **Permitted Use Policy 10. Allow small-scale child and elder care and outpatient medical and health support facilities in a wide variety of zoning districts to allow convenient access by all residents, and treat non-residential addiction services like other outpatient treatment facilities.** America's aging population will require increasing amounts of medical, dental, physical and occupational therapy, and other supportive services located conveniently to the neighborhoods where they "age in place." In addition, serious shortages of convenient childcare have a disproportionate impact on single-parent, often female-headed, households. Outpatient addiction treatment centers operate similarly to other types of outpatient facilities and should be treated as such. Because substance addiction is a growing medical and mental health challenge that affects all demographics, these facilities should be allowed with few restrictions in a wide variety of commercial zoning districts, and should not be subject to public hearing or development standards that are not also applied to other types of outpatient treatment facilities. For each of these use, avoid regulations that add costs or repeat state regulations or licensing requirements.

- **Permitted Use Policy 11. Ensure access to healthy food by allowing smaller grocery stores, local cuisine restaurants, and artisanal food producers with limited operational impacts near low-density residential neighborhoods and in "food deserts", and by ensure that there is not an overconcentration of food outlets that do not carry fresh, healthy food in disadvantaged.** Grocery stores and local food producers are important contributors to public health and are needed in almost every part of the community on a daily basis. Zoning regulations and procedures that create barriers to these uses should be removed or revised to allow wider access to healthy food. At the same time, the overconcentration of convenience stores and other stores that provide easy access to health compromising substances like alcohol and tobacco in historically disadvantaged and vulnerable communities should be limited or removed entirely.

C. Industrial Uses

Due to a long history of zoning practices that located or allowed environmentally harmful or polluting uses in or near historically disadvantaged and vulnerable neighborhoods, these communities, and particularly BIPOC communities, have suffered disproportionate burdens from air and water pollution, lack of safe or clean open and green space, and other environmental hazards. While current environmental regulations sometimes prohibit the creation of similar new industrial uses, existing sources of environmental risk often remain in place and are protected by their "legal nonconforming" status. The recommendations below are intended to reduce the disproportionate impacts from environmental hazards on these communities. This topic is also addressed in Chapter 5.3, and can be addressed through changes to zoning maps as well as rules.

- **Permitted Use Policy 12. To improve environmental justice, prohibit the location of new industrial uses and the expansion of existing industrial uses that do not meet current public health and environmental safety standards, and (where permitted by law) use amortization powers to end the operation of these nonconforming uses, particularly in historically disadvantaged and vulnerable communities.** Where existing environmentally harmful uses continue to operate as legal nonconforming uses, prohibit expansion of those uses unless the expansion will result in reduction and remediation of existing risks to public health and safety. When these uses are located close to schools, health care facilities, and other facilities serving vulnerable populations, expansion should be prohibited regardless of the size of the facility. Amortization allows municipalities to terminate nonconforming land uses to eliminate continuing industrial operations that exacerbate adverse health outcomes without displacing residents.

- **Permitted Use Policy 13. Classify low-impact and artisan manufacturing uses as commercial uses and allow them in more zoning districts.** While the term "industrial" is typically associated with large facilities with large neighborhood impacts, there are many small-scale assembly, processing, and fabrication activities with few or no negative impacts on the surrounding area. Because these uses are often grouped with the more intense industrial uses, there are often significant unnecessary limits on where they can be located. Allowing the small scale artisanal production and retail sale of products in the same building lowers the barriers to economic activity to those without the resources to maintain multiple properties to run their business.

D. Agricultural Uses

Agricultural use regulations, especially those related to urban agriculture, are an integral component of sustainable and equitable access to healthy, safe, and affordable food. Local production of food is increasingly allowed in many or all zoning districts but is particularly important in and near those historically disadvantaged and vulnerable neighborhoods where access to healthy food is difficult. The recommendations below are fundamentally intended to help not only increase access to healthy food sources but to empower and strengthen local food producers related to local and regional food systems.

- **Permitted Use Policy 14. Allow small-scale urban agriculture – including but not limited to community gardens, greenhouses, beekeeping, and poultry raising – in a wide variety of zoning districts, and allow light processing, packaging, and sales of products grown on the property.** To protect public health, ensure that soil conditions on an urban agriculture site are not contaminated, particularly when the site has been previously used for commercial or industrial purposes. Remove barriers to construction of supporting facilities needed to protect plants due to climatic or soil conditions. Allowing light processing, packaging, and sales of community agricultural products as accessory uses related to the growing of local food also provides a source of local employment.
- **Permitted Use Policy 15: Allow farmer's markets and other facilities for local food distribution in a wide variety of zoning districts, as either temporary or permanent uses.** Wide public access to healthy food is as important as the technical availability of healthy food – particularly for those who do not have the ability to grow it themselves.

E. Home Occupations

Zoning regulations often severely limit the types of revenue earning activities that can be conducted from a residential dwelling unit, which has a significant impact on those who do not have the resources to rent a separate business location, including but not limited to historically disadvantaged and vulnerable communities. In some cases, zoning limits are based on stereotypes regarding the activity being conducted rather than its impacts on the surrounding neighborhood. Removing prohibitions or overly restrictive requirements on home-based businesses are of particular benefit to single-parent or guardian households or other households with small children, elderly relatives, or other dependents by allowing them to run a business or maintain employment without the additional costs of childcare, eldercare, or commuting.

- **Permitted Use Policy 16: Update home occupation regulations to broaden the types of activities allowed to be conducted from dwelling units of all types.** Ensure that any restrictions on home occupations are based on documented neighborhood impacts and eliminate special permit requirements where possible. Regulations should focus on preventing negative impacts on the surrounding area, rather than trying to list specific permitted home businesses. Limits on the use of accessory buildings, prohibitions on employment of even one person from outside the household, additional requirements for

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off-street parking, and prohibitions on cottage food operations all create significant barriers to economic activities and likely have a disproportionate impact on historically disadvantaged and vulnerable communities.

F. Temporary Events

- Permitted Use Policy 17. Reduce zoning barriers for temporary events, entertainment, and outdoor sales, including garage/yard sales in residential areas, "pop-up retail" sidewalk sales and mobile food vendors where those barriers are likely to reduce social and economic opportunities for historically disadvantaged and vulnerable individuals. Temporary use regulations are often heavily restricted due to perceived or potential traffic and noise impacts, even though those impacts will be short-lived. Temporary events are often tied to cultural celebrations that foster a sense of community within a neighborhood and offer additional sources of temporary employment without the need to invest in a permanent place of business. Temporary use restrictions should be based on balancing the short-term impacts of these events with the social, economic, and cultural benefits they create. Larger temporary events should be required to be accessible to those using mobility devices such as wheelchairs and walkers, and to provide accessible support facilities (such as parking and restrooms).

3.4 SITE DEVELOPMENT STANDARDS

Site development standards address the physical layout and quality of the lots and parcels on which buildings are built and permitted activities are conducted, including access to the site, the number of parking spaces (if any) required, the amount of landscaping (if any) required, what kinds of outdoor lighting fixtures are permitted or prohibited, and permitted signage. The recommendations below address several major elements of site development standards common to zoning ordinances and how they can be used to improve equity for historically disadvantaged and vulnerable communities.

A. Who Must Comply

Because site development standards can add significant costs to a new development or redevelopment project, it is important to clarify what level of investment triggers the need to comply with those standards. Smaller investments generally require only partial compliance, or are exempt altogether, while larger investments require full compliance. Site development regulations are often tailored to allow additional flexibility for infill and redevelopment projects and can also be tailored to allow additional flexibility if necessary to allow needed investment and employment in historically disadvantaged and vulnerable neighborhoods.

- Site Development Policy 1. Draft thresholds for compliance with specific site development standards to avoid disproportionate impacts on historically disadvantaged and vulnerable neighborhoods. The "triggers" for compliance with different types of site development standards should be developed after close consultation with the affected neighborhoods so that they reflect a good balance between the desire to maintain and upgrade the quality of the neighborhood with the need to sustain investment and employment by existing businesses and affordability to residents of the area. These thresholds may differ based on the cultural backgrounds or traditional living arrangements and workplaces of different communities.

B. Access and Connectivity

Access and connectivity standards address internal circulation within a site, connections between development sites, and multiple modes of mobility to and throughout the site. Connectivity standards accommodate the many individuals who rely on public transit, walking, and biking as alternatives to vehicular travel, those who must rely on mobility aids, those using strollers for small children, and children who need safe routes to school. Fire and emergency response times are often longer in historically disadvantaged and vulnerable neighborhoods, and improved connectivity can shorten those response times.

- **Site Design Policy 2. Require high levels of accessibility and connectivity for pedestrians, bicycles, and motor vehicles in all new development and significant redevelopment.** Require that bicycle routes, sidewalks, internal walkways, and pedestrian crossings are safe and usable by persons experiencing disabilities. Consider requiring Complete Streets and going beyond the standard requirements of the Americans with Disabilities Act and embrace a Universal Design approach to create neighborhoods that are "usable by all people, to the greatest extent possible, without the need for adaptation or specialized design." Prohibiting the creation of new "gated communities" with single or limited points of access, which lengthen walking, bicycling, and motor vehicle trips and are a significant contributor to exclusionary development patterns. Consider requiring large projects with multiple buildings across multiple lots to incorporate low vision, blind-supportive, and deaf-friendly design features such as wide sidewalks, raised crosswalks, and other tactile markers to differentiate pathways.

C. Required Parking

Minimum off-street parking regulations raise the cost of housing and other development and often make redevelopment of older infill sites difficult or impossible, which likely has a disproportionately negative impact on historically disadvantaged and vulnerable neighborhoods. Often, these minimum requirements far exceed what is needed to achieve their original purpose, which was to protect public health and safety by reducing congestion on surrounding streets and to prevent overflow parking and related traffic from commercial uses in adjacent residential areas. Average temperatures are often higher in historically disadvantaged and vulnerable neighborhoods, and reducing parking reduces the amount of impervious surfaces that create those urban heat islands. Reducing or eliminating parking minimums can also increase the amount of land used to build housing, parks and open space, or other community-supporting uses rather than maintaining large swaths of surface parking or parking structures that sit vacant or underused.

- **Site Design Policy 3. Eliminate or reduce minimum off-street parking requirements in areas where those requirements serve as significant barriers to investment and are not necessary to protect public health and safety or pedestrians, bicyclists, or motorists using the facility.** Minimum parking requirements are often based on newer suburban development precedents that may not be applicable to denser, urban contexts or redevelopment projects. However, because of poor public transit access to employment opportunities, some historically disadvantaged and vulnerable households may have no choice but to own a motor vehicle (or more than one) to reach more dispersed work opportunities, and some employers may need more off-street parking because their workforce arrives from widely dispersed neighborhoods not served by other forms of transportation. Reductions in parking requirements should be based on careful consultation with affected neighborhoods and employers to balance the affordability and walkability benefits of less parking with the need to accommodate vehicles needed for employment without compromising public health and safety.

- Site Planning Policy 4. Do not require minor building expansions, minor site redevelopment projects, or adaptive reuse of existing buildings to provide additional parking unless the change will create significant impacts on public health or safety due to increased traffic congestion or overflow parking in residential neighborhoods. A major barrier to opening a small business or operating a restaurant or personal service use is additional parking requirements that are triggered when the intensity of site use increases. This can disproportionately impact historically disadvantaged and vulnerable businesses owners who have more constrained sites may lack the resources to make significant site improvements to accommodate a relatively small change in use. Often, the time involved in evaluating incremental parking requirements for small changes in property use far outweighs the benefits of those parking adjustments to public health and safety.

D. Landscaping, Open Space, and Tree Canopy

Many historically disadvantaged and vulnerable neighborhoods have lower levels of vegetation, landscaping, and open space for outdoor gatherings and activities that promote public health and well-being and increase property values. They often have less tree canopy to cool properties and offset heat island effects, which make many of these neighborhoods significantly warmer than others and creates health challenges for the elderly and persons experiencing disabilities. Some of these discrepancies are caused by lower levels of public investment compared to wealthier, whiter neighborhoods, while others are caused by zoning regulations that do not require the same levels private investment on private property. Tailored site design standards can help reverse these shortcomings over time.

- Site Planning Policy 5. Draft zoning standards that require or incentivize new development and redevelopment to increase the amount of landscaping, open space, and tree canopy in those neighborhoods that currently have less of these site design features. This may mean tailoring zoning standards to require higher levels of these site features in some neighborhoods, which may in turn require that the zoning rules provide added flexibility on other standards to offset added development costs. Ensure that new landscaping is located and sized to avoid obscuring sight lines for pedestrians, bicyclists, and motor vehicles that would increase risks to public health and safety.

E. Lighting for Public Safety

Because many historically disadvantaged and vulnerable neighborhoods are located in older areas of our communities, they often contain many properties that were developed before minimum lighting standards to protect public health and safety were adopted. Nighttime safety is important to all residents of the community, but particularly important to vulnerable populations, including the elderly, persons experiencing disabilities, women, children, and those relying on public transit.

- Site Planning Policy 6. Require adequate levels of lighting of sidewalks, walkways, public transit stops, and parking lots to protect the health and safety of vulnerable populations. Through shielding requirements, "dark sky" fixtures, limits on uplighting, and better light trespass standards, lighting needed for public safety can be readily balanced with community desires :to see the stars." Because excessive lighting standards have sometimes been used to increase surveillance of Black, Latino, and other persons of color, lighting standards should be drafted after careful consultation with the residents and businesses in the neighborhoods where they will be applied, so that they balance public safety for all.

4. The People – Equity in Zoning Procedures

While community participation has long been emphasized in creating community plans, it is not always a priority when drafting and implementing zoning regulations. This may be in part because zoning is perceived as a "technical" topic. It is one thing for residents to discuss a vision and goals for their community, but another for them to grasp and debate the legal ramifications of specific zoning regulations, let alone an entire zoning ordinance. But that is a serious mistake, because informed participation is critical to eliminating racism and discrimination in zoning. All community members have a right to be involved in the drafting, administration, and enforcement of zoning controls, as well as in changes to the zoning map. Equity in zoning requires that communities ensure diverse, inclusive, and effective participation in writing and changing the zoning rules; drawing and changing the zoning map; applying the zoning ordinance to development applications; and deciding how the rules will be enforced.

The continuing need to achieve much greater diversity and maximum participation in the planning profession was addressed both in the Planning for Equity Policy Guide, and in the introduction to this Policy Guide, so that discussion is not repeated here. Additionally, the Planning for Equity Policy Guide includes several important recommendations regarding community engagement and empowerment that apply to zoning as well as planning, and those policies are not repeated here. Instead, this section focuses on specific opportunities to improve engagement and participation related to zoning.

- **Capacity-Building Policy 1: Design and offer events or classes to help historically disadvantaged and vulnerable communities to understand and participate in zoning procedures, and to learn from members of those communities how current zoning procedures are affecting their neighborhoods, businesses, and quality of life.** Cities and counties that have offered "zoning 101" or "zoning academy" events and programs often report a significant increase in public understanding of the most effective ways to make their wishes known and understood throughout the zoning process. In seeking diverse participants, cities and counties may need to make accommodations for non-traditional work schedules and participants' needs to bring children to sessions. Events offering public education or seeking public input should be offered both virtually and in-person, at varying hours, potentially at locations where participants normally gather. If possible, offer childcare, meals, and possible stipends to recognize the value of participants' time.
- **Capacity-Building Policy 2: Ensure that planners receive diversity, equity, and inclusion (DEI) training.** As the planning profession works to build diversity over time, planners at work should enhance their sensitivity and knowledge of issues and concerns relevant to historically disadvantaged and vulnerable populations and neighborhoods, as well as their co-workers who are members of these communities.

4.1 Appointing Advisory and Decision-Making Boards

Although the ultimate authority to adopt and apply zoning regulations is almost always held by an elected City Council or Board of Commissioners, some powers are often delegated to appointed boards that are authorized to make recommendations or to make certain types of decisions. Examples include Planning Boards, Zoning Commissions, Historic Preservation Committees, Zoning Appeals boards, and officials appointed to conduct public hearings on zoning applications. The extent of authority granted to these bodies varies widely, but that does not change the importance of ensuring that their composition reflects the demographic and economic makeup of the community they represent. This Policy Guide has previously noted that the planning profession remains a predominantly "white" profession that often does not reflect the diversity of the communities it serves, and the same is often true of appointed zoning-related boards and officials. Some of the inequities in drafting, applying, and enforcing zoning regulations discussed in Sections 4.2 through 4.5 below may not be fully addressed until these boards truly reflect the diverse populations of our cities and counties.

- **Appointment Policy 1. The composition of non-elected boards and advisory committees should reflect the community, including proportionate representation from historically disadvantaged and vulnerable communities.** While "expertise" in zoning, planning, real estate development, and real estate markets has often been the key criterion for appointment to these boards, that approach often results in membership that does not reflect the makeup of the community. Professional expertise is important, but these boards also need to include significant local community expertise and lived experience. Their memberships need to brings those different kinds of knowledge that can be conveyed by more diverse voices that better understand the impacts of zoning decisions on all of our neighborhoods.

4.2 Writing and Changing the Zoning Rules

While full rewrites of a zoning ordinance are relatively rare, amendments to the current zoning rules occur frequently. This section address both large-scale and more targeted changes to the text of the zoning regulations. Two equity considerations arise when communities draft or update zoning regulations: (1) Who is writing or amending the rules, and (2) Who will be affected by the proposed changes. To the greatest extent possible, the task forces, consultants, and advisory committees involved in writing or amending zoning rules should reflect the demographic makeup of the community. Staff or advisory groups should also include individuals living, educating, or doing business in the areas that will be affected by the new rules under consideration.

In addition, zoning rewrite projects must include significant outreach efforts so they reflect input from diverse groups in the community, and particularly from historically disadvantaged and vulnerable communities. The rewrite process should include input from a standing advisory committee reflective of the community composition, and any proposed changes should be subject to public review and feedback long before there is an actual hearing on adopting those changes.

Just as importantly, the zoning drafting process should include specific opportunities to evaluate the potential impact of revised zoning regulations on all of our diverse neighborhoods. Some of these impacts may become evident through the community

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engagement process, but a more wide-ranging review by planners who will implement any updated regulations should also figure in the process. It may be appropriate to perform an equity audit of the current zoning regulations based on the recommendations in this Policy Guide. This consideration should extend beyond zoning district boundaries on a map, and will necessarily rely on knowledge of local circumstances. For example, would a change to home occupation permissions make it difficult for small child or adult daycare services to operate from family homes? Would new industrial use limitations disproportionately impact public health or employment in lower-income neighborhoods? Considering unintended or secondary consequences, and who will be most affected by them, is paramount to any zoning regulation update effort.

- Drafting Policy 1. Those framing, writing, and/or reviewing the zoning rules should reflect the demographic composition of the community and should include representatives from historically disadvantaged and vulnerable communities. Ideally, input from these groups should occur twice: once when amended language is being drafted, and again *before* that language is presented to a decision-making body. If changes are not incorporated based on public input prior to the hearing, discussion of that input should become part of the public hearing.
- Drafting Policy 2. Ensure that drafting efforts include tenants as well as property owners. This is important because historically disadvantaged and vulnerable communities generally have a higher percentage of renters than the overall population, and because the zoning changes can lead to gentrification and displacement that particularly impacts these community residents.
- Drafting Policy 3. Ensure that there are multiple opportunities for review of potential zoning impacts on historically disadvantaged and vulnerable communities. These reviews need to happen with sufficient time to receive meaningful and equitable input before public hearings on the proposed regulations begin.
- Drafting Policy 4. Avoid overly complicated regulations. Complicated regulations, and those that require detailed supporting documentation, make it difficult for residents (and particularly non-English speakers) to engage effectively in the drafting process. They also discourage zoning applications from those who do not have the resources to hire professional help to get through the zoning process.
- Drafting Policy 5. Draft objective and clear standards and review criteria to ensure a more transparent and efficient zoning ordinance. Similar to overly complicated regulations, vague and subjective standards are difficult and time-consuming to interpret, Overly subjective standards also make it easier for those individuals familiar with the public process (who are typically wealthier and often white) to oppose projects that might reduce zoning barriers to more equitable development.

4.3 Applying the Zoning Rules to Individual Properties

Although the drafting of zoning rules discussed in Section 4.2 and the adoption of area-zoning maps discussed in Section 5.1 are very important, most zoning activities involve the application of zoning rules that have already been drafted and adopted. The activities discussed in Sections 4.2 and 5.1 are often called “legislative” actions because they affect large areas of a community, they are almost always approved by the governing body, and that body has wide discretion to do what it thinks is best for the entire community.

In contrast, most zoning activity involves "administrative" and "quasi-judicial" actions that affect only one or a few properties. These types of decisions can include changing the zoning map for one or a few properties (often called a "rezoning"), approving a conditional use permit, development permit, demolition permit, or variance from the strict terms of the zoning rules, as well as many others. In most communities, these include:

- Decisions made by staff to confirm whether a development application complies with the adopted rules (often called an "administrative" or "ministerial" action, because it involves no discretion),
- Decisions by an appointed body that involve some level of discretion as to whether a development application meets standards and criteria stated in the zoning code (sometimes called a "quasi-judicial" decision, because the appointed body is acting similarly to a judge who applies the law to the facts of a specific case), and
- Decisions by the City Council or County Commissioners regarding an application covering one or a few properties (which are generally also "quasi-judicial" actions).

A. Administrative and Ministerial Decisions

Administrative and ministerial decisions are generally made by staff, and are the most common type of zoning decision. Because these decisions do not require staff to exercise discretion or judgment, the key to equity is to ensure that the zoning rules themselves do not have disproportionate impacts on historically disadvantaged and vulnerable communities (See Section 4.3 above). Because staff are often trained to make the same decision in the same way for similar applications, without knowledge of the applicant's race, ethnicity, national origin, religious affiliation, gender, sexual orientation, or level of physical or mental ability, some of the opportunities for inequity through the public hearing process (discussed below) can be removed. The "applicant neutrality" of this type of decision-making has led some communities to focus on making as many zoning decisions as possible administrative decisions. The alternative is to make the same type of decision a "quasi-judicial" decision before an appointed or elected body, and then make exceptional efforts to overcome the potential biases introduced through a public hearing requirement (also discussed below).

B. Decisions That Require a Public Hearing

While requiring a public hearing before making a zoning decision can increase opportunities for members of historically disadvantaged and vulnerable groups to be heard before decisions are made, they also create opportunities for inequities to enter the zoning decision-making process. In addition to the common use of vague or subjective criteria (discussed above), inequity can enter the hearing process because of (1) how the public is notified or those hearings; (2) the ways in which the public is permitted to participate in the hearing; and (3) the ability of different segments of the community to understand and participate in the hearing.

C. Notifying the Public

The importance of effective public notification, and improved ways to do that, are addressed in APA's Planning for Equity Policy Guide, and those same recommendations apply in the zoning context. Traditionally, notice has been provided to property owners within a defined radius of the proposed development project. There are several inherently inequitable aspects to this practice.

First, limiting notification to owners of property effectively disenfranchises the significant proportion of any community's population that does not own property. Beyond limiting the number of people who receive notice, mailing requirements often do not include notice to renters. Because historically disadvantaged and vulnerable communities are often disproportionately renters rather than property owners, mailing requirements that ignore renters introduce significant bias into the public hearing process. Because property owners are, by and large, older, whiter, and wealthier than other segments in a community, that means that notice may not be received by a proportionate number of the households in these communities. In areas with significant tribal or indigenous populations, ensure effective notice to those groups when developments are proposed on adjacent lands.

If who is notified can prejudice outcomes, that bias can be further exacerbated by how the public is notified. Depending on the type of decision being made, many zoning ordinances require mailed notice (sometimes certified), advertisements to be published in a "newspaper of record," and/or posted signs on the potential development site. Posted signs are an effective means of reaching a broad audience—anyone passing by can see the sign, learn what is proposed on a site, and understand how they can express their opinion on the proposal—provided the passersby can read them. Any community with significant numbers of residents whose first language is not English should require signs in alternate languages, or at least non-English instructions on how to find additional information in other languages.

The limitations of publishing an ad in a newspaper of record are multiple. Ads of this type are likely to be seen by a group similar in age and background to the property owners who received notice. It is not likely to be seen by younger residents who rely on electronic media for news and information, and almost guaranteed not to reach anyone in the community whose first language is not English.

Local governments have access to numerous means of communication that can more readily reach a diverse audience: their city or county website, social media accounts, and electronic notification by email or text notices. Many communities are already making use of these tools, but relatively few have written them into zoning regulations or put them on a par with required mailings or newspaper ads.

The amount of time that notices are required before the public hearing introduces another form or potential bias. The shorter the notice given, the less likely those with children or other dependents to care for, those working multiple jobs, and those with fixed work schedules will be able to participate, and those individuals often include a disproportionate number of historically disadvantaged and vulnerable persons.

- **Zoning Notification Policy 1. Review, update, and expand traditional notification procedures.** Expand the range of acceptable venues where notice required to be published will reach a wider range of recipients. Send mailed notice to tenants as well as property owners. If the neighborhood where the property is located has significant numbers of non-English speakers, send the notification in multiple languages, or at least indicate how non-English speakers can follow up to learn more. Expand posted notice requirements to apply to more application types, possibly even those that do not require a public hearing. Be sure each type of notice is translated into languages commonly spoken in the neighborhood where the property is located, and that notice is provided in a form that is accessible to those with visual impairment.

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- **<u>Zoning Notification Policy 2. Formalize and expand requirements to use newer means of notification</u>**. To ensure that historically disadvantaged and vulnerable communities are notified, identify interested community members and groups (housing authorities, tenants unions, community activist groups) and maintain updated lists of their contact information. Use websites, social media, text messages, or other electronic means to provide additional notice. Every application should be available for review on the city or county website, even for administrative decisions that do not require a public hearing. When a public hearing will be held, the site should include a way for the public to submit project-related comments rather than requiring them to write a letter or draft an email. Social media should be used provide notice about project applications, and to publicize upcoming public hearings. While not everyone can receive electronic notices, it is a valuable means of additional notice for many and should become a mandatory way to contact neighborhood associations and interest groups. Most communities publish electronic Board and Council agendas, and these calendars should be easy to find, and accessible by links from related pages.

D. Conducting the Public Hearing

As noted above, requiring a public hearing introduces a predictable source of bias into zoning administration. While most people care about their neighborhoods, some have a greater understanding of zoning laws and regulations, how to engage with their local government, and how to express themselves in ways that can influence zoning decisions. Historically disadvantaged and vulnerable communities are often less able than others to engage effectively in public hearings. For this and other reasons, many newer zoning ordinances reduce the number of decisions that require a public hearing and instead focus on extensive, representative public engagement to draft zoning rules and incentives that allow more decisions to be made administratively while avoiding negative impacts on these communities.

When public hearings are required, they should be conducted with as few barriers to participation as possible. Limiting public comment to a fixed time of day (particularly during working hours) and at a fixed location automatically disadvantages those who have work or family obligations at that time or lack the mobility to attend. Fortunately, many communities are offering expanded opportunities for virtual engagement in public hearings. Others are requiring planning staff to record staff reports a week or more in advance of the hearing, making it available through the city or county website, and offering the ability to write or record comments that are then replayed and made a part of the record during the public hearing itself. However, there is still a serious “digital divide” in most communities, as well as a language divide, and those who do not have high-speed internet access from home or a working understanding of English are the same groups that have typically been disenfranchised by traditional methods of participation.

- **<u>Public Hearing Policy 1. Require public hearings when there is a genuine need to use discretion in applying zoning criteria and standards to the facts of a specific proposal and property.</u>** To the greatest degree possible, draft objective standards and criteria that effectively avoid unintended negative impacts on historically disadvantaged and vulnerable individuals and neighborhoods, and allow those decisions to be made administratively.

- <u>Public Hearing Policy 2. Maximize the ways in which individuals can participate in public hearings, and avoid limiting engagement to a specific time and place.</u> Allowing public comment for a period before the hearing itself, and allowing virtual participation, can significantly increase participation from historically disadvantaged and vulnerable communities.
- <u>Public Hearing Policy 3. Bridge the digital, language, and ability divides. After expanding public notice as discussed in Section 4.4, provide ways for public comments to be received through verbal conversations with staff or in writing.</u> Make materials related to the hearing available in commonly spoken languages other than English, and in a format accessible to those experiencing visual impairment. Provide interpretation and translation services for those languages commonly spoken in the neighborhood where the property is located.

4.4 Enforcing the Zoning Rules

Once the zoning rules and maps are adopted, and decisions about proposed developments are made, decisions must be made about how zoning will be enforced. This is another area where unfairness can enter the process. Because most local governments have limited zoning enforcement staff, they often cannot investigate every alleged zoning violation, and zoning administrators often have significant flexibility to decide which alleged violations are most serious and create the greatest threats to public health, safety, and welfare.

Historically disadvantaged and vulnerable communities are sometimes less familiar with what zoning requires, the need to apply for zoning approvals, or the need to maintain their property in compliance with zoning standards. Because these communities often have lower than average incomes, they may also be less able to respond quickly to bring their properties into compliance with zoning standards.

This is particularly true in the case of "nonconformities," which are buildings and activities that were legally created but have become out of compliance with zoning rules due to a change in those rules or for some other reason that was not caused by the property owner or tenant. Nonconformities are situations that "happen to" property owners and tenants, often without their knowledge or understanding, and where particular flexibility in enforcement while still protecting public health and safety is necessary.

- <u>Zoning Enforcement Policy 1. Ensure that local government discretion to enforce zoning rules is not disproportionately focused on historically disadvantaged and vulnerable neighborhoods, unless the residents of the neighborhood itself have requested higher levels of zoning enforcement.</u> In some cases, disadvantaged neighborhoods request additional enforcement to address negligent landlords, tenants, or poor maintenance that creates public health and safety risks for the surrounding area, Those requests should be respected.
- <u>Zoning Enforcement Policy 2. Adopt a wide range of ways to bring violations into compliance with zoning requirements, and adequate time for people to do that.</u> Keep in mind that residents of historically disadvantaged and vulnerable neighborhoods may not have as much time or money to do so quickly, or the same ability to obtain loans needed to bring the property into compliance.

- **Zoning Enforcement Policy 3. When nonconformities are discovered, focus enforcement efforts on those that create significant threats to public health and safety, while allowing wide latitude to continue using buildings and engaging in activities that do not create risks of injury, death, or damage to surrounding properties.** Because many historically disadvantaged and vulnerable communities have fewer options about where to live and how to earn a living, the ability to continue to use existing buildings and to continue to operate and support existing businesses that do not create risks to others is particularly important.

5. The Map – Equity in Zoning Maps

Regardless of how good the zoning rules are, and regardless of who wrote them, zoning rules do not exist in a vacuum. They are applied through zoning maps, and those maps can embed and perpetuate disproportionate impacts on historically disadvantaged and vulnerable communities just as effectively as unfair rules and procedures. More specifically, many current zoning maps reflect the damaging overuse of Urban Renewal powers in some neighborhoods, the location of freeways to divide neighborhoods based on race or ethnicity, and initial reliance on "redlining" maps that discouraged investment in Black, Latino, and Asian neighborhoods. More recently, zoning maps have been revised to implement planning for climate resilience, to increase residential densities to promote affordability, and to respond to the removal of outdated freeways, but each of these changes also has the potential to create disproportionate impacts on historically disadvantaged and vulnerable communities. Amending zoning maps to promote social, climate, or economic equity is difficult work, because each action carries with it the likelihood of unintended consequences. This chapter addresses ways to think about and minimize those consequences.

In many cases, a change that could be achieved by changing the zoning map as recommended in this chapter could also be achieved changing the rules that apply in the existing zoning district (as discussed in Chapter 3). For most communities, there is no "right' way. The right way is the one that produces outcomes that are more equitable for these communities, and for which planners can gain the political support necessary to make the change.

Zoning maps can institutionalize inequitable opportunities and outcomes in one of four ways. They can:

- Constrain land supply for needed types of development;
- Concentrate polluting and harmful land uses and facilities in some neighborhoods;
- Limit access to key public services and facilities; and
- Perpetuate separation of populations based on old "redlining" maps.

Each of these sources of inequity are discussed separately below. In many cases, these unfair outcomes could be addressed by changing the zoning rules applicable in different zoning districts (as discussed in Section 3.1), but they can also be addressed by changing the zoning designations applied to different neighborhoods.

5.1 Drawing and Changing the Area-wide Zoning Maps

While community-wide replacements of a zoning map are relatively rare, many communities amend their current zoning maps regularly—sometimes on a monthly or weekly basis. This section addresses all types of zoning map changes—those affecting the entire community, or a large area of the community, as well as those affecting only one or a few properties.

Initiatives to consider community-wide or area-wide changes to the zoning map raise the same kinds of challenges to effective engagement as changes to zoning rules—and Drafting Policies 1, 2, and 3 apply to these types of community-wide or area-wide map changes. Because they affect large numbers of property owners and renters, it is particularly important that consultants, advisory groups, and assigned staff reflect the makeup of the areas to be affected as much as possible. In addition, because historically disadvantaged and vulnerable populations are particularly affected by the impacts of map changes, it is particularly important that the proposed changes be reviewed for potential impacts on affordability, gentrification, and environmental justice.

In almost all revisions of zoning maps, Drafting Policies 1, 2, 3 described in Section 4 (The People) above, also apply. In the context of zoning map actions, those policies are:

- <u>Zoning Map Policy 1. Those recommending changes to the zoning map should reflect the demographic composition of the community, and should include representatives of historically disadvantaged and vulnerable communities.</u>
- <u>Zoning Map Policy 2. Ensure that zoning map revision actions include residential tenants as well as property owners.</u>
- <u>Zoning Map Policy 3. Ensure that there are multiple opportunities for review of potential zoning impacts on historically disadvantaged and vulnerable communities.</u>

5.2 Making Land Available for Needed Types of Development

Because membership in a historically disadvantaged and vulnerable community tends to be correlated with lower-than-average income, members of these communities may be more likely to live in particular types of housing and to earn their livings in different types of employment. In many communities, they are more likely to live in multi-family apartments, in smaller houses on smaller lots, or a particular configuration of the home, such as a traditional "shotgun" house or mill village. Zoning maps that designate too little land for these types of housing have a very serious disproportionate impact on these communities by driving up the cost of housing.

The same disparity can often be found in the businesses owned and operated by members of historically disadvantaged and vulnerable communities, and the industries, services, and establishments that employ members of these communities. In many communities, these individuals are more likely to work in personal service, food service, hospitality, heavy commercial, construction, or industrial jobs, or rely on home occupations as first or second jobs. Again, zoning maps that make too little land available for these types of needed—and often essential—workplaces tend to make it harder for these individuals to form, grow, or be employed in the work needed to support their households.

While it is important to zone enough land to accommodate each of these activities, it is equally important to ensure that the locations of those lands do not perpetuate segregation

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based on race, ethnicity, national origin, or religion. In addition to revising zoning rules to allow these forms and types of housing and workplaces in more zoning districts, these disparities can be addressed by remapping more areas of the community into zoning districts that allow them.

- **Zoning Map Policy 4. Analyze local conditions to determine development types that correlate with homes, businesses, and services needed by and affordable to historically disadvantaged and vulnerable communities.** Apply zoning districts that make adequate amounts of land available in locations that do not perpetuate historic patterns of segregation.
- **Zoning Map Policy 5. Where rezoning occurs as a part of development application, and the development could be built under multiple zoning districts, designate the one that permits the greater variety of alternative development forms that could provide housing, employment, and service opportunities for disadvantaged and communities.** Avoiding over-restrictive or highly detailed zoning regulations allows a wider range of property owners and investors to develop in ways that reflect the existing fabric and scale of the community.

5.3 Removing Disparities in Neighborhood Health Risk

A second way in which zoning maps can create or perpetuate disproportionate impacts on Black, Latino, and other communities of color is by concentrating polluting or harmful land uses, or the forms of structures that can accommodate them, in or close to the neighborhoods where these populations live. The environmental justice movement and stronger environmental regulations are two forces already working to reduce these inequities. Because of their potential impacts on health and property values, these types of uses are sometimes referred to as Locally Unwanted Land Uses (LULUs). There is dramatic evidence that individuals exposed to polluting industries, highways, or other activities for extended periods of time have significantly higher health risks and shorter life expectancies, and pre-existing health conditions are made worse through that exposure.

Fixing this situation is more difficult than it sounds, however, for a variety of reasons. Some types of facilities logically need to be located in particular locations. Water treatment plants generally need to be near a river, and trucking terminals often pollute the community less when located near the highways used by the truckers.

In addition, the relocation of LULUs leads to re-sorting of the population. Those with more resources tend to move away from unpopular facilities and developments, which can lower land values and make housing more affordable to lower-income populations, which then move in. Since historically disadvantaged and vulnerable communities tend to have lower-than-average incomes, the proximity of these households to LULUs may tend to re-establish itself over time. The lower land value itself can become a seemingly rational reason additional LULUs would be built nearby, further concentrating the effect.

Finally, some LULUs are important sources of employment to individuals who do not have many employment options and making it difficult for them to continue in operation in their current locations can result in loss of jobs and livelihoods. However, the fact that zoning cannot prevent market responses to zoning changes does not imply that zoning should reinforce existing patterns of exposure to harmful environmental forces—and it clearly should not.

- <u>Zoning Map Policy 6. Revise zoning maps to avoid the future location of polluting or environmentally harmful facilities and other Locally Unwanted Land Uses in neighborhoods that already contain a disproportionate share of those uses and facilities</u>. Ensure that zoning maps allow practical locations for these and future similar uses in other areas of the community where they will not exacerbate health impacts on populations that have already been exposed to these and similar negative health impacts. This analysis should consider how long existing nonconforming uses are likely to operate and how that affects the concentration of uses in different neighborhoods.
- <u>Zoning Map Policy 7. Where zoning districts include protections from potential negative effects of development in adjacent districts, revise zoning maps to avoid shifting those potential negative impacts onto historically disadvantaged and vulnerable communities.</u> Ensure that zoning districts containing significant populations of color include the same protections from the impacts of nearby development as those containing whiter and more wealthy citizens.

5.4 Removing Disparities in Access to Key Services and Facilities

A third way in which zoning maps can create or perpetuate disproportionate negative impacts on historically disadvantaged and vulnerable communities is by making it difficult for those individuals to access open spaces or public or private health, educational, religious, or civic facilities or services. While needs differ for each neighborhood, these often include childcare centers, health clinics, hospitals, mental health facilities, good schools, places of worship, recreation centers, and sources of healthy food. In many cases, these types of facilities are built and operated by the local government, and many local governments have programs to locate new facilities where they are currently in short supply. In other cases these types of needed facilities are built and/or operated by private companies or non-profit organizations, and the local government has little control over their strategies to provide and expand (or contract) their services. Zoning cannot force any of these service providers to budget more money to close these gaps more quickly, but it can ensure that they are permitted and easy to develop where they are needed.

One way to address the shortage of needed facilities in these neighborhoods is to revise the zoning rules to allow or incentivize them in high need. However, where cities, townships, or counties require approval of a public facility base or overlay zoning district to locate new facilities, the answer may include revised zoning maps.

- <u>Zoning Map Policy 8. Revise zoning maps to ensure that needed health, educational, religious, and civic facilities or services are permitted and simple to establish in or near all residential areas of the city, including historically disadvantaged and vulnerable neighborhoods.</u> In many cases this simply involves removing prohibitions on specific uses based on outdated stereotypes about the scale, impacts, or clientele that may need these services.

5.5 Removing Historic Segregation through Mapping

A fourth way in which zoning maps create inequity is by perpetuating zoning boundaries that were initially designed to separate historically disadvantaged and vulnerable communities from other neighborhoods. In recent years, there has been increasing attention on the origins of the zoning maps used in American communities. More specifically, the attention has focused on the fact that traditional zoning emerged after the U.S. Supreme Court

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invalidated overtly racial zoning in *Buchanan v. Warley*, and appears to have been aimed at least in part on the same goal of separating different segments of the population from each. As discussed in Section 1.2.E, there is a strong correlation between historically disadvantaged and vulnerable populations and lower-than-average incomes, so zoning that separates people based on income levels has the indirect effect of also separating them based on race, ethnicity, gender, and ability.

Increasing attention has also been focused on the federal mortgage insurance system, which historically often led lenders to “redline” neighborhoods with high levels of BIPOC households. Many current zoning maps look surprisingly like those redlining maps. Together, these discussions have led to a stronger understanding of how today’s zoning maps may have institutionalized dividing lines based largely on race and ethnicity, even if historically disadvantaged and vulnerable persons are no longer prohibited from buying property or obtaining a loan on either side of those lines.

In some cases, the zoning boundaries that formalized these separations were reinforced by public investments, like the location of a highway, park, or open space to create a physical and psychological wall between different populations, and there have been calls for local governments to remove those highways and barriers to “re-knit” the divided urban fabric. While zoning generally cannot force a local government to spend money to remove those barriers, it has a lot to do with whether the zoning maps reinforce those barriers, as well as what happens when and if the barrier comes down.

One answer to redline-based zoning maps is simply to remap both divided neighborhoods to the same zoning district, thereby equalizing the opportunities for investment and development on both sides of the line. But that solution has potentially serious consequences. The effect of redline-based zoning maps was often to decrease the value of land in the historically disadvantaged and vulnerable neighborhood and increase it in the neighborhood next door or across the highway. Adopting the same zoning district in both areas may well lead to speculative investment in the disadvantaged neighborhood. That new investment may well come from investors outside the neighborhood and could lead to gentrification and displacement of the existing residents. If this happens, the result of “equalizing” the zoning map may mean that few existing residents can obtain the loans needed to redevelop their properties and that living conditions do not improve for those living in the formerly redlined neighborhood. Map changes may be more effective if paired with sustained technical and financial assistance to the residents of formerly redlined neighborhoods, so that the residents can remain in their neighborhoods of choice and become their own advocates to remove physical and regulatory barriers.

- **Zoning Map Policy 9. Analyze zoning map boundaries based on discriminatory lending policies or the construction of divisive public works, and revise maps to remove those historical boundaries if doing so would increase the economic health and welfare of the historically disadvantaged and vulnerable community.** Do not remove those zoning boundaries when they are desired by the existing residents and businesses to discourage speculative investment, gentrification, or displacement of its residents. Removal of redline-based barriers should only be done after close consultation with the affected community to balance increased economic opportunity with the preservation of desired cultural or community character.

- Zoning Map Policy 10. **Where zoning map changes have potential impacts on historically disadvantaged and vulnerable neighborhoods, consider the use of non-zoning agreements and commitments to offset those impacts or offer compensating benefits to the neighborhood.** This may involve the creation of a revolving loan fund to expand the resources available to current residents, or other agreements requiring that developers share the new opportunities created by remapping by employing or partnering with existing residents, property owners, and business owners in the neighborhood. It could also include granting a "right of return" allowing existing residents displaced by redevelopment to own or rent housing or business locations within the new development. It is important that efforts to "un-redline" zoning maps anticipate these types of impacts on the existing neighborhoods and include tools to mitigate their impacts.

6. Related Policy Guides

Aging in Community (2014)
Community Residences (1997)
Environment: Waste Management (2002)
Factory Built Housing (2001)
Food Planning (2007)
Hazard Mitigation (2020)
Healthy Communities (2017)
Historical and Cultural Resources (1997)
Homelessness (2003)
Housing (2019)
Planning for Equity (2019)
Provision of Child Care (1997)

7. References and Further Reading

[In process]

City of Ypsilanti
PLANNING COMMISSION
One South Huron Street
Ypsilanti, Michigan 48197

2023 Calendar of Meetings

The regular meetings of the City of Ypsilanti **Planning Commission** for the year of 2023 will be held on the **on the third Wednesday of each month,** unless otherwise indicated. Meetings will start at 7:00 p.m. in the City Hall Council Chambers (first floor) at One South Huron Street | Ypsilanti, Michigan.

January 18
February 15
March 15
April 19
May 17
June 20
July 19
August 16
September 20
October 18
November 15
December 20

The City of Ypsilanti encourages persons with disabilities to participate and will provide necessary reasonable auxiliary aids and services, such as signers for the hearing impaired, Limited English Proficiency (LEP) services, and audios of printed materials being considered at the meeting. Individuals requiring auxiliary aids or services should provide two (2) days' notice to the City, and contact the City by writing or calling the following –

City Clerk's Office
One South Huron Street
Ypsilanti, Michigan 48197
(734) 483-1100

All persons are welcome to attend. For further information on the Planning Commission, please contact Holli Andrews, City Planner at 734-483-9646 or handrews@cityofypsilanti.com, or visit www.cityofypsilanti.com/329/Planning-Commission.