

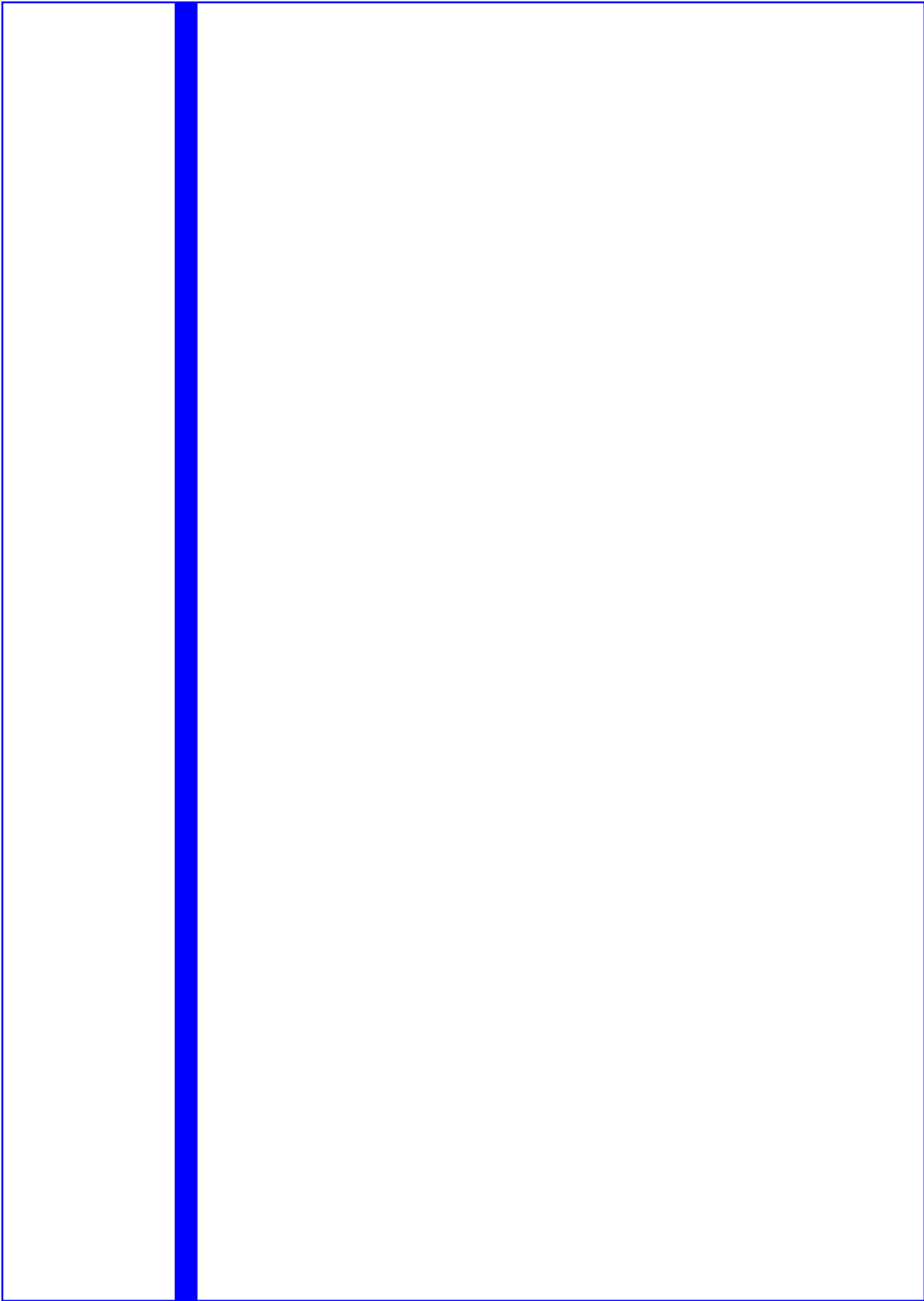
To Test or Not To Test

or ...

What is a land-use audit?

**IDENTIFYING DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES IN THE
ZONING AND LAND-USE PRACTICES OF LOCAL JURISDICTIONS
UPDATED FEBRUARY 2002**

Housing Rights, Inc.



I. INTRODUCTION

The purpose of this training manual is to promote the housing rights of persons with disabilities by:

- ❖ providing specific tools for documenting a local jurisdiction's compliance with state and federal fair housing laws in relation to the rights of persons with disabilities,
- ❖ educating local officials about fair housing law, and
- ❖ suggesting actions which may be needed to bring a local jurisdiction's regulations into compliance with fair housing law.

Our goal is to remove barriers to housing choice for persons with disabilities.

EXAMPLES OF BARRIERS

Discriminatory barriers in the zoning and land use area are generally regulations which treat housing for persons with disabilities differently from housing for persons without disabilities. Sometimes a regulation appears neutral on its face, but in practice it has a discriminatory effect. For example:

- ❖ Definition of "family." Frequently zoning ordinances define family in terms of persons related by blood, marriage or adoption. Such a zoning ordinance does not limit the number of persons who are related to each other from living together in a single-family residential zone (though there may be a building code limit on occupancy).

The definition of family may also include a limited number of unrelated persons (such as no more than five), in which case a household with more than that number of unrelated persons would not be allowed in a single-family residential zone.

Some persons with disabilities prefer to live in an environment with other persons with disabilities and where they have access to social and economic support. Limiting the number of unrelated persons who may live together in a single-family residential zone is a barrier to their housing choice.



- ❖ Conditional or special use permit. Generally, single-family residential use¹ is allowed “by right” in residential zones. (“By right” means no special permit is required for the use.) Many jurisdictions require a conditional or special use permit for group living arrangements of persons with disabilities. These permits are discretionary (can be denied) and generally require public notice and a public hearing before the planning commission, with a possible appeal to the city council (or similar elected body).

The requirement for a noticed public hearing most often results in vocal opposition to “those people” living in the neighborhood (“Not In My Back Yard” or NIMBY). Frequently, when faced with such opposition, the decision makers choose to deny the permit or place so many restrictions on the permit that the housing becomes infeasible.

The requirement for a conditional or special use permit is particularly discriminatory because (1) the notice informs the public that the housing is for people with disabilities, and it may inform them of the specific nature of the disability, and (2) it restricts housing choice by either denying or conditioning the residential use.

The above examples are the most frequent barriers to housing choice of persons with disabilities. We have created test and audit tools in order to document zoning and land use regulations and practices which have a discriminatory effect on persons with disabilities. Previous tests and audits that were conducted by the sponsors of this handbook have uncovered many variations on the two barriers mentioned above, as well as other regulations and practices which limit where and how persons with disabilities may live. The material presented in this training manual builds on the experience gained from previous tests and audits:

- (1) The tools have been revised and simplified.
- (2) The test and audit procedures are more clearly defined.

Footnotes at end of chapter.

II. BACKGROUND

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

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

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

that the prohibition against discrimination against those with handicaps² apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.

[HR Report 100-711, page 24]

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

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

It may be that much of this reluctance is caused when local elected officials and other government decision-makers do not fully understand the Act and what is required by the Act.

A test or audit is a tool with which to acquire credible and objective



information regarding compliance with the law. Conducting a test or audit which documents regulatory barriers to housing choice for persons with disabilities is an important objective tool for educating local officials. It is our intention that providing this 'feedback' to local officials will lead to the removal of barriers, so that persons with disabilities will be able **to live in the residence of their choice in the community.**

III. FEDERAL FAIR HOUSING LAW

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

DEFINITION OF HANDICAP

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

“Handicap” means, with respect to a person -

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

[42 USC 3602(h)]

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

UNLAWFUL ACTS

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

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



(A) that buyer or renter,

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

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

[Emphasis added.]

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

(A) that person; or

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

(C) any person associated with that person.

[Emphasis added.]

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

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

[Emphasis added.]

[42 USC 3604]

ENFORCEMENT

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

REMEDIES

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



IV. STATE FAIR HOUSING LAWS

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

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

LAND USE, ZONING AND RESTRICTIVE COVENANTS

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

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

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

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

[It shall be unlawful]

- (l) To discriminate through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry. Discrimination includes, but is not lim-

ited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable.

DISCRIMINATORY EFFECT

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

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

- (a) Proof of an intentional violation of this article includes, but is not limited to, an act or failure to act that is otherwise covered by this part, that demonstrates an intent to discriminate in any manner in violation of this part. A person intends to discriminate if race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice. An intent to discriminate may be established by direct or circumstantial evidence.
- (b) Proof of a violation causing a discriminatory effect is shown if an act or failure to act that is otherwise covered by this part, and that has the effect, regardless of intent, of unlawfully discriminating on the basis of race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry. [...] In cases that do not involve a business establishment, the person whose action or inaction has an unintended discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of this part if the person can establish that the action or inaction is necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect and effectively carries out the purpose it is alleged to serve.
- (1) Any determination of a violation pursuant to this subdivision shall consider whether or not there are feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect. Courts have interpreted this to include land use and zoning actions.

Courts have interpreted this to include land



V. LEGAL ISSUES

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

A. Discriminatory Intent

To prove discriminatory intent under the FHA, the plaintiff³ need only show that the plaintiff's disability was one factor considered by the defendant in making a land use or zoning decision. The plaintiff's handicap need not be the sole basis for the defendant's discriminatory actions. Further, a plaintiff need not demonstrate that the defendant harbors personal animosity, ill will, or a malicious desire to discriminate. Intentional discrimination includes actions motivated by stereotypes, prejudice, unfounded fears, misperceptions, paternalistic attitudes and decisions by local officials to that respond to certain neighborhood and community concerns. Both circumstantial and direct evidence may be admitted to demonstrate discriminatory intent.

B. Discriminatory Effect or Impact

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

C. Reasonable Accommodation

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

Courts have interpreted this to include land use and zoning actions.

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

D. Direct Threat Exception

42 USC 3604(f)(9) of the FHA provides that a dwelling does not need to be made available “to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.” However, the threat must be ‘real’ (imminent) and not based upon an individual’s ‘fear’ of people with disabilities.

E. Illegal Acts

1. Conditional and Special Use Permits

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

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



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

Many land use practices designate districts as “single-family residential” or “commercial” and restrict such districts to compatible or similar uses. In limiting the use to single-family residences, the land use laws must define what constitutes a “family.” A definition of “family” that singles out persons with disabilities or restricts their housing opportunities may violate the FHA. Further, failure, on the part of the local jurisdictions, to modify the definition of family or make an exception may constitute a failure to make reasonable accommodations.

The FHA exempts from its coverage reasonable restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 42 USC 3607(b)(1).

In addition, the FHA includes a prohibition against discrimination on the basis of familial status. The law defines “familial status” as one or more individuals, under the age of 18 living with a parent, a person having legal custody of such individual(s), or the designee of such parent or legal custodian. This provision therefore provides an additional ground to challenge discriminatory land use practices, when such practices effect group or other supported housing for children with disabilities.

3. Occupancy Standards

The FHA exempts from its coverage reasonable restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 42 USC 3607(b)(1). The legislative history clearly indicates that maximum occupancy limits are permissible only if applied equally to all applicants (whether the applicant is what is considered to be a ‘traditional family’, or not) and do not operate to discriminate on the basis of ‘handicap’.

4. Health and Safety Regulations

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

These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities.

[HR Report 100-711, page 24.]

Land use practices and other regulatory authority involving housing, which are justified on health and safety grounds, must be based on an individualized inquiry, must not be overbroad, and cannot impose requirements greater than those imposed on similarly situated non-disabled persons (traditional families, the family composition that is considered, in the public arena, as a traditional family, or a two-parent family).

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

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

6. Neighbor Notice and Comment Requirements

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



7. Restrictive Covenants

Restrictive covenants are provisions in deeds, or other documents transferring title, that limit the use of property and prohibit certain uses. Violations of the FHA may occur when neighbors and others seek to enforce terms of restrictive covenants against the operation of housing for persons with disabilities. This may arise where those opposed to the housing argue that the group or supported housing that may be provided is not “residential” but a “business” which is a nonconforming or prohibited use of a residential building.

8. Spacing: Concentration and Dispersal Requirements

Many states and local jurisdictions have laws or policies that seek to disperse group homes and other types of facilities to address possible “overconcentration” of this type of housing in certain areas. These laws or policies are not used to constrain concentration of other ‘protected groups’⁴ nor the general public.

Another purported rationale behind these laws and policies is a goal of integration. In California, the Community Care Facility Act, Health & Safety Code Section 1520.5, declares that it is state policy to prevent overconcentration of residential care facilities (licensed facilities) and requires at least 300 feet between facilities. This code section has not been challenged in the courts.

VI. UNLAWFUL ZONING AND LAND USE PRACTICES

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

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

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

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

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

Ask yourself:

Do these (your community's) regulations limit the residential choice of persons with disabilities?

SINGLE-FAMILY RESIDENTIAL ZONE

Single-family (and multi-family) residential zones, in themselves, are not discriminatory. They may be discriminatory when they exclude the possibility of group homes for persons with disabilities. They may also



be discriminatory if group homes for persons with disabilities are allowed only by conditional or special use permit.

DEFINITION OF “FAMILY”

Single-family residential zones allow family residential use by right, i.e., without any conditional or special use permit. Different jurisdictions have different definitions of “family.” Below are some definitions of “family” which would have a discriminatory effect if group homes for persons with disabilities were not otherwise allowed in the zone. The definitions come from cities in California, but may be similar to those in your area.

Family: An individual, or two or more persons related by blood, marriage, or adoption, or a group of not more than five persons, who are not related by blood, marriage, or adoption, excluding servants, living together as a single household unit in a dwelling unit. [City of Modesto] (This definition, with minor variations, is found in many California zoning codes.)

“Family” means one or more persons occupying a premises and living as a single housekeeping unit as distinguished from a group occupying a hotel, club, fraternity, sorority house, roominghouse, or boardinghouse. A family shall be deemed to include necessary servants. [City of San Bruno] (This definition, with minor variations, is found in many California zoning codes.)

“Family” means individuals that may occupy a dwelling unit and consisting of persons related by blood, marriage or adoption plus not more than two additional unrelated persons; or unrelated persons not to exceed a total of three. [City of Menlo Park]

“Family” means an individual or group of persons living together who constitute a bona fide single housekeeping unit in a dwelling unit. “Family” shall not be construed to include a fraternity, sorority, club, or other group of persons occupying a hotel, lodginghouse, or institution of any kind. [City of Cupertino]

Family: A single and separate living unit, consisting of either:

(a) One person, or two or more persons related by blood,

marriage or adoption or by legal guardianship pursuant to court order; plus necessary domestic servants and not more than three roomers or boarders; or

(b) A group of not more than five persons unrelated by blood, marriage or adoption or such legal guardianship.

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

“Family” shall mean:

(1) One person living alone;

(2) Two or more persons living together who have made social, economic and psychological commitments to each other and who constitute a bona fide single housekeeping unit.

[City of Fremont]

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

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

LICENSED COMMUNITY CARE FACILITIES

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



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

As the majority of California jurisdictions are not knowledgeable about federal and state fair housing law regarding group homes, they rely on the State Community Care Facilities Act, which they misconstrue to require a conditional use permit (CUP) for licensed group homes serving more than six persons. They further misconstrue this state law thinking that it 'allows' them to restrict living arrangements for 'groups' of people with disabilities who live together (group homes).

GROUP HOMES NOT REQUIRING LICENSING

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

NONPROFIT ORGANIZATIONS

Some group homes are run by nonprofit organizations, either specifically for persons with disabilities or for others—battered women and children, persons who are homeless—some of whom qualify as persons with disabilities. If the group home does not require State licensing, the jurisdiction may require a conditional use permit based on the fact that it is operated by a nonprofit organization. The zoning code may include a CUP requirement for “charitable institutions” or for projects receiving some government funding. (We do not see a land-use issue here. Rather, we see assumptions being made that are based upon the sponsorship and by extension upon who will be living in the housing, and not on land-use issues.)

SUPPORTIVE SERVICES

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

that many of the definitions of “family” include a statement to the effect that “family includes all necessary servants.”)

CONDITIONAL USE PERMIT

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

The CUP process is generally used for the type of projects whose impacts need to be evaluated on a case-by-case basis related to a specific site. For instance, a CUP may be required for churches in residential zones. The reason for this requirement would be the need to assess the particular impacts the proposed uses of the church might have on the residential neighborhood, particularly the probable traffic and on-street parking impacts caused by the church uses. The CUP process can also be ‘triggered’ for projects which propose a different ‘use’ than what previously existed on that site. Or a CUP may be required of a church that decides to provide free lunches or a group home that wants to add more beds. (Though the sponsors of the church and the group home may argue that what they are proposing does not change the use of the project.)

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

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

When the CUP process is applied to a group home for persons with disabilities, experience has shown that the notice and public hearing requirements bring out a vocal and determined opposition who do not want “those people” living in their neighborhood. Faced with strong neighborhood opposition to the group home, decision-makers most often bow to this opposition and deny the project, or place so many conditions on the project that it becomes infeasible. (Such as: residents can only be out on the sidewalk if supervised by staff.)

The CUP requirement acts as a deterrent to potential providers of group homes for persons with disabilities because of the costs involved and the uncertain outcome of the permit process. An applicant may spend



significant money processing the permit and complying with additional requirements that may be imposed or suggested by staff. If there is an appeal involved, more money will be spent. Frequently, the final decision is to deny the project.

And if the project is approved, the neighbors will all know, because of the public notice procedure, the nature of the disability of the persons who will reside there. (As yet, nobody has challenged this violation of the privacy right of the California Constitution.)

Essentially, the CUP requirement has a discriminatory effect on persons with disabilities because it makes it difficult, and often impossible, to locate a group home in a residential neighborhood. And it suggests that people with disabilities living in a residential building is a different use than people without disabilities living in that same building.

The CUP process limits housing choice for people with disabilities.

SPECIAL LOCATIONAL CRITERIA FOR GROUP HOMES

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

SPECIAL DEVELOPMENT STANDARDS FOR GROUP HOMES

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

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

SPECIAL OPERATING CONDITIONS FOR GROUP HOMES

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

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

BOARDING OR ROOMING HOUSE

If a group home for persons with disabilities does not meet the definition of a licensed residential care facility, some jurisdictions will classify the use as boarding or rooming house even though the use is actually a single household living arrangement. This use is generally not allowed in a single family residential zone. It may be allowed either by right or by CUP in a multi-family residential or commercial zone. This classification, therefore, limits the ability of persons with disabilities to live in the residence of their choice in the community. If the choice is to live with others in a group home in a single-family neighborhood, that choice may not be available.

FUNDING

Even where there are no zoning impediments to the establishment of a group home for persons with disabilities, there may be an impediment caused by a request for local government funding. Many jurisdictions, when providing funding for housing include some sort of neighborhood or community notice which identifies the proposed project site and the intended residents. Such notice gives an opportunity for opposition to develop, often growing to the point where the decision-makers decide to withdraw funds for that particular site. Some jurisdictions only require the public notification for controversial projects (such as those for people with disabilities). This is clearly being done because of 'who' is going to live in the proposed housing.



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

Discrimination against persons with disabilities is illegal⁵, whether or not it is covered by the Fair Housing Act.

Footnotes

¹ The word ‘use’, in this context, is a planning term. It refers to how a property or building will be ‘used’. Commercial vs. Residential. Multi-family vs. single family.

² The term ‘handicap’ is used in the FHA and is repeated in the document to more closely reflect the wording of the law. Otherwise, the term ‘disabled’ will be used.

³ “He who...seeks remedy in a court of justice for an injury to, or a withholding of, his rights.”

⁴ Groups of individuals who share a characteristic, such as race, religion, age, ethnic origin. Discrimination against people who are ‘members’ of these groups is prohibited by fair housing law.

⁵ See the American’s with Disabilities Act.

VII. OVERVIEW OF TEST AND AUDIT TOOLS

Tests and audits are two different tools which may be used to document (assess and identify) a jurisdiction's compliance with fair housing laws. They obtain similar information, but by different methods. Both are equally useful. The choice of which to use will depend on factors discussed below.

TEST

The test is designed to test a jurisdiction's practice from the point of view of a member of the public who visits the jurisdiction's zoning counter to obtain zoning information. Most people believe the information they are told at a zoning counter. They may make major decisions based on this information without ever getting an official, written opinion from the jurisdiction.

The quality of information obtained at a zoning counter will vary depending on the knowledge, training and experience of the zoning counter staff person. It will also depend on the zoning code, itself. Zoning codes may not be up-to-date, they may not reflect court decisions or changes in federal and state law, or they may be silent on certain uses. Silence may mean that the use is not allowed, or it may mean that the zoning administrator or the planning commission will decide how to classify the use.

When tested in California, the scenario of the fair housing test described below led to various responses, some of which were clearly colored by the bias of the staff person. Under such circumstances, even when the regulations allowed the use, the staff person advised the tester the use was not allowed.

AUDIT

The audit focuses on a jurisdiction's written regulations, policies and procedures. The auditor starts at the zoning counter and explains to the staff person that he or she is conducting an audit concerning housing for persons with disabilities. The auditor says he or she will need to review certain documents, obtain copies of relevant material, and ask a series of questions. Because of the serious and official nature of the audit, the zoning counter staff person may bring in a planner higher up in the organization to answer the questions.

The audit (1) addresses the zoning treatment of a variety of housing choices, (2) obtains information on the application of a condi-



tional use permit process to housing for persons with disabilities, and (3) analyzes relevant data and policies found in the jurisdiction's planning documents for the purpose of identifying barriers.

REASONS TO USE ONE TOOL OVER THE OTHER

How do you decide whether to use the test tool or the audit tool? Below are some of the differences between the two methods which may help you make that decision.

Test

To be able to file a discrimination complaint with the U.S. Department of Housing and Urban Development, or to sue in court, a tester must have standing to sue, that is the tester must have a personal stake in the outcome. [During the course of our work on zoning and land-use issues, questions were raised regarding the standing of our testers. While we believe that we resolved these issues satisfactorily, we decided to handle the issue of tester standing very conservatively. Therefore, the test tool presented here requires a tester who is a parent of an adult child with a psychiatric disability.]

Local chapters of the Alliance for the Mentally Ill (AMI) are a good source of potential testers. Such testers are motivated and have little difficulty conducting the test because they can basically play themselves. The experience of doing the test is an eye-opener for the testers, who generally are unaware of how their jurisdiction discriminates against persons with disabilities (if this is the case). This experience can lead to education and advocacy to change discriminatory regulations.

Generally, a tester will conduct tests of jurisdictions close to home. The number of testers to be trained will depend on the number and location of jurisdictions to be tested,

A test supervisor should accompany each tester initially, to ensure that the test procedures are followed and all the relevant information is recorded.

As part of the test, the tester will obtain copies of regulations applicable to the given scenario. Someone other than the tester should obtain copies of other regulations which may limit housing choices of persons with disabilities. All of these regulations should be analyzed for their potential discriminatory effect.

A test is a relatively inexpensive method to document a fair housing problem. The results of the test can be used to educate the jurisdiction about the problem and about fair housing law. The tester can also be a plaintiff and file a fair housing complaint or lawsuit when the situation so merits.

Audit

The information from the audit is more comprehensive than that obtained from the test. It also involves more time to review the documents and analyze the relevant materials. Auditors should be people who have some familiarity with zoning and planning (to be able to ask additional, probing questions when necessary, and to be able to identify and analyze relevant material in the planning documents). Graduate planning students and retired planners might be considered for this task.

Audits may be more appropriate as part of a larger assessment of fair housing compliance by local jurisdictions. This is because of the quantity and variety of information obtained and the analysis of planning documents. The time and costs involved in conducting audits are better justified when the information from each audited jurisdiction is compiled and presented as part of a report assessing fair housing compliance in a state or region.

The findings of each audit should be conveyed to the jurisdiction and a meeting set up to discuss the findings and fair housing law (see below). Although an auditor would not have standing to file a fair housing complaint or lawsuit, information gathered during the audit process may lead to litigation filed on behalf of an injured party. (The audits conducted in California under a HUD Fair Housing Initiatives Program grant included a litigation component.)

ANALYSIS OF RESULTS

After completing a test or an audit, a report should be written documenting the findings. The use of worksheet forms is suggested to help in identifying discriminatory regulations and practices (examples in Appendices B and C). The complexity of the audit will require more analysis than needed for the test. Each report should specify what regulations, policies and/or practices seem to be a barrier to housing choice for persons with disabilities, i.e., a violation of fair housing law.



FOLLOW-UP ACTIONS

After the report has been completed, a summary of the findings of the test or audit should be conveyed to the jurisdiction and a meeting set up to discuss the findings and fair housing law. The purpose of this meeting is educational. Where fair housing problems have been identified, an offer of technical assistance should be made to the jurisdiction to help it bring its regulations into compliance with fair housing law.

If no action is forthcoming to comply with the law, then other actions might be contemplated, including a broader educational and advocacy effort.

VIII. TEST

WHAT IS A TEST?

A test is a method to identify fair housing discrimination. Frequently tests are used to identify racially discriminatory practices in the rental or sales of housing and other housing related practices (lending, insurance, etc.). Typically, a white couple will visit a real estate office or apartment complex, then a black couple will visit the same office or complex. Both couples will present the same scenario (the black couple might even indicate a higher income than the white couple). The test will show whether these two couples receive equal treatment by the real estate office or apartment complex. Frequently tests show that the white couple is more favorably treated than the black couple. The white couple may be shown a desirable house or apartment and the black couple may be told there is nothing available. This is discrimination based on race and it is illegal.

The fair housing test presented here is designed to test whether a local government in its land use and zoning regulations and practices treats persons with disabilities differently from persons without disabilities. This test is different from that described above. It is not a paired test. The test will also identify whether a local government will provide reasonable accommodations in its rules, policies, practices and services to enable a person with disabilities equal opportunity to use and enjoy a dwelling. A refusal to make such reasonable accommodation is a violation of fair housing laws.

BACKGROUND MATERIALS

Before undertaking a test, it is important that the tester and other participants understand fair housing law as it relates to persons with disabilities. The report entitled "Fair Housing Law: Zoning and Land Use Issues" (See Appendix A) provides a good background on the law.

Conducting the test requires some understanding of zoning terminology and how words in a zoning code can have the effect of limiting the housing choice of persons with disabilities. The paper entitled "Additional Background Information" (Appendix A) is helpful in this regard.



TEST COMPONENTS

Jurisdiction

Jurisdiction means the local government with zoning and land use authority. In California it would be a city or a county.

Tester

Tester should be someone who has standing to file a fair housing discrimination lawsuit if necessary. Given the scenario of this test, the tester should be a parent of an adult child with a psychiatric disability. When reading the information below and following the test procedures, the tester should substitute “wife” for “husband,” “father” for “mother,” “daughter” for “son,” “he” for “she,” and “him” for “her,” as necessary to represent the tester’s own situation.

Note: If a different scenario is selected, the tester qualifications should be adapted to the selected scenario.

Scenario

Note: This training manual presents a specific scenario, with materials related to that scenario. It may be that there is a need to test a different scenario. If so, the test tool should be revised to fit the new scenario. All forms and sample letters can be found in Appendix B.

Tester goes to zoning information counter of test jurisdiction, asks for zoning information, and then tells the staff person the following scenario:

My husband and I want to buy a house for our son who is a young adult with a psychiatric disability. We would like for him to share the house with seven other young adults who also have psychiatric disabilities. For it to pencil out financially, we need a total of eight residents. My husband spoke with a banker friend who advised him to check with the City (or County) to find out what their regulations are. So, here I am. Are there any special restrictions we should know about before we buy a house for our son?

When the staff person responds, tester writes down the response and asks for a copy of any definition or regulation the staff person refers to. Tester uses a regular notepad, not a form, to write

down the staff response. Immediately after the test, the tester fills out Fair Housing Test Form and Test Narrative and attaches notes and relevant copies of jurisdiction materials.

If the staff person says there are some restrictions, tester says she has heard that she can request a “reasonable accommodation” to allow this housing for her son, because he is disabled. Tester then asks how she can make this request for reasonable accommodation.

Request for Written Opinion

The staff person may suggest to tester that she write a letter to the zoning administrator (or some other official) to get a written opinion. If the staff person does not make this suggestion, tester tells the staff person that she would like to write a letter to the appropriate official to obtain a written opinion as to any special restrictions there may be on the proposed use. Tester asks the staff person for the name, title and address of the person to whom she should address this request.

Subsequently, tester writes a letter to the appropriate official to obtain a written opinion as to any special restrictions there may be on the proposed use. In the letter, tester mentions that she has heard that she can request a “reasonable accommodation” to allow this housing for her son, because he is disabled. Tester asks how she can make this request for reasonable accommodation if one is needed. Tester gets approval from test supervisor before mailing the letter.

Request for Reasonable Accommodation

If a waiver of a regulation is needed to allow the housing for her son, tester requests this reasonable accommodation in writing. Similarly, a request for reasonable accommodation is also appropriate when the application of a regulation needs to be modified. If jurisdiction has a procedure for requesting reasonable accommodation, tester follows the procedure. Otherwise, tester writes a letter to the planning director, describing what she wants to do, what she has been told by staff, and requesting that a reasonable accommodation be made in the regulations to allow her to provide the housing for her son. Tester gets approval from test supervisor before mailing letter.



Analysis of Regulations

As the test addresses just one form of housing a person with a disability might choose, it is recommended that the jurisdiction's regulations be reviewed to determine whether there may be other regulations which may limit the housing choice of persons with disabilities. To do this, a person other than the tester should review the jurisdiction's zoning code and obtain copies of relevant regulations, including definition of "family" (if there is one) and any regulations applicable to board and care home, boarding house, group care, group home, residential care facility, and supportive housing.

Test Report Worksheet

Test supervisor completes the Test Report Worksheet based on information obtained from test and jurisdiction's written regulations.

Test Report for Jurisdiction

Test supervisor writes a brief report for jurisdiction summarizing findings of fair housing test. (See Appendix B for Sample Test Report for Jurisdiction.)

Letter to Jurisdiction Requesting Meeting

Project director writes letter to the mayor with copies to the planning director and city attorney. (If the jurisdiction is not a city, the letter should go to the people holding equivalent positions in that jurisdiction.) The letter informs the mayor of the fair housing project and requests a meeting to present the project findings. Enclosed with the letter should be a copy of the Test Report and a copy of the report entitled "Fair Housing Law: Zoning and Land Use Issues" (Appendix A)

TEST PROCEDURE

1. Determine jurisdictions to be tested. Possible candidate jurisdictions include large cities and cities where there have been complaints of fair housing discrimination against persons with disabilities.
2. Designate test supervisor(s). Test supervisor is responsible for training and supervising testers, ensuring that tests are properly conducted, debriefing tester after test, completing test worksheet, and writing test report for jurisdiction.
3. Recruit qualified testers. The scenario for this test requires a

parent of a young adult with a psychiatric disability. A good source for recruiting qualified testers would be the local chapter of the Alliance for the Mentally Ill. If it is difficult to find qualified testers, consideration might be given to modifying the scenario to adapt to a tester who is not a parent but would have standing to be a plaintiff in a lawsuit, if necessary. (See page 25 for discussion of standing.)

4. Give testers background materials. In advance of the training session, give testers copies of the report entitled “Fair Housing Law: Zoning and Land Use Issues” and the paper entitled “Additional Background Information” (both documents are in Appendix A).
5. Train the testers. At the training session, the trainers should do a role-playing demonstration of several examples of what might occur at a zoning counter. Trainers should ask testers what they observed and discuss it in the context of fair housing. (See Appendix B for Sample Tester Training Outline.)

Next, trainers should go over the procedures for conducting a test. Finally, tester-jurisdiction assignments should be made and test forms distributed. There should be a sign-up sheet with the names and phone numbers of the testers. Each tester should be given the name and phone number of the test supervisor. The tester and test supervisor should then work out a tentative schedule for going to the different jurisdictions.

6. Conduct the test. The test consists of the following steps. Additional steps may be necessary depending on the circumstances. The project director and/or the test supervisor will make that decision.
 - a. Tester calls the jurisdiction to find out zoning counter hours and location and whether an appointment is needed.
 - b. Tester consults with test supervisor and they decide conduct test alone, then tester can do so, and this step can be eliminated.)
 - c. Tester goes to zoning counter and follows scenario. Tester obtains business card of counter staff person and copies of relevant regulations and procedures. Tester asks how she can get a written opinion as to any special



restrictions there may be on the proposed use and how she can make a request for reasonable accommodation.

- d. Immediately after the test, tester goes to car, completes Fair Housing Test Form and Test Narrative, and attaches notes and copies of jurisdiction materials.
 - e. Tester meets with test supervisor to discuss what happened at the zoning counter and to go over the forms and materials. Test supervisor may suggest tester obtain additional information or materials. Test supervisor provides guidance on what to say in the request for written opinion letter.
 - f. Tester writes request for written opinion letter. Tester obtains approval of test supervisor before mailing letter.
 - g. After receiving response to request for written opinion, tester meets with test supervisor to go over response and discuss next step.
 - h. If needed, tester writes request for reasonable accommodation letter. (See Appendix B for Sample Request for Reasonable Accommodation.) Tester obtains approval of test supervisor before mailing letter.
 - i. After receiving response to request for reasonable accommodation, tester meets with test supervisor to go over response and discuss next step.
 - j. When test supervisor says test is complete, tester gives all the materials to the test supervisor.
7. Obtain other relevant regulations. A person other than the tester reviews the jurisdiction's zoning code and obtains copies of relevant regulations, including definition of "family" (if there is one) and any regulations applicable to board and care home, boarding house, group care, group home, residential care facility, and supportive housing. It will probably be necessary to go to the zoning counter to get this information, though it may be available on the Internet.
 8. Meet with project director. Test supervisor meets with project director to go over test results and materials.

9. Complete Test Report Worksheet. Test supervisor completes the Test Report Worksheet based on information obtained from test and jurisdiction's written regulations.
10. Write Test Report for Jurisdiction. Using the Test Report Worksheet, test supervisor writes a brief report for jurisdiction summarizing findings of fair housing test. (See Appendix B for Sample Test Report for Jurisdiction.)
11. Write Jurisdiction Letter. Project director writes letter to the mayor with copies to the planning director and city attorney. (If the jurisdiction is not a city, the letter should go to the people holding equivalent positions in that jurisdiction.) The letter informs the mayor of the fair housing project and requests a meeting to present the project findings. The project director encloses with the letter a copy of the Test Report for Jurisdiction and a copy of the report entitled "Fair Housing Law: Zoning and Land Use Issues" (Appendix A)
12. Meet with jurisdiction. Project director meets with jurisdiction's representatives to present the test findings and discuss them in the context of fair housing law. Project director offers jurisdiction technical assistance to help it bring its regulations and practices into compliance with the law, if that is necessary. Project director also offers to provide a training session for staff on fair housing for persons with disabilities. Project director may bring others to the meeting, such as a fair housing attorney.
13. Follow-up actions. Additional follow-up actions will depend on the specific situation. Where it has been identified that changes in regulations and practices are needed, it is recommended that the jurisdiction be contacted the following year to find out what changes have been made.



IX. AUDIT

WHAT IS AN AUDIT?

The term audit is usually used in the context of accounting, however there is a secondary meaning of this term. The Merriam-Webster Online Dictionary defines the secondary meaning as “a methodical examination and review.” This definition better describes a fair housing audit.

The California Land Use and Zoning Campaign

The California Land Use and Zoning Campaign was a geographically broad assessment of local compliance with California and Federal fair housing laws providing protection for housing for persons with disabilities. It was conducted by Fair Housing Congress of Southern California (FHCS) under a HUD Fair Housing Initiatives Program (FHIP) Grant. During the course of two years, 90 cities and counties were audited for discriminatory land use and zoning practices. An audit tool was developed which measured compliance with fair housing laws using 15 land use and zoning policies and practices that create potential barriers to housing for persons with disabilities.

Subsequently, Housing Rights, Inc., received a HUD FHIP grant to continue the auditing of California jurisdictions. The audit tool presented here was developed in consultation with the consultant who prepared the final audit report for FHCS. The present audit tool is simpler in scope, making the audit easier to conduct and the information obtained easier to manage. The audit addresses major zoning regulations and practices which have the potential for limiting the housing choices of persons with disabilities.

AUDIT COMPONENTS

Jurisdiction

Jurisdiction means the local government with zoning and land use authority. In California it would be a city or a county.

Auditor

Auditor means the person who conducts the audit. As this audit addresses zoning regulations and practices and also requires review and analysis of planning documents, an auditor should be someone

who has some familiarity with zoning and planning (to be able to ask additional, probing questions when necessary, and to be able to identify and analyze relevant material in the planning documents).

Audit Tool

The audit tool has two parts: Part A, Zoning, and Part B, General Plan and Other Documents. Part A involves reviewing the jurisdiction's zoning code and then asking a staff person ("Interviewee") a series of questions designed to disclose potentially discriminatory regulations and practices.

Part B involves reviewing relevant planning documents, identifying and analyzing material in those documents which is relevant to housing for persons with disabilities, and asking a staff person questions related to that information. Analysis of the planning documents may reveal inconsistencies between planning policies and zoning regulations. Planning documents such as the consolidated plan and housing element will include information on the number of persons with specified disabilities and their unmet housing needs.

This particular audit tool was developed for use in California. As zoning and planning requirements differ depending on the state and local jurisdiction, the audit tool should be reviewed and revised so that the questions and references are appropriate for the area to be audited.

Audit Report Worksheet

Auditor completes the Audit Report Worksheet (Appendix C) based on information obtained from audit interviews and jurisdiction's written materials.

Audit Report for Jurisdiction

Auditor writes a brief report for jurisdiction summarizing findings of fair housing audit. (See Appendix C for Sample Audit Report for Jurisdiction.)

Letter to Jurisdiction Requesting Meeting

Project director writes letter to the mayor with copies to the planning director and city attorney. (If the jurisdiction is not a city, the letter



should go to the people holding equivalent positions in that jurisdiction.) The letter informs the mayor of the fair housing audit and requests a meeting to present the audit findings. (See Appendix C for Sample Jurisdiction Letter for Audit.) Enclosed with the letter should be a copy of the Audit Report for Jurisdiction and a copy of the report entitled “Fair Housing Law: Zoning and Land Use Issues” (Appendix A).

AUDIT PROCEDURE

All forms and sample letters can be found in Appendix C

1. Determine jurisdictions to be audited. Possible candidate jurisdictions include large cities and cities where there have been complaints of fair housing discrimination against persons with disabilities.
2. Designate audit supervisor(s). Audit supervisors are responsible for training and supervising the auditors, ensuring that the audits are properly conducted, and reviewing and approving the auditor’s report for each audit.
3. Recruit qualified auditors. As mentioned above, an auditor should be someone who has some familiarity with zoning and planning (to be able to ask additional, probing questions when necessary, and to be able to identify and analyze relevant material in the planning documents). A potential source for auditors would be graduate planning schools. Other sources might be retired planners, graduate students in related fields, or law students. The FHCSC audit demonstrated the need for auditors who would understand the relevance of the questions asked, who could ask follow-up or probing questions when necessary, and who could provide a meaningful analysis of planning documents.
4. Train the auditors. The audit supervisor(s) should train the auditors. In advance of the training session, auditors should be provided with background material on fair housing for persons with disabilities and zoning terminology (both documents are in Appendix A). At the training session, the trainers should go over the audit procedures and audit tool. Auditors should be encouraged to ask questions to ensure that they understand the purpose of the questions asked in the audit. Trainers should write down areas that need clarifying, as this information will be useful later when evaluating the audit tool

and process. (See Appendix C for Sample Auditor Training Outline.)

Next, auditor-jurisdiction assignments should be made and audit forms distributed. There should be a sign-up sheet with the names and phone numbers of the auditors. Each auditor should be given the name and phone number of the audit supervisor. The auditor and audit supervisor should then work out a tentative schedule for completing the assigned work.

5. Conduct the audit. The audit consists of the following steps. Additional steps may be necessary depending on the circumstances. The project director and/or the audit supervisor will make that decision.
 - a. Auditor calls the jurisdiction to find out zoning counter hours and location and whether an appointment is needed.
 - b. Auditor goes to the zoning counter and follows instructions on Part A: Zoning (Appendix C) as modified to suit project particulars.
 - c. Auditor reviews zoning code and flags pages to be copied.
 - d. Auditor asks staff person questions contained in Interviewee Questionnaire Part A (Appendix C).
 - e. Auditor obtains copies of relevant planning documents (in California these are the General Plan Land Use and Housing Elements and the Consolidated Plan, including the Assessment of Impediments to Fair Housing Choice). (See Appendix C for Part B: General Plan and Other Documents.)
 - f. Auditor reviews the planning documents. Auditor may choose to review the documents while at the jurisdiction's planning department or later elsewhere.
 - g. Auditor asks appropriate staff person follow-up questions, as necessary, after reviewing planning documents. Auditor uses Interviewee Questionnaire Part B (Appendix C).



- h. Auditor uses Audit Supplemental Answer Sheet (Appendix C) as needed to record additional information.
6. Complete Audit Report Worksheet. Auditor completes the Audit Report Worksheet based on information obtained from audit interviews and jurisdiction's written materials.
7. Draft Audit Report for Jurisdiction. Using the Audit Report Worksheet, auditor drafts a brief report for jurisdiction summarizing findings of fair housing audit.
8. Meet with audit supervisor. Auditor goes over draft audit report with audit supervisor.
9. Write final audit report. Upon approval of audit supervisor, auditor writes final audit report and submits it and audit materials to audit supervisor.
10. Submit audit report to project director. Audit supervisor submits audit report and audit materials to project director.
11. Write jurisdiction letter. Project director writes letter to the mayor with copies to the planning director and city attorney. (If the jurisdiction is not a city, the letter should go to the people holding equivalent positions in that jurisdiction.) The letter informs the mayor of the fair housing audit and requests a meeting to present the audit findings. (See Appendix C for Sample Jurisdiction Letter for Audit.) The project director encloses with the letter a copy of the Audit Report for Jurisdiction and a copy of the report entitled "Fair Housing Law: Zoning and Land Use Issues" (Appendix A).
12. Meet with jurisdiction. Project director meets with jurisdiction's representatives to present the audit findings and discuss them in the context of fair housing law. Project director offers jurisdiction technical assistance to help it bring its regulations and practices into compliance with the law, if that is necessary. Project director also offers to provide a training session for staff on fair housing for persons with disabilities. Project director may bring others to the meeting, such as a fair housing attorney.
13. Follow-up actions. Additional follow-up actions will depend on the specific situation. Where it has been identified that changes in regulations and practices are needed, it is recommended that the jurisdiction be contacted the following year to find out what changes have been made.

X. CONCLUSION

The test and audit tools presented above are effective means to assess a jurisdiction's compliance with state and federal fair housing law. The findings of a test or audit are useful, first of all, to educate a jurisdiction's officials about fair housing law and to seek their voluntary cooperation to bring their regulations and practices into compliance with the law. Offers of technical assistance and fair housing training may be welcome. If, on the other hand, a jurisdiction is not willing to eliminate regulations and practices that have a discriminatory effect, the test or audit may serve as the basis for future litigation to bring about compliance with the law.

The test or audit findings are also useful to educate the broader public about discriminatory practices they may not be aware of. This broader education may result in advocacy for change to eliminate the discriminatory practices.



2002 UPDATE

OVERVIEW

The good news: The protections enacted with the passage of the Fair Housing Amendments Act of 1988 remain intact. The bad news: Throughout the nation, local governments have balked at implementing the provisions relating to group homes for persons with disabilities and for children.

The Fair Housing Act (FHA) survived repeated attempts to amend the Act to give back to local governments zoning control over group homes. Faced with a united front of disability, children's, and civil rights advocates, the National League of Cities decided to try to find a middle ground by working with a group of fair housing advocates to write a handbook on fair housing and the siting of group homes.

The handbook is entitled "Local Officials Guide—Fair Housing—The Siting of Group Homes for the Disabled and Children." It was jointly produced by the National League of Cities and the Coalition to Preserve the Fair Housing Act. The handbook presents areas of agreement and areas of disagreement between the two organizations. Copies can be obtained online at: <http://www.bazelon.org/cpfha/grouphomes.html>.

While courts continue to uphold the provisions of the Fair Housing Act, implementation of the Act through litigation is a slow and inefficient process. A far better approach is for local governments to acknowledge their responsibility towards all members of their community, including children and persons with disabilities, and to voluntarily bring their regulations, policies and procedures into compliance with state and federal fair housing laws.

Until such time as a local government's regulations are brought into compliance with fair housing laws, more use should be made of the FHA's requirement to provide reasonable accommodations to rules, policies, practices and procedures when such accommodations may be necessary to afford a person with disabilities an equal opportunity to use and enjoy a dwelling.

FEDERAL ACTIONS

Federal courts throughout the nation continue to uphold the provisions of the Fair Housing Amendments Act of 1988. Since this training manual was first written, the United States Supreme Court has issued two opinions which are particularly relevant to group homes for per-

sons with disabilities and children. The cases are City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) and Olmstead v. L. C., 527 U.S. 581 (1999).

City of Edmonds v. Oxford House, Inc.

The issue in the Edmonds case was whether a zoning definition of “family” which differentiates between related persons without regard to number and unrelated persons which are limited in number qualifies for the FHA exemption regarding the maximum number of occupants permitted to occupy a dwelling. [42 U.S.C. Section 3606(b)(1)] The Court held “that section 3607(b)(1) does not exempt prescriptions of the family defining kind, i.e., provisions designed to foster the family character of a neighborhood. Instead, section 3607(b)(1)’s absolute exemption removes from the FHA’s scope only total occupancy limits, i.e., numerical ceilings that serve to prevent overcrowding in living quarters.”

The Court’s ruling is significant, because it clarifies that the typical definition of “family” is not exempt from the provisions of the FHA.

Olmstead v. L.C.

The Olmstead case concerns Title II of the Americans with Disabilities Act (ADA) and its implementing regulation known as the “integration regulation.” The Court held that under Title II of the ADA States are required to place persons with mental disabilities in community settings rather than in institutions when the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

The Court’s ruling is significant, because it means that States must increase opportunities for community-based treatment for persons who are inappropriately institutionalized. As group homes are a potential housing resource for such persons, there may be increased attention paid to zoning discrimination against group homes.

On June 19, 2001, President George W. Bush issued an Executive Order titled “Community-Based Alternatives for Individuals With Disabilities.” The Order recognizes that the “Federal Government must assist States and localities to implement swiftly the Olmstead decision, so as to help ensure that all Americans have the opportunity to live



close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life.” The Order directs specified Federal Agencies to “work cooperatively to ensure that the Olmstead decision is implemented in a timely manner.”

Americans With Disabilities Act (ADA)

In some recent cases, courts have ruled that the ADA applies to zoning decisions made by a public entity. [Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, (9th Cir. 1999) 179 F.3d 725; Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37 (2d Cir. 1997)] This means that, when appropriate, advocates can allege violations of both the ADA and the FHA.

STATE ACTIONS—CALIFORNIA

Reasonable Accommodations

Almost fourteen years after its enactment, most cities and counties in California still have not made the changes necessary to comply with the Fair Housing Amendments Act of 1988 and the very specific language in California fair housing law which prohibits discrimination through public and private land use practices, decisions, and authorizations. [Government Code section 12955(l)] In response to this inaction, on May 13, 2001, the Attorney General of the State of California sent a letter to the mayors of all the cities and the chairs of all the county boards of supervisors re “Adoption of A Reasonable Accommodation Procedure.”

The first paragraph of the letter reads as follows:

Both the federal Fair Housing Act (“FHA”) and the California Fair Employment and Housing Act (“FEHA”) impose an affirmative duty on local governments to make reasonable accommodations (i.e., modifications or exceptions) in their zoning laws and other land use regulations and practices when such accommodations “may be necessary to afford” disabled persons “an equal opportunity to use and enjoy a dwelling.” (42 U.S.C. Section 3604(f)(3)(B); see also Gov. Code, sections 12927(c)(1), 12955(l).) Although this mandate has been in existence for some years now, it is our understanding that only two or three local jurisdictions in California provide a process specifically designed for people with disabilities and other eligible persons to utilize in making

such requests. In my capacity as Attorney General of the State of California, I share responsibility for the enforcement of the FEHA's reasonable accommodations requirement with the Department of Fair Employment and Housing. Accordingly, I am writing to encourage your jurisdiction to adopt a procedure for handling such requests and to make its availability known within your community.

In the last paragraph of the letter, the Attorney General mentions "Examples of reasonable accommodation ordinances are easily attainable from jurisdictions which have already taken this step and from various nonprofit groups which provide services to people with disabilities, among others." Specific reference is made to Mental Health Advocacy Services, Inc. of Los Angeles, which maintains a collection of reasonable accommodation ordinances, copies of which are available upon request.

Due to receipt of the Attorney General's letter, cities and counties are on notice that they are expected to adopt a reasonable accommodation procedure. Some cities and counties are beginning to do that.

Other Tools

Fair housing advocates have been successful in amending other provisions of California law to further the goals of the Fair Housing Amendments Act of 1988.

Government Code section 12955 (fair housing) was amended to make it unlawful to discriminate based on source of income. "Source of income" is defined as "lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant."

Government Code section 12955(l) now reads:

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



Government Code section 65583 (housing element law) was amended to add the following requirement to the mandated contents of local general plan housing elements:

65583(c)(3). Address and, where appropriate and legally possible, remove government constraints to the maintenance, improvement, and development of housing, including housing for all income levels and housing for persons with disabilities. The program shall remove constraints to, or provide reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities. All California cities and counties are required to adopt (and revise every five years) housing elements which comply with the mandated contents specified in the law. Failure to do so leaves the local jurisdiction open to a lawsuit. If the Court finds that the housing element is legally inadequate the Court must impose sanctions as specified in the law. As the potential sanctions are significant, local governments usually respond by bringing their housing elements into compliance with the law.

Government Code section 65008 (anti-discrimination in planning and zoning) was amended to add “familial status” and “disability” to the list of prohibited discriminatory factors. Gov. Code section 65008 contains a lengthy list of “No Nos.” It begins with the following:

(a) Any action pursuant to this title by any city, county, city and country, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state because of any of the following reasons:

(1) The race, sex, color, religion, ethnicity, national origin, ancestry, lawful occupation, familial status, disability, or age of the individual or group of individuals...

Gov. Code section 65008 has rarely if ever been used in litigation, but it does have the potential to make null and void a discriminatory planning or zoning action.

AFFORDABLE HOUSING

Nationally, and certainly in California, we are experiencing a housing crisis, in that the development of affordable housing has not kept up with the growth in population. Lack of affordable housing particularly impacts persons with disabilities whose only source of income is Supplemental Security Income (SSI) or Social Security Disability Income (SSDI). For this reason, it is critical that unrelated persons with disabilities be able to share a house or live in a group home if that is their choice. Generally such housing arrangements are more affordable than individual living units.

Priced Out in 2000

The June 2001 issue of Opening Doors, Housing Crisis Continues—Findings from “Priced Out in 2000,” contains the following information:

Over three and a half million adults with disabilities received SSI benefits equal to a monthly income of \$512 in 2000. People with disabilities continue to be the poorest people in the nation. As a national average, SSI benefits in 2000 were equal to only 18.5 percent of the one-person median household income, falling below 20 percent of median income for the first time in over a decade.

In 2000, people with disabilities receiving SSI benefits needed to pay—on a national average—98 percent of their SSI benefits in order to be able to rent a modest one-bedroom unit at the published U.S. Department of Housing and Urban Development (HUD) Fair Market Rent (FMR).

In 2000, there was not one single housing market in the country where a person with a disability receiving SSI benefits could afford to rent a modest efficiency or one-bedroom unit.

[The complete June 2001 issue of Opening Doors can be accessed online at: http://www.c-c-d.org/back_issues.htm.]

Loss of Subsidized Housing Units

The September 2001 issue of Opening Doors, What’s Wrong With This Picture? An Update on the Impact of Elderly Only Housing Policies on People with Disabilities, discusses the impact of the sweeping changes to federal housing laws which made it legal to restrict or exclude non-elderly people with disabilities from certain affordable



rental housing. The Technical Assistance Collaborative (TAC) and the Consortium for Citizens with Disabilities Housing Task Force (CCD Housing Task Force) analyzed data from HUD and two federal studies.

The data and reports indicate that between 268,500 and 293,500 units of federally subsidized housing are currently designated elderly only. The data also suggest that more subsidized housing owners will designate additional units of housing as elderly only in the months and years to come.

The authors state: "Before 1992, according to federal law, owners of certain HUD subsidized housing developments were required to make these apartments available to both elderly households and non-elderly people with disabilities on an equal basis. Elderly only housing laws (beginning with the Housing and Community Development Act of 1992) fundamentally altered this equal access policy by permitting owners to greatly restrict or completely prohibit non-elderly people with disabilities from moving into these properties." Making these units unavailable to persons with disabilities further restricts their housing opportunities.

[The complete September 2001 issue of Opening Doors can be accessed online at: http://www.c-c-d.org/back_issues.htm.]

Housing Discrimination by Private Parties

In a tight housing market—which we have now—landlords can obtain higher rents and be selective of tenants. Many are no longer willing to rent to persons with disabilities. Furthermore, many landlords who previously accepted Section 8 vouchers have opted out of the program. Thus, the tight housing market further limits the housing opportunities of persons with disabilities.

CONCLUSION

Safe and decent housing is a necessity for persons with disabilities, yet it is becoming further out of reach. The obvious solution is to increase the supply of affordable housing to meet the need, but that seems like an unattainable goal. One thing that can be done, however, is for local governments to remove the barriers which currently limit housing opportunities of persons with disabilities. Simply complying with fair housing laws can make a difference—and there is no cost to the taxpayers.