

MODEL ORDINANCE FOR PROVIDING REASONABLE ACCOMMODATION UNDER FEDERAL AND STATE FAIR HOUSING LAWS

The following documents have been prepared for use by cities and counties to provide a process for making reasonable accommodation to land use and zoning decisions and procedures regulating the siting, funding, development and use of housing for people with disabilities.

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September 2003

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Introduction

Jurisdictions have become increasingly aware of their obligations under fair housing laws and federal and state housing planning documents to remove land use and zoning constraints to the development of housing for individuals with disabilities and provide reasonable accommodation to ensure equal access to housing. This introduction explains those legal mandates that require cities and counties to both eliminate fair housing violations and implement a procedure for providing reasonable accommodation in land use, zoning and building regulations, policies, practices and procedures.

Federal and State Fair Housing Laws

The federal Fair Housing Amendments Act of 1988 and California's Fair Employment and Housing Act prohibit discrimination against individuals with disabilities in housing and require that cities and counties take affirmative action to eliminate regulations and practices that deny housing opportunities to individuals with disabilities. More specifically, fair housing laws require that cities and counties provide individuals with disabilities or developers of housing for people with disabilities, flexibility in the application of land use and zoning and building regulations, practices and procedures. Local jurisdictions must even waive certain requirements when it is necessary to eliminate barriers to housing opportunities. For example, a family could seek reasonable accommodation from its local jurisdiction for waiver of a residential fence height restriction so their son, who because of his mental disability fears unprotected spaces, may use the backyard. This reasonable accommodation mandate could also provide flexibility in the application of a local zoning code regulation that limits the size of residences in R1 zones. Reasonable accommodation could be provided to allow an individual with a disability to exceed that limit to build a wheelchair ramp.

While fair housing laws intend that all people have equal access to housing, the law also recognizes that individuals with disabilities may need extra tools to achieve equality. Providing reasonable accommodation is one way for local jurisdictions to provide relief from land use and zoning and building regulations and procedures that have the effect of discriminating against the development, siting and use of housing for individuals with disabilities. Adopting a reasonable accommodation ordinance will not, however, cure a zoning ordinance that on its face discriminates against individuals with disabilities. Nor will an offer of reasonable accommodation ever excuse a city or county from liability for intentional discrimination.

Federal and State Mandated Housing Planning Documents

In addition to complying with fair housing laws, a jurisdiction is also required by both federal and state law to develop plans for meeting the housing needs of those in the jurisdiction, including individuals with disabilities. Both the federally mandated Analysis of Impediments to Fair Housing Choice, which is a stand-alone document, and a part of the Consolidated Plan and, California's Housing Element statute require that local governments identify constraints to providing housing for individuals with disabilities and develop strategies for removing those constraints. In addressing the housing needs of individuals with disabilities, the statute now recognizes that local land use and zoning regulations, practices and procedures impose significant barriers to developing much needed housing for individuals with disabilities. Every jurisdiction's housing element must have a program that:

“ . . . remove[s] constraints to, or provide[s] reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities.” Cal. Gov. Code § 65583(c)(3).

The most effective way for local governments to comply with the housing element requirement to remove constraints to the development of housing for individuals with disabilities is to undertake an impediments study to identify local barriers to the development of housing for individuals with disabilities, and thereafter revise land use and zoning and building code regulations, practices and procedures that violate fair housing laws. At the same time, cities and counties should adopt a reasonable accommodation ordinance to provide for flexibility in the application of zoning and land use regulations and procedures. If a local government's housing element fails to comply with the housing element requirements that address land use and zoning barriers to the development and siting of housing for individuals with disabilities as set forth above, its planning document will be considered deficient when it is reviewed by the California Department of Housing and Community Development.

California Attorney General Letter

The State Attorney General's recent urging that all California cities and counties implement a fair housing reasonable accommodation procedure for their land use and zoning activities further compels jurisdictions to adopt a reasonable accommodation ordinance for individuals with disabilities. In his May 2001 letter, Attorney General, Bill Lockyer, explained that local governments have an affirmative duty under fair housing laws to provide reasonable accommodation and “[i]t is becoming increasingly important that a process be made available for handling such requests that operates promptly and efficiently.” The State Attorney General, in rejecting local governments'

use of the variance or conditional use permit process to evaluate requests for reasonable accommodation under fair housing laws, explained:

“Further, and perhaps even more importantly, it may well be that reliance on these alternative procedures, with their different governing criteria, serves at least in some circumstances to encourage community opposition to projects involving desperately needed housing for the disabled. As you are well aware, opposition to such housing is often grounded on stereotypical assumptions about people with disabilities and apparently equally unfounded concerns about the impact of such homes on surrounding property values.” California Attorney General letter, May 2001 (emphasis added).

In response to the State Attorney General’s letter, many cities throughout the state have indicated that they are adopting fair housing reasonable accommodation procedures as one way of addressing barriers in land use and zoning regulations and procedures.

We urge cities and counties to take a comprehensive approach to eliminating discrimination and furthering housing opportunities for individuals with disabilities. By reviewing and revising as necessary local zoning and land use regulations, procedures and practices and adopting a reasonable accommodation ordinance, local governments will go a long way in complying with fair housing laws and furthering the housing opportunities of individuals with disabilities.

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF _____
ADDING SECTIONS ____ TO THE MUNICIPAL CODE, PROVIDING A
PROCEDURE FOR REASONABLE ACCOMMODATION IN THE CITY'S LAND
USE AND ZONING AND BUILDING REGULATIONS PURSUANT TO FAIR
HOUSING LAWS.

THE CITY COUNCIL OF THE CITY OF _____ ORDAINS AS FOLLOWS:

Sec. 1. Purpose.

It is the policy of the jurisdiction, pursuant to the federal Fair Housing Amendments Act of 1988 and the California Fair Employment and Housing Act (hereafter "fair housing laws"), to provide individuals with disabilities reasonable accommodation in rules, policies, practices and procedures to ensure equal access to housing and facilitate the development of housing for individuals with disabilities. This ordinance establishes a procedure for making requests for reasonable accommodation in land use, zoning and building regulations, policies, practices and procedures of the jurisdiction to comply fully with the intent and purpose of fair housing laws.

Sec. 2. Findings.

The Council of the jurisdiction finds:

The federal Fair Housing Amendments Act of 1988 and California's Fair Employment and Housing Act impose an affirmative duty on local governments to make reasonable accommodation in their land use and zoning regulations and practices when such accommodation may be necessary to afford individuals with disabilities an equal opportunity to housing;

- A. The Housing Element of the jurisdiction must identify and develop a plan for removing governmental constraints to housing for individuals with disabilities including local land use and zoning constraints or providing reasonable accommodation;
- B. The Attorney General of the State of California has recommended that cities and counties implement fair housing reasonable accommodation procedures for making land use and zoning determinations concerning individuals with disabilities to further the development of housing for individuals with disabilities;

- C. A fair housing reasonable accommodation procedure for individuals with disabilities and developers of housing for individuals with disabilities to seek relief in the application of land use, zoning and building regulations, policies, practices and procedures will further the jurisdiction's compliance with federal and state fair housing laws and provide greater opportunities for the development of critically needed housing for individuals with disabilities.

Sec. 3. Applicability.

Reasonable accommodation in the land use and zoning context means providing individuals with disabilities or developers of housing for people with disabilities, flexibility in the application of land use and zoning and building regulations, policies, practices and procedures, or even waiving certain requirements, when it is necessary to eliminate barriers to housing opportunities.

An individual with a disability is someone who has a physical or mental impairment that limits one or more major life activities; anyone who is regarded as having such impairment; or anyone with a record of such impairment.

A request for reasonable accommodation may be made by any individual with a disability, his or her representative, or a developer or provider of housing for individuals with disabilities, when the application of a land use, zoning or building regulation, policy, practice or procedure acts as a barrier to fair housing opportunities.

Sec. 4. Notice to the Public of Availability of Accommodation Process.

Notice of the availability of reasonable accommodation shall be prominently displayed at public information counters in the planning, zoning and building departments, advising the public of the availability of the procedure for eligible individuals. Forms for requesting reasonable accommodation shall be available to the public in the Planning and Building and Safety departments.

Sec. 5. Requesting Reasonable Accommodation.

- A. In order to make housing available to an individual with a disability, any eligible person as defined in Sec. 3 may request a reasonable accommodation in land use, zoning and building regulations, policies, practices and procedures.

- B. Requests for reasonable accommodation shall be in writing and provide the following information:
- (1) Name and address of the individual(s) requesting reasonable accommodation;
 - (2) Name and address of the property owner(s);
 - (3) Address of the property for which accommodation is requested;
 - (4) Description of the requested accommodation and the regulation(s), policy or procedure for which accommodation is sought; and
 - (5) Reason that the requested accommodation may be necessary for the individual(s) with the disability to use and enjoy the dwelling.
- C. Any information identified by an applicant as confidential shall be retained in a manner so as to respect the privacy rights of the applicant and shall not be made available for public inspection.
- D. A request for reasonable accommodation in regulations, policies, practices and procedures may be filed at any time that the accommodation may be necessary to ensure equal access to housing. A reasonable accommodation does not affect an individual's obligations to comply with other applicable regulations not at issue in the requested accommodation.
- E. If an individual needs assistance in making the request for reasonable accommodation, the jurisdiction will provide assistance to ensure that the process is accessible.

Sec. 6. Reviewing Authority.

- A. Requests for reasonable accommodation shall be reviewed by the "reviewing authority," using the criteria set forth in Sec. 7.
- B. The reviewing authority shall issue a written decision on a request for reasonable accommodation within thirty (30) days of the date of the application and may either grant, grant with modifications, or deny a request for reasonable accommodation in accordance with the required findings set forth in Sec. 7.
- C. If necessary to reach a determination on the request for reasonable accommodation, the reviewing authority may request further information from the applicant consistent with fair housing laws, specifying in detail the

information that is required. In the event that a request for additional information is made, the thirty (30) day period to issue a decision is stayed until the applicant responds to the request.

Sec. 7. Required Findings.

The written decision to grant, grant with modifications, or deny a request for reasonable accommodation shall be consistent with fair housing laws and based on the following factors:

- (1) Whether the housing, which is the subject of the request for reasonable accommodation, will be used by an individual with disabilities protected under fair housing laws;
- (2) Whether the requested accommodation is necessary to make housing available to an individual with disabilities protected under the fair housing laws;
- (3) Whether the requested accommodation would impose an undue financial or administrative burden on the jurisdiction and;
- (4) Whether the requested accommodation would require a fundamental alteration in the nature of the jurisdiction's land use and zoning or building program.

Sec. 8. Written Decision on the Request for Reasonable Accommodation.

- A. The written decision on the request for reasonable accommodation shall explain in detail the basis of the decision, including the reviewing authority's findings on the criteria set forth in Sec. 7. All written decisions shall give notice of the applicant's right to appeal and to request reasonable accommodation in the appeals process as set forth below. The notice of decision shall be sent to the applicant by certified mail.
- B. The written decision of the reviewing authority shall be final unless an applicant appeals it to the jurisdiction's planning commission.
- C. If the reviewing authority fails to render a written decision on the request for reasonable accommodation within the thirty (30) day time period allotted by Sec. 6, the request shall be deemed granted.
- D. While a request for reasonable accommodation is pending, all laws and regulations otherwise applicable to the property that is the subject of the request shall remain in full force and effect.

Sec. 9. Appeals.

- A. Within thirty (30) days of the date of the reviewing authority's written decision, an applicant may appeal an adverse decision. Appeals from the adverse decision shall be made in writing.
- B. If an individual needs assistance in filing an appeal on an adverse decision, the jurisdiction will provide assistance to ensure that the appeals process is accessible.
- C. All appeals shall contain a statement of the grounds for the appeal. Any information identified by an applicant as confidential shall be retained in a manner so as to respect the privacy rights of the applicant and shall not be made available for public inspection.
- D. Nothing in this procedure shall preclude an aggrieved individual from seeking any other state or federal remedy available.

EXHIBIT A

NOTICE OF FAIR HOUSING ACCOMMODATION PROCEDURES FOR PEOPLE WITH DISABILITIES

THIS IS NOT A COMPREHENSIVE EXPLANATION OF YOUR RIGHTS UNDER FEDERAL and STATE FAIR HOUSING LAWS.

You may request a reasonable accommodation to rules, policies, practices and procedures for the siting, development and use of housing, including housing related services or facilities, if you meet all of the following:

- you have a disability* or the housing is for people with disabilities;
- you may need a reasonable accommodation to existing rules and regulations to have equal opportunity to housing AND;
- your request for accommodation would not be an undue burden on the city or county.

If you believe that you satisfy the above criteria and are entitled to a reasonable accommodation under federal and state fair housing laws, you may obtain a Fair Housing Accommodation Request form from the front desk. If you need assistance in applying for a reasonable accommodation, the Department will assist you.

* Under the law, a disability is a physical or mental impairment that limits one or more major life activities; a record of having such an impairment or; being regarded as having such an impairment. Fair housing laws do not protect individuals currently using illegal substances, unless they have a separate disability.

EXHIBIT B

FAIR HOUSING ACCOMMODATION REQUEST **EXPLANATION OF RIGHTS UNDER FAIR HOUSING LAWS**

Before completing the request for a reasonable accommodation, below, please read the following information about who is protected by federal and state fair housing laws and what accommodation may be available under the law. This is not a comprehensive explanation of your rights under federal and state fair housing laws.

Do the protections of federal and state fair housing laws apply to me?

You are protected by the federal Fair Housing Amendments Act of 1988 and California's Fair Employment and Housing Act if you have a disability or the housing is for people with disabilities. "Disability" means any one of the following: a physical or mental impairment that limits one or more major life activities or a record of having such an impairment or being regarded by others as having such an impairment. Federal and state fair housing laws do not protect an individual currently using illegal substances, unless that person has a separate disability.

What kind of accommodation may I request under federal and state fair housing laws?

If you have a disability or the housing is for people with disabilities, both federal and state fair housing laws require that the city or county provide you with reasonable accommodation in rules, policies, practices and procedures that may be necessary for people with disabilities to have equal opportunity to use and enjoy a dwelling. More specifically, the city or county must provide you with reasonable accommodation in decisions and procedures regulating the siting, funding, development or use of housing, including housing related services or facilities.

How do I request reasonable accommodation from the City or County?

To make a request for reasonable accommodation, answer the questions on the attached one page request form, sign and date the form and return it to the Department. If you need help in answering the questions on the request form, you may ask for assistance from the Department. Your accommodation request will be reviewed by the reviewing authority who will issue a written decision on your request within thirty (30) days of the date of the request. If the reviewing authority does not issue a written decision within 30 days, your request will automatically be granted. If the reviewing authority needs additional information consistent with fair housing laws to consider your request, the 30 day time period will stop running until you respond to the request.

What if my request for reasonable accommodation is denied?

If your request for accommodation is denied, you may appeal the adverse decision by filing a Notice of Appeal with the appeals designee within thirty (30) days of the decision. You may request reasonable accommodation in the procedure by which an appeal may be conducted. You may also contact your local fair housing or disability rights organization or legal services office for further assistance. Nothing in this accommodation request procedure limits your right to any other available state or federal remedy.

APPLICATION FOR REQUEST FOR REASONABLE ACCOMMODATION

NOTE: If you need help in completing this request form, the Department will assist you. Please contact the person at the counter where you received this request form for assistance.

1. Name of Applicant

Telephone Number

2. Address

3. Address of Housing At Which Accommodation Is Requested

4. Describe the accommodation you are requesting and the specific regulation(s) and/or procedure(s) from which accommodation is sought.

5. Give the reason that the reasonable accommodation may be necessary for you or, the individuals with disabilities seeking the specific housing, to use and enjoy the housing. You do not need to tell us the name or extent of your disability or that of the individuals seeking the housing.

6. If we have questions about your request for reasonable accommodation and you would like us to contact someone assisting you with this request, instead of you, please give us that person's name, address and telephone number.

7. Signature of Applicant _____ Date _____

PLEASE ATTACH ANY DOCUMENTS THAT YOU THINK SUPPORT YOUR REQUEST FOR REASONABLE ACCOMMODATION AND WOULD ASSIST US IN CONSIDERING YOUR REQUEST.

EXHIBIT C

**NOTICE OF DECISION ON FAIR HOUSING
ACCOMMODATION REQUEST**

1. Date of Application: _____

2. Date of Decision: _____

3. The request for a Fair Housing Accommodation is:

_____ Granted _____ Denied (See Notice below re right to appeal decision.)

4. The reasons for this decision are as follows:

5. The facts relied on in making this decision:

Signature of Designee _____ Date _____

NOTICE: If your request for accommodation was denied, you may appeal the reviewing authority's decision to the Planning Commission within thirty (30) days of the date of this decision. To file an appeal, complete and file an Appeal of Denial of Fair Housing Accommodation Request form with the Department. You may request reasonable accommodation in the procedure by which an appeal may be conducted.

EXHIBIT D

**APPEAL OF DENIAL OF FAIR HOUSING
ACCOMMODATION REQUEST**

NOTICE: PLEASE ATTACH TO THIS APPEAL FORM (1) A COPY OF YOUR FAIR HOUSING ACCOMMODATION REQUEST ALONG WITH ANY ATTACHMENTS SUBMITTED WITH THE REQUEST AND (2) THE NOTICE OF THE DECISION DENYING YOUR ACCOMODATION REQUEST.

1. Date of Adverse Decision: _____

2. Date Appeal Filed: _____

3. State why you think the denial of your request for accommodation was wrongly decided:

4. Provide any new information, facts or documents that support your request for accommodation:

5. Signature _____ Date _____

GUIDELINES FOR REGULATIONS GOVERNING REQUESTS FOR REASONABLE ACCOMMODATION

Sec. 1. Purpose.

The federal Fair Housing Amendments Act of 1988 and California's Fair Employment and Housing Act ("fair housing laws") prohibit local government from impeding housing opportunities for people with disabilities through discriminatory land use and zoning decisions. These fair housing laws also create an affirmative duty to "make reasonable accommodations in rules, policies, practices, or services when accommodation may be necessary to afford such person[s] equal opportunity to use and enjoy a dwelling."¹

When the jurisdiction applies its land use and zoning and building regulations, policies, practices and procedures to the development, siting or use of housing for individuals with disabilities, it must comply with federal and state fair housing laws and administer those regulations, policies, practices, and procedures in a manner that affirmatively furthers those laws.²

While the federal legislative history identifies historic discrimination through local land use and zoning regulations, California's fair housing law explicitly prohibits discriminatory "public or private land use practices, decisions and authorizations" including, but not limited to, "zoning laws, denials of use permits, and other [land use] actions . . . that make housing opportunities unavailable" to people with disabilities.³

Sec. 2. Findings.

Both federal and state fair housing laws mandate that cities and counties provide reasonable accommodation.⁴

All California jurisdictions are required to prepare and adopt a housing element as part of their general plan. The housing element must include; an identification and analysis of existing and projected housing needs, including the needs of individuals with disabilities; an identification of resources and constraints to address needs and goals and; a schedule for the development of needed housing for the community. The housing element statute was recently amended to further specify that the element must include programs that remove land use and zoning constraints or provide reasonable accommodation for housing for individuals with disabilities.⁵

The Attorney General of the State of California, Bill Lockyer, recently urged cities and counties throughout the state to adopt reasonable accommodation procedures for land use and zoning decision-making for housing for individuals with disabilities.⁶ The Attorney General has cautioned against using existing conditional use permit or variance procedures for reviewing requests for

reasonable accommodation because the criteria for planning determinations differs from those which govern fair housing decision-making.⁷

Sec. 3. Applicability.

The Act protects any of the following: an individual with a physical or mental impairment that limits one or more major life activities; anyone who is regarded as having any such impairment; or anyone who has a record of having such an impairment.⁸

Individuals in recovery from drug or alcohol abuse are protected by federal and state fair housing laws.⁹ However, individuals currently using illegal substances are not protected under the law, unless they have a separate disability.

The protections afforded people with disabilities under federal and state fair housing laws extend to those who are associated with them, including providers and developers of housing for people with disabilities.¹⁰

Sec. 4. Notice to the Public of Availability of Accommodation Process.

Under federal and state fair housing laws, a jurisdiction has an affirmative duty to make reasonable accommodations in rules, policies, practices and procedures where accommodation may be necessary to ensure that people with disabilities have equal access to housing.¹¹ By providing the public with notice of the availability of its procedure for requesting accommodation, the jurisdiction takes an affirmative step in accordance with the federal and state mandates to make accommodation available to people with disabilities.¹² To reach all individuals who may need to request accommodation, notice should be posted in the planning, zoning and building departments where decisions are made regulating the siting, development and use of housing. Accommodation request forms should be available in those same departments.

Sec 5. Requesting Reasonable Accommodation.

- A. A request for accommodation may be made by any eligible person as defined in Sec. 3 for the purpose of making housing available to individuals with disabilities. For example, a reasonable accommodation request may be made by an individual with a disability, a family member or friend of a person with a disability, or a developer of housing for people with disabilities.
- B. A jurisdiction in its reasonable accommodation procedure may seek information from the applicant that explains the need for the accommodation based on the disability and will allow for the reviewing authority to make a determination on the request in accordance with the factors articulated in Sec. 7 of the ordinance. The jurisdiction cannot, however, seek confidential information as to the nature or severity of the disability of the applicant or those individuals with disabilities intending to

occupy the housing that is the subject of the request for reasonable accommodation.¹³

- C. A jurisdiction must establish a procedure to safeguard any confidential information that an applicant has voluntarily provided to the jurisdiction in a request for reasonable accommodation.¹⁴
- D. The Regulations provide flexibility in the time to request an accommodation because unforeseen circumstances often arise in the approval process for the siting, funding, development or use of housing. For example, a developer seeking initial approval of building plans for housing specifically designed for people with disabilities might need an accommodation on a side yard requirement. Or, a project already approved may need to be modified to accommodate an additional change due to state licensing requirements.
- E. The process for making a reasonable accommodation request must be accessible to an individual with a disability. Therefore, a jurisdiction must provide assistance to an individual who needs help in requesting accommodation and offer flexibility in the procedure set forth in existing regulations. For example, a jurisdiction might record on the application form information provided by an individual who because of a disability is unable to complete the form alone.¹⁵

Sec. 6. Review of Requests for Reasonable Accommodation.

- A. The reviewing authority may request additional information necessary for making a determination on the request for reasonable accommodation that complies with the fair housing law protections and the privacy rights of the individual with a disability to use the specific housing. See confidentiality discussion, Sec. 5, above.
- C. If the reviewing authority requests additional information from the applicant consistent with fair housing law protections and privacy rights, the 30-day time period for making a determination on the request stops running until the additional information is provided to the reviewing authority. This procedure is intended to expedite the information gathering process and facilitate the issuance of a timely decision by the reviewing authority. It is in the best interest of the applicant seeking accommodation to provide the requested information as soon as possible to obtain a speedy decision.

Sec. 7. Required Findings.

Factor 1: Whether the housing, which is the subject of the request for reasonable accommodation, will be used by an individual with disabilities protected under fair housing laws?

An individual is protected under fair housing laws if he or she meets the definition of disability set forth in Sec. 3, above. If the housing that is the subject of the request for reasonable accommodation is intended for people with disabilities, this prerequisite is met.¹⁶

Factor 2: Whether the requested accommodation is necessary to make housing available to an individual with disabilities protected under fair housing laws?

Under fair housing laws, jurisdictions have an affirmative duty to provide individuals with disabilities reasonable accommodations to “rules, policies, practices, or services, when such accommodation may be necessary to afford such persons equal opportunity to use and enjoy a dwelling. . .”¹⁷ Whether an accommodation is necessary requires a “fact-specific inquiry regarding each such request.”¹⁸ Failure to make reasonable accommodation is a violation of federal and state fair housing laws.¹⁹

Factor 3: Whether the requested accommodation would impose an undue financial or administrative burden on a jurisdiction?

Once an individual establishes that an accommodation is necessary for equal access to housing, a jurisdiction must provide the requested accommodation unless it presents evidence that granting the accommodation would impose an undue financial or administrative burden on the jurisdiction.²⁰ Here again, the analysis is a fact-specific inquiry. If the jurisdiction establishes an undue burden, then the accommodation is not reasonable and should not be granted. In the land use and zoning context, many requests for accommodation will be a request to modify or waive a regulation or procedure. It costs a jurisdiction nothing to waive a rule, meaning that “. . . the accommodation request amounts to nothing more than a request for non-enforcement of a rule.” In those instances, a jurisdiction would not be likely to demonstrate undue burden.²¹

Factor 4: Whether the requested accommodation would require a fundamental alteration in the nature of the jurisdiction’s land use and zoning or building program?

In addition to not imposing an undue financial or administrative burden, a reasonable accommodation must also not result in the fundamental alteration in the nature of a program.²² “Fundamental alteration” has been defined as, “(1) a substantial change in the primary purpose or benefit of a program or activity; or (2) a substantial impairment of necessary or practical components required to achieve a program or activity’s primary purpose or benefit.”²³ In the land use and zoning context, “fundamental alteration in the nature of the program” means an alteration so far reaching that it would undermine the basic purpose of maintaining the character of the neighborhood. The case law indicates that in most instances granting a request to modify or waive a zoning policy or procedure, does not result in a fundamental alteration in the nature of a program.²⁴

Sec. 8. Written Decision on the Request for Reasonable Accommodation.

- A. The reviewing authority's written decision is to be based on a consideration of the four factors set forth in Sec. 7. The reviewing authority shall not rely on discriminatory stereotypes.²⁵
- B. This provision encourages prompt decision-making on requests for reasonable accommodation as delays may cause an individual with disabilities to lose a housing opportunity or a developer of housing for individuals with disabilities faced with extensive delays may be harmed by increases in development costs or risk the future of a project.

Sec. 9. Appeals.

- A. An individual denied a requested reasonable accommodation has 30 days from the date of the written decision to file an appeal.
- B. As with the filing of the original appeal, a jurisdiction must make efforts to ensure that the appeals process is accessible to individuals with disabilities.²⁶
- C. The statement of the grounds for appeal is necessary for the Planning Commission to review the appeal and reconsider the individual's request for accommodation.
- D. A jurisdiction's procedure for requesting accommodation and the appeals process in no way limits an individual's right to any other available remedy including, but not limited to, filing a complaint with the Department of Housing and Urban Development, the jurisdiction's Department of Fair Employment and Housing or commencing an action in state or federal court.

Environmental Determination

Jurisdictions with a certified Local Coastal Plan may need to amend their Plan to reflect a zoning amendment adding a reasonable accommodation procedure. The Coastal Commission does not, however, have the authority to make a determination under its own rules which conflicts with or undercuts the protections of the Fair Housing Amendments Act of 1988.

¹ 42 U.S.C. §§ 3601 et seq., § 3604(f)(3)(B) (reasonable accommodation); Cal. Gov. Code §§ 12955 et seq., § 12927(c)(1) (reasonable accommodation). In addition to federal and state fair housing laws, two other significant federal anti-discrimination laws offer protection against discrimination to people with disabilities, including land use and zoning activities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of disability in any program or activity that is conducted by the federal government or that receives federal financial assistance. The Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., prohibits discrimination against individuals with disabilities in a number of areas, including all public services – irrespective of federal financial assistance. Both § 504 and the ADA require

reasonable accommodation and the accommodation analysis under these federal laws is very similar to that of the fair housing laws.

² The federal regulations that implement the Fair Housing Amendments Act of 1988 state that its fundamental purpose is to prohibit practices that “restrict the choices” of people with disabilities to live where they wish or that “discourage or obstruct choices in a community, neighborhood or development. 24 C.F.R. § 100.70(a)(1994). The legislative history is precise in identifying discriminatory land use practices:

The Act is intended to prohibit the application of 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.

54 Fed. Reg. 3246 citing House of Representatives Report No. 100-711, 100th Congress, 2d Session at 24.

³ In a statement of legislative intent that accompanied the amendments, the following findings were made:

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

Stats. 1993 ch 1277, § 18 (emphasis added).

⁴ See note 1, *supra*.

⁵ Gov. Code § 65583(c)(3), Chapter 671, Statutes of 2001 (Senate Bill 520) effective January 1, 2001, amended housing element law and Gov. Code § 65008. See also www.hcd.ca.gov.

⁶ Letter from California Attorney General Bill Lockyer to California cities and counties (May 2001). A copy of the letter is available from Mental Health Advocacy Services, Inc.

⁷ In addition to different governing criteria, the Attorney General further cautions against using the variance or conditional use permit process for considering reasonable accommodation requests because the public notice and hearing process may “encourage community opposition to projects involving desperately needed housing for the disabled.” Attorney General letter at 3-4.

⁸ The definition of disability under the California Fair Employment and Housing Act while similar to federal law, is broader requiring that an individual have an impairment that limits a major life activity. Cal. Gov. Code § 12955.3. The Fair Housing Amendments Act requires that an individual have an impairment that “substantially limits” a major life activity to be considered disabled under the law. 42 U.S.C. § 3602(h); 24 CFR § 100.201. The Fair Housing Act provides that nothing in the Act “shall be construed to invalidate or limit any law of the State . . . that grants, guarantees, or protects the same rights as are granted by [the Fair Housing Act].” 42 U.S.C. § 3615. Hence, California’s definition of disability is controlling.

⁹ 24 C.F.R. § 100.201. See City of Edmonds v. Washington State Building Code Council, 18 F. 3d 802, 804 (stating that “participation in a drug rehabilitation program, coupled with non-use, meets the definition of handicapped.”); United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992); Oxford House v. Town of Babylon, 819 F.Supp.1179 (E.D.N.Y. 1993).

¹⁰ See Epicenter of Steubenville, Inc. v. City of Steubenville, 924 F.Supp. 845, 849 (S.D. Ohio 1996) (operators of adult care facilities have standing to challenge a city's moratorium on new facilities where the operator couldn't get a permit to open a new facility; "Congress granted the right to sue under the statute to a broad group of persons so as to ensure that the FHAA would be enforced. Under the statute, any "aggrieved person" may sue to enforce its provisions."); Simovits v. Chanticleer Condominium Ass'n, 933 F.Supp. 1394 (N.D. Ill. 1996) (a fair housing agency may sue under the Act if it shows deflection of the agency's time and money from counseling to legal efforts directed against discrimination); Judy B. v. Borough of Tioga, 889 F.Supp. 792 (M.D. Pa 1995) (a person who is not himself handicapped, but who is prevented from providing housing for handicapped persons by a municipality's discriminatory acts, has standing to sue under the Act).

¹¹ See note 1, *supra*. Turning Point, Inc. v. City of Caldwell, 74 F. 3d 941 (9th Cir. 1996) (cities have an affirmative duty to provide reasonable accommodation).

¹² The Department of Housing and Urban Development (HUD) has promulgated regulations under both § 504 of the Rehabilitation Act of 1973 and the Fair Housing Amendments Act of 1988 that require a notice of rights under federal law. Under § 504, which is looked to for interpretation of the Act, HUD requires "initial and continuing steps to notify program participants, beneficiaries, applicants" . . . of its policy of nondiscrimination under the law. 24 CFR § 8.54. Under fair housing regulations, HUD requires that a fair housing poster be displayed at any place of business where a dwelling is offered for sale or rent, real estate-related transactions are conducted and brokerage services are provided to the public. 24 CFR § 110.10. Additionally, under federal assisted housing programs, HUD requires notice of the availability of reasonable accommodation at the time of the prospective tenant's application interview for housing and in any written letter of rejection. Handbook 4350.3, par. 12-23j; par. 12-30c; HUD Notice H 01-02(HUD)(addressing compliance with Section 504 and the Fair Housing Act of 1988).

¹³ It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such person. 24 CFR § 100.202.

¹⁴ The Washington D.C. reasonable accommodation ordinance provides a mechanism for safeguarding confidential information voluntarily provided to it in a request for reasonable accommodation. The information is placed in a separate file marked "confidential" and access to confidential files is restricted to personnel involved in the reasonable accommodation determination process.

¹⁵ Title II of the Americans With Disabilities Act requires that state and local governments provide program access for individuals with disabilities to the whole range of city services and programs. 42 U.S.C. § 12131; 28 C.F.R. § 35.150(a)(3). If an action would result in a fundamental alteration to the nature of the services or result in an undue administrative or financial burden, the state or local government must take any other action that it can to ensure that individuals with disabilities receive the services of the program.

¹⁶ See notes 8 and 10, *supra*.

¹⁷ See note 1, *supra*.

¹⁸ U.S. v. California Mobile Home Park Mgmt Co., 107 F.3d 1374 (9th Cir. 1997)(reaffirming Mobile Home Park, 29 F. 3d 1413 (9th Cir. 1994), that the reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination; Department of Justice Memorandum to National League of Cities, March 4, 1996 at 6.

¹⁹ Oxford House-C v. City of St. Louis, 843 F.Supp. 1556 (E.D. Mo. 1994) (forcing a group home to use the variance process was not a reasonable accommodation where compliance would have a discriminatory effect and the process, which required a public hearing and notice, stigmatized the prospective residents, increased their stress and evidence showed that any attempt to obtain a variance would be futile); United States v. City of Philadelphia, 838 F.Supp. 223 (E.D.Pa. 1993), aff'd w/o opinion, 30 F.3d 1488 (3d Cir. 1994) (the City of Philadelphia violated the Act by refusing to allow substitution of a side yard for the zoning requirement that a building have a rear yard for a home for chronically homeless people with mental disabilities); Oxford House v. Babylon, 819 F.Supp.1179 (E.D.N.Y. 1993) (group home established as reasonable their request that the town accommodate them by modifying its interpretation under the ordinance of the term "family"); Parish of Jefferson v. Allied Health Care, Inc., C.A. No.91-1199, (E.D.La., June 10, 1992), 1992 WL 142574 (E.D. La.1992) (allowing six individuals with mental retardation to reside in a dwelling was a reasonable accommodation to a zone restricting single family dwellings to a maximum of four unrelated persons).

²⁰ The "undue financial or administrative burden" standard for determining whether an accommodation is reasonable under the Fair Housing Amendments Act of 1988 is borrowed from case law interpreting Section 504 of the Rehabilitation Act. Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed. 2d 980 (1979); H.R. Rep.No.711, 100th Cong.,2d Sess. 25 (1988).

²¹ Proviso Ass'n v. Village of Westchester, 914 F.Supp. 1555 (N.D. Ill. 1996).

²² The "fundamental alteration" test, like "undue financial or administrative burden," derives from Section 504 of the Rehabilitation Act and is also explained in Southeastern Community College v. Davis, 442 U.S. 397. See note 20, *supra*.

²³ Robert Burgdorf, "Equal Access to Public Accommodations," in West, Jane, ed., *The Americans with Disabilities Act, From Policy to Practice*, Milbank Memorial Fund (1991) at 190. Elaborating on what constitutes a fundamental alteration, Professor Burgdorf explains:

Lower court have further outlined the concept: reasonable accommodations are not mandated if they would endanger a program's viability; massive changes are not required; nor are modifications that would 'jeopardize the effectiveness' of the program or would involve a 'major restructuring' of an enterprise; and modifications that would so alter an enterprise as to create, in effect, a new program are not required.

²⁴ Smith & Lee Assoc. v. City of Taylor, 102 F.3d 781 (6th Cir. 1996) (allowing a 9-person adult foster care home to locate in a single family residential zone is fundamentally consistent with the single family uses surrounding the proposed home and would not constitute an undue burden or a fundamental alteration of the city's master plan); Martin v. Constance, 843 F.Supp. 1321 (E.D. Mo. 1994)(it would be neither an undue burden nor undermine the basic purpose of maintaining the residential character of a neighborhood to not enforce a restrictive covenant against a state operated home for individuals with developmental disabilities); Oxford House v. Babylon, 819 F.Supp. 1179 (E.D.N.Y. 1993) (modifying city's interpretation under the ordinance of the term "family" was reasonable where the group home had no adverse effect on the residential character of the neighborhood and neither the operation of the group home nor the residents caused any financial or administrative burdens on the town); United States v. Marshall, 787 F.Supp. 872 (W.D. Wis. 1992) (granting a variance under state law to allow a group home for people with mental disabilities to locate within 2500 feet of a group home for the elderly would not "undermine the basic purpose which the requirement seeks to achieve" where the homes would not be separated by a wide portion of a river with no bridge connection).

²⁵ United States v. Borough of Audubon, 797 F.Supp. 353 (D.N.J. 1991) aff'd 968 F.2d 14 (3d Cir. 1992) (the Court sanctioned the Borough and permanently enjoined it from interfering with the

living arrangements of the residents of the home and held that when acts are undertaken with improper discriminatory motive, the Act may be violated even though those acts may have otherwise been justified under state law); A.F.A.P.S. v. Regulations & Permits Admin., 740 F.Supp. 95 (D.P.R. 1990) (the denial of an application for a special use permit to operate a residence for persons with AIDS violated the Act where the intent and effect of the denial discriminated against AIDS patients and the asserted reason for the denial was pretextual).

²⁶ See note 15, *supra*.