

**ATTACHMENT #2 –
BACKGROUND FOR REASONABLE ACCOMMODATION**



STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
BILL LOCKYER
ATTORNEY GENERAL

May 15, 2001

To: All California Mayors:

Re: Adoption of A Reasonable Accommodation Procedure

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. § 3604(f)(3)(B); see also Gov. Code, §§ 12927(c)(1), 12955(l).)¹ 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.²

¹ Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12131-65) and section 504 of the Rehabilitation Act (29 U.S.C. § 794) have also been found to apply to zoning ordinances and to require local jurisdictions to make reasonable accommodations in their requirements in certain circumstances. (See *Bay Area Addiction Research v. City of Antioch* (9th Cir. 1999) 179 F.3d 725; see also 28 C.F.R. § 35.130(b)(7) (1997).)

² A similar appeal has been issued by the agencies responsible for enforcement of the FHA. (See Joint Statement of the Department of Justice and the Department of Housing and Urban Development, *Group Homes, Local Land Use and the Fair Housing Act* (Aug. 18, 1999), p. 4, at <<http://www.bazelon.org/cpfha/cpfha.html>> [as of February 27, 2001].)

May 15, 2001

Page 2

It is becoming increasingly important that a process be made available for handling such requests that operates promptly and efficiently. A report issued in 1999 by the California Independent Living Council makes it abundantly clear that the need for accessible and affordable housing for Californians with disabilities will increase significantly over the course of the present decade.³ The report's major findings include the following:

- Between 1999 and 2010, the number of Californians with some form of physical or psychological disability is expected to increase by at least 19 percent, from approximately 6.6 million to 7.8 million, and may rise as high as 11.2 million. The number with severe disabilities is expected to increase at approximately the same rate, from 3.1 million to 3.7 million, and may reach 6.3 million.⁴ Further, most of this increase will likely be concentrated in California's nine largest counties.⁵
- If the percentages of this population who live in community settings—that is, in private homes or apartments (roughly 66.4 percent) and group homes (approximately 10.8 percent)—is to be maintained, there will have to be a substantial expansion in the stock of suitable housing in the next decade. The projected growth of this population translates into a need to accommodate an additional 800,000 to 3.1 million people with disabilities in affordable and accessible private residences or apartments and an additional 100,000 to 500,000 in group homes.

I recognize that many jurisdictions currently handle requests by people with disabilities for relief from the strict terms of their zoning ordinances pursuant to existing variance or conditional use permit procedures. I also recognize that several courts called upon to address the matter have concluded that requiring people with disabilities to utilize existing, non-

³See Tootelian & Gaedeke, *The Impact of Housing Availability, Accessibility, and Affordability On People With Disabilities* (April 1999) at <<http://www.calsilc.org/housing.html>> [as of February 27, 2001].

⁴The lower projections are based on the assumption that the percentage of California residents with disabilities will remain constant over time, at approximately 19 percent (*i.e.*, one in every five) overall, with about 9.2 percent having severe disabilities. The higher figures, reflecting adjustments for the aging of the state's population and the higher proportion of the elderly who are disabled, assume that these percentages will increase to around 28 percent (*i.e.*, one in every four) overall, with 16 percent having severe disabilities. (*Ibid.*)

⁵These are: Alameda, Contra Costa, Los Angeles, Orange, Riverside, Sacramento, San Bernardino, San Diego, and Santa Clara. (*Ibid.*)

May 15, 2001

Page 3

discriminatory procedures such as these is not of itself a violation of the FHA.⁶ Several considerations counsel against exclusive reliance on these alternative procedures, however.

Chief among these is the increased risk of wrongfully denying a disabled applicant's request for relief and incurring the consequent liability for monetary damages, penalties, attorneys' fees, and costs which violations of the state and federal fair housing laws often entail.⁷ This risk exists because the criteria for determining whether to grant a variance or conditional use permit typically differ from those which govern the determination whether a requested accommodation is reasonable within the meaning of the fair housing laws.⁸

Thus, municipalities relying upon these alternative procedures have found themselves in the position of having refused to approve a project as a result of considerations which, while sufficient to justify the refusal under the criteria applicable to grant of a variance or conditional use permit, were insufficient to justify the denial when judged in light of the fair housing laws' reasonable accommodations mandate. (See, e.g., *Hovson's Inc. v. Township of Brick* (3rd Cir. 1996) 89 F.3d 1096 (township found to have violated the FHA's reasonable accommodation mandate in refusing to grant a conditional use permit to allow construction of a nursing home in a "Rural Residential—Adult Community Zone" despite the fact that the denial was sustained by the state courts under applicable zoning criteria); *Trovato v. City of Manchester, N.H.* (D.N.H. 1997) 992 F.Supp. 493 (city which denied disabled applicants permission to build a paved parking space in front of their home because of their failure to meet state law requirements for a variance found to have violated the FHA's reasonable accommodation mandate).

⁶See, *U.S. v. Village of Palatine, Ill.* (7th Cir. 1994) 37 F.3d 1230, 1234; *Oxford House, Inc. v. City of Virginia Beach* (E.D.Va. 1993) 825 F.Supp. 1251, 1262; see generally Annot. (1998) 148 A.L.R. Fed. 1, 115-121, and later cases (2000 pocket supp.) p. 4.)

⁷ See 42 U.S.C. § 3604(f)(3)(B); Gov. Code, §§ 12987(a), 12989.3(f).

⁸ Under the FHA, an accommodation is deemed "reasonable" so long as it does not impose "undue financial and administrative burdens" on the municipality or require a "fundamental alteration in the nature" of its zoning scheme. (See, e.g., *City of Edmonds v. Washington State Bldg. Code Council* (9th Cir. 1994) 18 F.3d 802, 806; *Turning Point, Inc. v. City of Caldwell* (9th Cir. 1996) 74 F.3d 941; *Hovsons, Inc. v. Township of Brick* (3rd Cir. 1996) 89 F.3d 1096, 1104; *Smith & Lee Associates, Inc. v. City of Taylor, Michigan* (6th Cir. 1996) 102 F.3d 781, 795; *Erdman v. City of Fort Atkinson* (7th Cir. 1996) 84 F.3d 960; *Shapiro v. Cadman Towers, Inc.* (2d Cir. 1995) 51 F.3d 328, 334; see also Gov. Code, § 12955.6 [explicitly declaring that the FEHA's housing discrimination provisions shall be construed to afford people with disabilities, among others, no lesser rights or remedies than the FHA].)

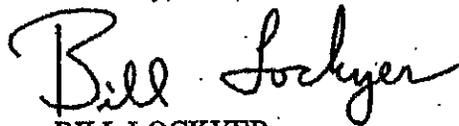
May 15, 2001

Page 4

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.⁹ Moreover, once triggered, it is difficult to quell. Yet this is the very type of opposition that, for example, the typical conditional use permit procedure, with its general health, safety, and welfare standard, would seem rather predictably to invite, whereas a procedure conducted pursuant to the more focused criteria applicable to the reasonable accommodation determination would not.

For these reasons, I urge your jurisdiction to amend your zoning ordinances to include a procedure for handling requests for reasonable accommodation made pursuant to the fair housing laws. This task is not a burdensome one. Examples of reasonable accommodation ordinances are easily attainable from jurisdictions which have already taken this step¹⁰ and from various nonprofit groups which provide services to people with disabilities, among others.¹¹ It is, however, an important one. By taking this one, relatively simple step, you can help to ensure the inclusion in our communities of those among us who are disabled.

Sincerely,



BILL LOCKYER

Attorney General

⁹Numerous studies support the conclusion that such concerns about property values are misplaced. (See Lauber, *A Real LULU: Zoning for Group Homes and Halfway Houses Under The Fair Housing Amendments Act of 1988* (Winter 1996) 29 J. Marshall L. Rev. 369, 384-385 & fn. 50 (reporting that there are more than fifty such studies, all of which found no effect on property values, even for the homes immediately adjacent).) A compendium of these studies, many of which also document the lack of any foundation for other commonly expressed fears about housing for people with disabilities, is available. (See Council of Planning Librarians, *There Goes the Neighborhood . . . A Summary of Studies Addressing the Most Often Expressed Fears about the Effects Of Group Homes on Neighborhoods in which They Are Placed* (Bibliography No. 259) (Apr. 1990).)

¹⁰ Within California, these include the cities of Long Beach and San Jose.

¹¹ Mental Health Advocacy Services, Inc., of Los Angeles for example, maintains a collection of reasonable accommodations ordinances, copies of which are available upon request.



Reasonable Accommodation and Anti-Discrimination Based on Source of Income Best Practices

March 2, 2009

I. Background

A series of federal and state laws have been enacted over the past several years to prohibit policies that act as a barrier to individuals with disabilities who are seeking housing. Among such laws are the Federal Fair Housing Amendments Act of 1988, California's Fair Employment and Housing Act, and the State's Housing Element law. Additionally, HUD requires that cities utilizing Community Development Block Grant (CDBG) funds prepare an "Analysis of Impediments to Fair Housing Choice." Taken together, these pieces of legislation require jurisdictions to take affirmative action to eliminate regulations and practices that deny housing opportunities to individuals with disabilities.

Consistent with federal and state law, each housing element should contain policies and programs to implement fair housing laws and to provide housing for all need groups. Examples of jurisdictions in the Bay Area that have adopted such measures include East Palo Alto (Anti-Discrimination Ordinance) and the City of Santa Rosa (Reasonable Accommodation Ordinance)

II. Reasonable Accommodation

Fair housing laws and subsequent federal and state legislation require all cities and counties to further housing opportunities by identifying and removing constraints to the development of housing for individuals with disabilities, including local land use and zoning barriers, and to also provide reasonable accommodation as one method of advancing equal access to housing. The proposed ordinance provides a fair and reasonable means of accommodating the special housing needs individuals with disabilities, as required by state and federal law.

The Fair Housing laws require that cities and counties provide flexibility or even waive certain requirements when it is necessary to eliminate barriers to housing opportunities for people with disabilities. An example of such a request might be to place a ramp in a front yard to provide access from the street to the front door.

The State Attorney General, in a letter to the City of Los Angeles in May 2001, stated 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." He advised jurisdictions not to use existing variance or conditional use permit processes because they do not provide the correct standard for making fair housing determinations and because the public process used in

Reasonable Accommodation and Anti-Discrimination Based on Source of Income

making entitlement determinations fosters opposition to much needed housing for individuals with disabilities. In response to the State Attorney General's letter, many cities throughout the state are adopting fair housing reasonable accommodation procedures as one way of addressing barriers in land use and zoning regulations and procedures.

A fundamental characteristic of a fair housing reasonable accommodation procedure is the establishment of appropriate findings that reflect the intent and specific language of both the federal and state fair housing statutes. In this regard, it is somewhat different than traditional or typical zoning cases because here the focus of review is the need of the individual with disabilities to overcome barriers to housing, not on the topography of the site or the unique character of the lot. The focus here is solely on the special need of the individual to utilize his or her home or dwelling unit, which is directly related to the individual's disability. It is this reasoning that underlies the Attorney General's warning not to utilize variance criteria for such determinations.

Best Practices

POLICY

Special Needs Housing: Provide housing for population groups who require special assistance (special needs groups include homeless persons; people with disabilities; the elderly; people with serious illnesses, substance abuse or mental health issues; large families; female-headed households; farmworkers; and other persons in the community identified as having special housing needs).

POSSIBLE PROGRAMS

Adaptable Units for Persons Living with Disabilities. The City will attempt to ensure that new housing developments include units that can be adapted for use by disabled residents.

Reasonable Accommodation. The City will amend its Zoning Ordinance to provide individuals with disabilities reasonable accommodation in rules, policies, practices and procedures that may be necessary to ensure equal access to housing. The purpose of this is to provide a process for individuals with disabilities to make requests for reasonable accommodation in regard to relief from the various land use, zoning, or building laws, rules, policies, practices and/or procedures of the City.

POSSIBLE ORDINANCE PROCESS AND STRUCTURE

Create a process in which the Director of _____ (Planning and Building or their designee GENERIC) would determine that the individual making the request for accommodation has a disability as defined in the law and verified by an appropriate professional, or is developing housing for individuals with disabilities. Second, the applicant would establish that, because of the disability, the requested accommodation is necessary to overcome a barrier to housing. If the individual has established the need for the accommodation based on the disability, the _____ (Planning and Building or their designee GENERIC) will determine that it is "reasonable," and grant the request, unless he/she can establish that granting

Reasonable Accommodation and Anti-Discrimination Based on Source of Income

the request would be an undue financial or administrative burden to the City or would result in a fundamental alteration in the City's land use and zoning programs.

The _____ (Planning and Building or their designee GENERIC) may gather additional information necessary to make a determination on a request, and may also consider "alternative accommodations which may provide an equivalent level of benefit" to that which has been requested by an individual with disabilities. An alternative accommodation would be considered if the _____ (Planning and Building or their designee GENERIC) determines that providing the requested accommodation would create an undue administrative or financial burden to the City or result in a fundamental alteration in the nature of the City's programs and that an alternative method is available to achieve an equivalent accommodation. In providing reasonable accommodation, it is generally presumed that the individual with disabilities is in the best position to know whether the requested accommodation is effective.

The _____ (Planning and Building or their designee GENERIC) would prepare a written decision, including findings based on specific factors in the Fair Housing laws and delineated in the ordinance. The decision may be appealed to the City Council. This analytic process for reviewing and making determinations on requests for reasonable accommodation is well established in the case law interpreting the fair housing mandate. This analysis is also consistent with the approach used by other cities, such as Long Beach, Santa Rosa and San Jose and the District of Columbia.

Similar "reasonable accommodations" that relate solely to requirements contained in the Building Code may be necessary.

III. Anti-Discrimination Based on Source of Income

POLICY

Equal Housing Opportunities: Promote equal housing opportunities for all persons and assure effective application of Fair Housing law. To the extent possible, the City will ensure that individuals and families seeking housing are not discriminated against on the basis of race, color, religion, marital status, disability, age, sex, family status (due to the presence of children), national origin, or other arbitrary factors, consistent with the Fair Housing Act.

POSSIBLE PROGRAMS

Adopt an Anti-Discrimination Ordinance. Adopt an Anti-Discrimination Ordinance to prohibit discrimination based on the source of a person's income or the use of rental subsidies, including Section 8 and other rental programs.

Respond to Complaints. The _____ TITLE/POSITION _____ is the designated Equal Opportunity Coordinator in _____ with responsibility to investigate and deal appropriately with complaints. The City will refer discrimination complaints to the appropriate legal service, county, or state agency, or Fair Housing agency. If mediation fails and enforcement is necessary, the City will refer tenants to the State Department of Fair Employment and Housing or HUD, depending on the nature of the complaint.

Disseminate Fair Housing Information. The ____ TITLE/POSITION ____ is the designated Equal Opportunity Coordinator in _____ and will ensure that written materials regarding fair housing law are provided at various public locations in the town and that information regarding fair housing agencies and phone numbers is posted at City Hall, the Post Office, and local transit locations where feasible. The ____ TITLE/POSITION ____ will provide information to real estate professionals, property owners and tenants on their rights and responsibilities and the resources available to address fair housing issues.

POSSIBLE ORDINANCE PROCESS AND STRUCTURE

The purpose of this ordinance is to encourage landlords to participate in the Section 8 rent subsidy program administered by the San Mateo County Department of Housing and to establish a right of existing tenants to be free of certain discrimination based on their use of a rental subsidy. It would be unlawful for the owner or manager of rental housing to discriminate against an existing tenant on the basis of that tenant's use of a Section 8 rent subsidy. It would be a violation of this prohibition for a property owner or manager to refuse to accept a Section 8 rent subsidy for which an existing tenant qualifies, or to terminate the tenancy of an existing tenant based on the property owner's or manager's refusal to participate in a Section 8 rent subsidy program for which an existing tenant has qualified.

Provisions of an ordinance could include: (1) Purpose and findings; (2) Right to protection against discrimination in rental housing on the basis of source of income; (3) Exceptions; (4) Redress; and, (5) Liability (protection for the jurisdiction).

Produced by San Mateo County Department of Housing and Baird + Driskell Community Planning.