



# DISCRIMINATORY ZONING and the FAIR HOUSING ACT



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# **DISCRIMINATORY ZONING AND THE FAIR HOUSING ACT**

## **I. INTRODUCTION**

This booklet is designed to acquaint people with disabilities, advocates, providers, and attorneys with the Fair Housing Amendments Act of 1988 ("FHAA" or the "Act")<sup>1</sup> and, in particular, its impact on state and local zoning laws and land use regulations.<sup>2</sup> Restrictive zoning laws that limit housing choices for persons with disabilities were a particular target of the FHAA, and many lawsuits under the Act have successfully challenged the use of zoning laws to prohibit or limit group homes and other housing arrangements for people with disabilities.<sup>3</sup>

**PLEASE NOTE: THE INFORMATION IN THIS BOOKLET IS NOT INTENDED TO CONSTITUTE LEGAL ADVICE APPLICABLE TO SPECIFIC FACTUAL SITUATIONS.**

## **II. BACKGROUND OF THE FAIR HOUSING AMENDMENTS ACT**

The FHAA was enacted in 1988 to extend the protections of the 1968 Fair Housing Act to people with disabilities. In passing the FHAA, Congress recognized that "[t]he right to be free of housing discrimination is essential to the goal of independent living."<sup>4</sup> The purpose of the Act, therefore, is to prohibit practices that restrict the choices of people with disabilities to live where they want to live or that "discourage or obstruct [those] choices in a community, neighborhood or development."<sup>5</sup> Given the broad remedial goals of the FHAA, courts have held that its provisions should be broadly construed.<sup>6</sup> Courts have also rejected constitutional challenges to the application of the FHAA to local zoning laws and decisions.<sup>7</sup>

### **Who Is Protected By The FHAA?**

The Act protects people with "handicaps." The term "handicap" is defined broadly and includes those individuals with physical or mental impairments which substantially limit one

or more of their major life activities.<sup>8</sup> "Major life activities" include, but are not limited to, caring for one's self, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>9</sup> Many people with disabilities, especially those who live in residential placements, will readily meet this standard (e.g., people with mental retardation, organic brain syndrome, emotional or mental illness, significant hearing or visual impairment, severe physical disabilities, and AIDS).<sup>10</sup> Persons who are recovering from substance abuse are also considered to have a disability under the FHAA, but persons engaged in current illegal use of or addiction to controlled substances are not protected by the FHAA.<sup>11</sup>

In addition to persons with actual and current impairments that substantially limit their major life activities, the Act extends protection to people who do not currently have disabilities but who have histories of disabilities (for example, individuals who have histories of mental illness or substance abuse) and people who are treated as though they have disabilities, even if they do not (for example, individuals whose high blood pressure does not substantially limit their major life activities but who are treated by others as being unable to undertake certain major life activities).<sup>12</sup>

### **Who Must Comply With The FHAA's Requirements?**

Property owners, most landlords, real estate agents, and others involved in the sale or lease of housing and apartments must comply with the FHAA's requirements. In addition, as discussed below, the Act prohibits a broad range of activities, including restrictive zoning. As a result, zoning boards, municipalities, and other governmental entities that take actions in violation of the FHAA will be liable.<sup>13</sup>

### **What Activities Or Acts Does The FHAA Prohibit?**

The FHAA prohibits a broad range of discriminatory activities. Under the Act, it is unlawful:

- \* To discriminate in the sale or rental, *or to otherwise make unavailable or deny*, a dwelling to any buyer or renter because of a handicap of the buyer or renter, a person residing in or intending to reside in the dwelling after it is bought or rented, or any person associated with that buyer or renter.<sup>14</sup>
- \* To discriminate against any person in the *terms, conditions, or privileges* of sale or rental of a dwelling, or in the *provision of services* or facilities in connection with such a dwelling, because of a handicap of that person, a person residing in or intending to reside in the dwelling, or a person associated with that person.<sup>15</sup>
- \* To refuse to permit, at the expense of the person with the handicap, *reasonable modifications of existing premises* occupied or to be occupied by such person if those modifications are necessary to afford the individual full enjoyment of the premises (although, in renting property, a landlord may, where reasonable, obtain an agreement to restore the property to the original condition).<sup>16</sup>
- \* To refuse to make *reasonable accommodations in rules, policies, practices, or services* when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.<sup>17</sup>

A person who demonstrates a violation of any of these provisions establishes liability under the FHAA and need not prove that the violation was the cause of some specific type of harm; the harm is the discrimination.<sup>18</sup>

The FHAA also makes it unlawful "to coerce, intimidate, threaten, or interfere with" a person's right to enjoy fair housing.<sup>19</sup> For example, attempts by municipalities to interfere with group homes may give rise to liability under the Act.<sup>20</sup> Similarly, efforts by municipalities or community residents to interfere with the sale of a home to individuals with disabilities through enforcement of restrictive land covenants violates the Act.<sup>21</sup> It is more difficult, however, to impose liability for interference under the FHAA against neighbors for opposition to group

homes.<sup>22</sup> Occasionally, a neighborhood group may seek to invoke the FHAA to challenge residences for people with disabilities, but such challenges are unlikely to be successful.<sup>23</sup>

### **III. ZONING AND THE FAIR HOUSING ACT**

While state and local governments have authority to regulate land use, that authority has sometimes been invoked to restrict the ability of individuals with handicaps to live in communities. The legislative history of the FHAA makes plain that Congress sought to prohibit the application of state and local zoning and land use laws in ways that limit access to housing by people with disabilities, stating:

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.<sup>24</sup>

While the Act prohibits intentional discrimination, it also prohibits other forms of discrimination in zoning, including discriminatory classification of persons with disabilities; zoning laws which, although neutral on their face, have a "disparate impact," i.e., a discriminatory effect, on persons with disabilities; and the failure of municipal officials to reasonably accommodate the needs of persons with disabilities.

#### **Intentional Discrimination**

If the land use law or zoning decision is the result of an intention to discriminate against people with disabilities, it violates the FHAA. Intentional discrimination may be the product of discriminatory animus, e.g., stereotypes, fears about crime or diminution in property values, prejudice about people with disabilities, or a malicious desire to discriminate. As one court has explained: "Any discrimination in housing that is based on unsupported stereotypes, prejudices,

fear stemming from ignorance or generalizations, or aversion toward the handicapped is illegal."<sup>25</sup> Intentional discrimination also includes acts simply "motivated by or based on consideration of the protected status itself" and that are not based upon discriminatory animus.<sup>26</sup> A plaintiff need not prove that discrimination was the *sole* motivating factor in the challenged action; it is sufficient that he show that discrimination was a motivating factor.<sup>27</sup>

Intentional discrimination may violate the FHAA even though it does not result in an actual denial of a housing opportunity. As one court has reasoned: "It would run contrary to the remedial purposes of the [FHAA] to hold that a defendant, acting with the intent of denying a handicapped person housing, could avoid liability merely because his efforts were unsuccessful. ... [T]he [FHAA] is directed at the elimination of discriminatory conduct, not merely discriminatory results ...."<sup>28</sup>

Generally, in an FHAA case alleging intentional discrimination, courts apply the burden-shifting framework for proof established in *McDonnell Douglas Corp. v. Green*<sup>29</sup> (concerning employment discrimination based on race and gender),<sup>30</sup> at least when there is no direct proof of discriminatory intent.<sup>31</sup> Under this burden-shifting scheme, the plaintiff must establish that: (1) he is a member of a protected class; (2) he applied for and was qualified for the housing opportunity; (3) he was rejected for the housing opportunity; and (4) the housing opportunity remained available.<sup>32</sup> The fourth element alternatively may be established by showing that the rejection occurred in circumstances that gave rise to an inference of unlawful discrimination.<sup>33</sup> After the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce evidence that shows some legitimate, nondiscriminatory reason for its action.<sup>34</sup> If the defendant meets that burden, then the ultimate burden of proof switches back to the plaintiff to

demonstrate that the defendant's reasons were not the true reasons, but, rather, were a pretext for discrimination.<sup>35</sup>

Ultimately, "[t]he determination of whether an action is based on 'discriminatory intent' requires a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"<sup>36</sup> As evidence that a challenged action was motivated by discriminatory intent, courts may consider: (1) the discriminatory impact of the action; (2) the historical background of the action; (3) the sequence of events leading up to the action; (4) departures from normal procedures; and (5) departures from normal substantive criteria.<sup>37</sup> Further, a municipality may be liable for actions that deny housing opportunities because of discriminatory animus by its constituents, i.e., "for effectuating the discriminatory wishes of the body politic," even though the local officials did not themselves inflame, direct, or encourage such discriminatory sentiments.<sup>38</sup>

As the zoning cases summarized below demonstrate, intentional discrimination can take many forms.

- \* Denial of special use permit for halfway house for recovering alcoholics may have been result of intentional discrimination. Statements by decision-makers reflected that the decision was based on the identity of the clients and that the legitimate reasons advanced by the city (e.g., safety concerns) could have been pretextual since the city allowed the development of a child-care project on the same property on which the halfway house was to be developed.<sup>39</sup>
- \* Circumstantial evidence showed a city's discriminatory animus against individuals with disabilities. The original version of the city's zoning ordinance banned all youth homes from residential neighborhoods and was only amended after a state administrative body found the ordinance to be discriminatory. The city also amended its ordinance to remove language about integration of special needs housing and replaced it with language about avoiding concentration of such housing and protecting residential

neighborhoods from adverse impacts. In addition, the city had no youth homes within its residential areas.<sup>40</sup>

- \* A one-year moratorium on new adult care facilities for persons with disabilities was held to be a "classic case of discriminatory treatment because ... the ordinance was passed with the intent to discriminate against" persons with mental impairments.<sup>41</sup>
- \* A court found evidence of discriminatory intent in enacting a zoning ordinance requiring that group homes be separated by at least 1,000 feet where the evidence established that the officials imposed the requirement in response to community fears and concerns about property values.<sup>42</sup>
- \* The denial of a permit to allow renovations for a group home for people who are mentally ill and substance abusers was held to be the result of intentional discrimination in violation of the Act where the decision was based on objections to the residents' handicaps.<sup>43</sup>
- \* Requiring a zoning application for a special exception to provide a residence for persons who are HIV-positive was deemed to be the result of intentional discrimination where there was significant community opposition, the residence met the town's zoning criteria for a "family" residence, and the zoning officials departed from normal procedures in considering the issue.<sup>44</sup>
- \* Zoning officials' requirement that group home apply for variance and local government's issuance of summonses for noise and parking violations were the result of discriminatory intent. The intent was revealed by community opposition and the fact that no similar citations had previously been issued.<sup>45</sup>
- \* Amendment of a zoning ordinance in response to effort to create group home for persons who are HIV-positive that generated intense community opposition was result of unlawful discriminatory intent.<sup>46</sup>
- \* Zoning officer's reversal of initial decision that group home for recovering substance abusers was a permitted use under the zoning ordinance following expression of neighborhood and City Council opposition evidenced discriminatory animus in violation of the Act.<sup>47</sup>
- \* Excessive police activity and regulatory actions designed to force residents out of home for recovering substance abusers stated

claim for intentional discrimination under FHAA given statements of officials that they objected to the residences.<sup>48</sup>

- \* A town's amendment of its zoning ordinance to bar an assisted living facility in a particular zone following expressions of community hostility evidenced discriminatory intent in violation of the FHAA.<sup>49</sup>
- \* Statute that placed special burdens on boarding homes (e.g., requiring new certificates of inspection each time a new resident moved in; posting bond to cover relocation costs in case the facility was forced to close; and requiring homes to obtain zoning permission even when they are in properly zoned areas) was "freighted with discriminatory intent" and violated the FHAA.<sup>50</sup>
- \* The county's requirement that a provider of housing for recovering substance abusers could locate such housing only in one type of zoning district and even then only if it received a special exception may reflect intentional discrimination when such limitations were not required by the county's zoning law.<sup>51</sup>
- \* The District of Columbia's treatment of a group home for people with disabilities as a treatment facility rather than a family (even though it met the zoning law's definition of family) constituted intentional discrimination since it was due to widespread and vocal community opposition.<sup>52</sup>

Of course, the courts in a few cases have held that the evidence was insufficient to establish that zoning decisions affecting individuals with disabilities were motivated by discriminatory intent.<sup>53</sup>

### **Discriminatory Classifications**

Zoning laws that use discriminatory classifications (i.e., "discriminate on their face") violate the FHAA. Such laws are a form of disparate treatment which, like disparate treatment which is motivated by discriminatory animus, violates the FHAA.<sup>54</sup> Proof that the laws were motivated by discriminatory animus is unnecessary.<sup>55</sup>

If a zoning law is discriminatory on its face,<sup>56</sup> the burden is on the defendant to justify the discriminatory classification.<sup>57</sup> The "justification must serve, in theory and in practice, a

legitimate, bona fide interest of the ... defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."<sup>58</sup> The fact that a facially discriminatory zoning law may also apply to certain types of facilities for non-disabled persons does not detract from the discriminatory nature of the classification.<sup>59</sup> Several FHAA cases have addressed discriminatory classifications, holding:

- \* Dispersion requirements mandating that group homes be separated by a particular distance are discriminatory classifications that violate the Act.<sup>60</sup>
- \* Requirements that group homes occupy detached single family houses; that they be operated only by non-profit organizations; that there can be no more than one person per room; and that they be subject to special inspections violate the FHAA.<sup>61</sup>
- \* Application of fire code which required sprinkler system and fire alarm monitoring system to group home for persons with mental illness (who had no problems with evacuation in case of emergency) simply because the house was deemed a residential board and care facility under the fire code was held to be a discriminatory classification in violation of the FHAA.<sup>62</sup>
- \* A zoning ordinance that excluded from single-family residential districts group homes for persons with disabilities was deemed to violate the Act.<sup>63</sup>
- \* Reversing the dismissal of a FHAA claim challenging a statute that allowed permits for group homes to be conditioned on 24-hour supervision and establishment of a community advisory committee to hear neighbors' complaints, a federal appeals court held that the plaintiff had stated a valid claim under the Act that the statute constituted a discriminatory classification.<sup>64</sup>
- \* A zoning ordinance that imposed rigorous safety requirements on homes for individuals with developmental disabilities and did not tailor those requirements to specific types of disabilities violated the Act.<sup>65</sup>
- \* A zoning ordinance that imposed certain requirements on "residential social service facilities" (including minimum spacing

requirements, health and safety inspections and requirements, and informational requirements) was held to violate the Act.<sup>66</sup>

- \* A zoning ordinance that required notice to neighbors of a group home's existence constituted a discriminatory classification in violation of the Act because it was not imposed on any other properly zoned residential unit.<sup>67</sup>
- \* A regulation that required boarding home residents to be able to self-evacuate (and, therefore, required them to be ambulatory) might be an unlawful discriminatory classification under the FHAA.<sup>68</sup>
- \* Requiring a six-person group home for people with disabilities to secure a certificate of occupancy when a six-person home that did not house people with disabilities did not have to secure such a certificate was a discriminatory classification under the FHAA.<sup>69</sup>

### **Disparate Impact**

Zoning laws that are "facially neutral" (that is, they apply to all persons, not just those with disabilities) will violate the FHAA if they have a "disparate impact" or discriminatory effect on people with disabilities. A plaintiff can establish a disparate impact claim by showing "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."<sup>70</sup> If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to show that it had a legitimate, non-discriminatory reason for the action and that no less discriminatory alternatives were available.<sup>71</sup>

One type of zoning law that often has been held to have a disparate impact on people with disabilities is a definition of the term "family" that allows any number of related persons to live together but limits the number of unrelated persons who may live together. Although such laws apply to groups of unrelated, non-disabled persons (e.g., college students, nuns, etc.), such laws may be deemed to have a disparate impact on persons with disabilities because

usually such individuals need to live in group settings for both programmatic and financial reasons.<sup>72</sup> The disparate impact analysis also has been utilized in finding that facially neutral zoning ordinances that have the effect of barring nursing facilities, congregate care facilities, or similar types of dwellings from the municipalities' residential areas have a disparate impact on people who have disabilities.<sup>73</sup>

It is not enough, though, that a facially neutral zoning law has the effect of barring a particular use for people with disabilities to establish an unlawful disparate impact. For example, one court rejected a disparate impact claim asserted against a zoning law that limited housing to family residences for up to four unrelated persons when the plaintiff wanted to use a residence in the district for a vacation home for between five and twenty-three persons with developmental disabilities at a time.<sup>74</sup> Another court rejected an FHAA claim that the fire department's application of fire code regulations for lodging and rooming homes to a group residence for people with disabilities had an unlawful disparate impact on people with disabilities.<sup>75</sup>

Disparate impact analysis theoretically is inappropriate when analyzing the validity of zoning laws that treat people with disabilities differently than people without disabilities and are not "facially neutral," i.e., those laws that affect people with disabilities explicitly (such as spacing or dispersion requirements for group homes or zoning laws that require certain safety features only in group homes).<sup>76</sup> Many courts, nevertheless, have applied a disparate impact analysis to laws that are facially discriminatory. For example:

- \* Spacing or dispersion requirements for group homes have been held to create a disparate impact on people with disabilities in violation of the FHAA.<sup>77</sup>
- \* A requirement that group homes be subject to evaluation by a "program review board" prior to issuance of a group home license

was determined to have a disparate impact on people with disabilities in violation of the FHAA.<sup>78</sup>

- \* A requirement that group homes include only "exceptional persons" (defined as persons with disabilities who are "capable of proper judgment in taking action for self-preservation under emergency conditions" and are "mobile and capable of exiting from a building, following instructions and responding to an alarm") was held to have a disparate impact on persons with disabilities in violation of the FHAA.<sup>79</sup>
- \* Requiring a group home for persons who are HIV-positive to apply for special exception (when zoning commission did not require other unrelated groups of people to apply for special exceptions) was held to have a disparate impact on people with disabilities.<sup>80</sup>
- \* The denial of special use permit for AIDS hospice was held to have a disparate impact on people with disabilities in violation of the Act.<sup>81</sup>

### **Reasonable Accommodation**

The failure of zoning officials to allow for "reasonable accommodations" in their policies to allow persons with disabilities to live in the community will violate the FHAA regardless of whether the officials acted with discriminatory intent.<sup>82</sup> The failure to provide a reasonable accommodation is an independent form of discrimination under the FHAA.<sup>83</sup> The reasonable accommodation requirement of the Act mandates that officials "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities."<sup>84</sup> A reasonable accommodation claim does not require proof that the defendant's actions were motivated by animus.<sup>85</sup>

There are three elements to a reasonable accommodation claim. The requested accommodation must be (1) reasonable and (2) necessary (3) to provide equal opportunity.<sup>86</sup> The concept of "equal opportunity" under the FHA generally means providing people with disabilities with the right to choose to live in single-family neighborhoods so as to end their

exclusion from the American mainstream.<sup>87</sup> An accommodation is "necessary" if, but for the accommodation, the plaintiff is likely to be denied an equal opportunity to enjoy the housing of his choice.<sup>88</sup> An accommodation is "reasonable" if it does not impose an undue financial or administrative burden and does not undermine the zoning scheme.<sup>89</sup> Whether an accommodation is reasonable is a highly fact-specific inquiry.<sup>90</sup> Speculation concerning potential burdens resulting from the accommodation is insufficient to render a requested accommodation unreasonable.<sup>91</sup>

It is increasingly important that any evidence in support of a reasonable accommodation request be presented to local zoning officials.<sup>92</sup> One federal appellate court has ruled that federal courts reviewing FHAA reasonable accommodation claims may not consider any evidence that was not presented to the local zoning officials.<sup>93</sup> However, this does not mean that the decisions of local zoning officials are entitled to deference.<sup>94</sup>

The courts are divided as to who has the burden of proving that an accommodation is reasonable/unreasonable. The majority of courts, however, have concluded that plaintiff has the burden of showing that the requested accommodation is necessary to provide equal opportunity and is not unreasonable on its face. If the plaintiff satisfies that burden, the burden shifts to the defendant to show that the requested accommodation is unreasonable.<sup>95</sup>

Courts have applied the FHAA's reasonable accommodation provision to zoning laws and ordinances in a variety of circumstances:

- \* A municipality's refusal to permit a nursing home to operate in a mixed residential zone violated the reasonable accommodation mandate.<sup>96</sup>
- \* Philadelphia's failure to grant a reasonable accommodation of its minimum side yard requirement for a single room occupancy facility for persons with mental illness and recovering substance abusers violated the reasonable accommodation provision.<sup>97</sup>

- \* A municipality's failure to issue a variance to its zoning laws to allow the operation of a single room occupancy facility for persons with mental illness and recovering substance abusers in a commercial/industrial district was deemed likely to violate the reasonable accommodation provision.<sup>98</sup>
- \* Noting the need for alternative housing for persons who are elderly and have disabilities and the economic inefficiency of operating adult foster care facilities for only six persons (as permitted by the existing law), a court held that the FHAA's reasonable accommodation provision required a city to take the steps necessary (through amendment of its zoning laws) to allow a 12-person adult care facility to operate.<sup>99</sup>
- \* A requirement that group homes obtain a variance to operate within 1,000 feet of another group home was deemed to be an insufficient accommodation where the variance process was lengthy, costly, and burdensome.<sup>100</sup>
- \* Refusal to waive requirements concerning sewage disposal that would allow operation of assisted living facility was likely a violation of the FHAA's reasonable accommodation requirement given the facility's workable proposal to address the sewage issue and the town's accommodation of such issues for other developments.<sup>101</sup>
- \* Refusals to grant exceptions to spacing/dispersion requirements have been held to violate the FHAA's reasonable accommodation provision.<sup>102</sup>
- \* Refusal to waive zoning laws that restrictively define "family" and/or limit the number of unrelated persons who may live together so as to bar operation of group facilities have been held to violate the FHAA's reasonable accommodation provision.<sup>103</sup>

While these decisions reveal that many zoning laws must yield to the right of people with disabilities to live in the homes of their choice, it would be a mistake to assume that they always will do so. For example:

- \* A court held that a city's refusal to turn water on for group home when the home refused to extend the water/sewer line to the edge of the property did not violate the reasonable accommodation requirement.<sup>104</sup>

- \* A court held that a refusal to grant a variance to erect a 6-foot fence on a property to accommodate a person with post-traumatic stress disorder and a heart condition was not unlawful since the plaintiff did not establish that the fence would force him to move.<sup>105</sup>
- \* Traffic safety issues and inadequate access for emergency vehicles raised by site plan for 95-bed nursing facility rendered the requested accommodation unreasonable.<sup>106</sup>
- \* A court held that a zoning board's refusal to allow a group home to expand from 8 to 15 persons did not violate the FHAA's reasonable accommodation requirement.<sup>107</sup>
- \* A court held that an accommodation to allow construction of an assisted living facility in a commercial district would not be reasonable since individuals with disabilities were not being denied any housing opportunities available to non-disabled individuals, even though the town had re-zoned some parts of the commercial district to allow some residential uses.<sup>108</sup>
- \* A court held that a municipality did not violate the FHAA's reasonable accommodation requirement when it denied a developer's request for a waiver of density requirements to allow it to build accessible housing units for persons with disabilities since the developer's reason for the requested waiver -- concern about the increased cost of the units if the requirement was not waived -- was not a valid reason to justify a zoning accommodation.<sup>109</sup>
- \* A court held that plaintiffs had failed to establish their reasonable accommodation claim to require the town to allow operation of a vacation residence for persons with mental retardation by waiving the law limiting to four the number of unrelated persons who can live together because plaintiffs had failed to prove that the residence would not be economically viable without a larger number of residents than allowed by the zoning law or that there was a need for such a program.<sup>110</sup>
- \* A court held that the City's application of its zoning ordinance, which required group homes for five or more persons to seek a special exception to operate in the primary residential district, did not violate the FHAA's reasonable accommodation requirement.<sup>111</sup>
- \* A court held that a city's refusal to allow more than eight people to live in a group home did not violate the reasonable

accommodation requirement since the city's zoning law permitted up to eight unrelated persons with disabilities to live together while it permitted only three unrelated, non-disabled persons to live together.<sup>112</sup>

- \* A court held that it was not a reasonable accommodation to grant a variance to allow construction of a two-story, four-unit apartment building in residential district simply because the first floor units would be accessible, stressing that the reasonable accommodation mandate did not require waiver of any zoning rule any time a developer wants to develop accessible housing.<sup>113</sup>
- \* A court held that denial of a conditional use permit to construct a community-based residential facility was not a violation of the reasonable accommodation provision since the application was denied due to the inadequacy of the plans and because the proposal was inconsistent with the zoning scheme.<sup>114</sup>
- \* A court rejected a reasonable accommodation claim challenging a city's denial of a special use permit to allow an adult foster care facility to operate in the central business district since the city stated it would assist the provider to locate another location.<sup>115</sup>
- \* A city did not violate the FHAA by refusing to allow the plaintiffs to re-zone their property to build four five-person homes for people who are elderly or have disabilities since the plaintiffs could have built as many as 15 three-person residences on their property without the city's permission and thus the accommodation was not necessary.<sup>116</sup>
- \* The town's refusal to waive a requirement that the plaintiffs subdivide their property if they wanted to keep their own residence on the site of their proposed 21-unit assisted living facility and the requirement that the plaintiffs allow review of the plans did not violate the FHAA because waiver of those requirements were not necessary for the plaintiffs to establish the facility.<sup>117</sup>

#### **IV. ENFORCEMENT OF THE FHAA**

##### **Who Can Complain Of FHAA Violations?**

The FHAA permits any "aggrieved party" to complain of violations.<sup>118</sup> This obviously includes individuals with disabilities who live in or would live in the housing. It also includes

individuals who do not have handicaps but who live with those who do as well as entities that provide services to people with handicaps.<sup>119</sup> In order to assert a claim, a person or entity must show only that (1) there has been an actual or threatened injury; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury can be redressed by the requested relief.<sup>120</sup>

### **Are There Means Of Relief Short Of Going To Court?**

Yes. An "aggrieved party" who has been the victim of housing discrimination may file an administrative complaint with the United States Department of Housing and Urban Development (HUD). An administrative complaint *must* be filed within one year of the discriminatory act.<sup>121</sup> HUD can send you a complaint form or you can download a complaint form from HUD's website, [www.hud.gov](http://www.hud.gov), which you can complete and mail to:

Office of Fair Housing and Equal Opportunity  
U.S. Department of Housing and Urban Development  
Room 5204  
451 Seventh Street, S.W.  
Washington, D.C. 20410-2000

Alternatively, you can file a complaint online at HUD's website, [www.hud.gov](http://www.hud.gov) or by calling HUD toll-free at 800-669-9777.

If you do not use HUD's complaint form, you can send a letter to HUD, which includes: (1) your name, address, and phone number; (2) the name and address of the person or entity who your complaint is against; (3) the address of the dwelling that is the subject of your complaint; and (4) a description of the violation, including the date or dates when important actions occurred. You should mail the letter to:

Philadelphia Regional Office of Fair Housing and Equal Opportunity  
U.S. Department of Housing and Urban Development  
The Wanamaker Building  
100 Penn Square East

Philadelphia, PA 19107-3380

Within 100 days after you file a complaint with HUD, the agency should conduct an investigation and make a determination as to whether reasonable cause exists to believe a discriminatory housing practice has occurred.<sup>122</sup> In addition, HUD may seek to resolve the matter through "conciliation."<sup>123</sup> If conciliation is unsuccessful and HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, HUD will prosecute the action,<sup>124</sup> either administratively or in court,<sup>125</sup> and pay all litigation expenses that may be incurred.<sup>126</sup> If, however, the matter involves the legality of local zoning or land use laws or ordinances and conciliation proves unsuccessful, HUD will not make a reasonable cause determination but, instead, will refer the investigative material to the United States Department of Justice.<sup>127</sup>

In addition to formal methods of enforcing the FHAA, bringing to the attention of local officials the requirements of the Act and the many examples of successful enforcement in Pennsylvania will often succeed in resolving the zoning problems.

### **How Can You Seek Judicial Relief?**

If you believe that you have a claim of housing discrimination, you may file a complaint in state or federal court under the Act within two years of the date of the discriminatory practice.<sup>128</sup> You do *not* need to file a complaint with HUD before filing suit.<sup>129</sup> Since the FHAA allows, but does not require, the court to appoint a lawyer to represent persons who are unable to afford counsel,<sup>130</sup> it may be best for persons who are indigent to proceed directly to court.

For more information on your rights or assistance in enforcing your rights under the Fair Housing Act, you can contact the Regional Fair Housing and Equal Opportunity Office of the Department of Housing and Urban Development at (215) 656-0663 ext. 3241 or (888) 799-2085

(voice) or (215) 656-3450 (TDD) or the intake system of Disability Rights Network of Pennsylvania at (800) 692-7443 (voice) or 877-375-7139 (TDD)

### **What Remedies Are Available In An FHAA Lawsuit?**

The FHAA allows private individuals who establish that a discriminatory housing practice has occurred to recover actual and punitive damages as well as an injunction to stop the FHAA violation.<sup>131</sup> While the statute allows the recovery of punitive damages, it is unsettled whether such damages can be recovered against municipalities in light of a non-FHAA decision by the Supreme Court that held that punitive damages cannot be assessed against municipalities in civil rights suits under 42 U.S.C. § 1983.<sup>132</sup> A prevailing party under the FHAA also may recover his attorneys' fees and costs.<sup>133</sup>

### **V. POSSIBLE DEFENSES TO FHAA CLAIMS**

A municipality may raise any number of defenses to an FHAA claim. A defendant may assert that the prospective residents of a facility do not have disabilities protected by the FHAA. A defendant also may dispute the substance of the FHAA claims (e.g., asserting that the defendant did not intend to discriminate against plaintiffs, that an ordinance does not disparately impact people with disabilities, or that a requested accommodation is unreasonable). There are, however, several other defenses that may arise in FHAA litigation involving zoning laws and practices that should be considered prior to filing suit.

#### **The Maximum Occupancy Limit Exemption**

The FHAA exempts completely ordinances that restrict "the maximum number of persons permitted to occupy a dwelling."<sup>134</sup> Until 1995, many municipalities defended FHAA challenges to the limited number of unrelated persons who may live together by arguing that such restrictions were exempt from the FHAA because they constituted maximum occupancy

limitations. In 1995, the Supreme Court settled the dispute and definitively ruled that such zoning ordinances were not exempt from the FHAA's reach (although the Court did not rule on the question of whether the application of such ordinances violated the FHAA).<sup>135</sup> However, true occupancy limitations that serve health and safety purposes (i.e., those that link the number of persons, regardless of disability, to the size of the dwelling) may be exempt under the FHAA.

### **The Direct Threat Defense**

The FHAA provides that a dwelling need not be made available to a person "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."<sup>136</sup> This exception to the FHAA's prohibition on discrimination must be narrowly construed.<sup>137</sup> The FHAA's direct threat provision, therefore, does not permit a municipality to impose zoning restrictions on persons with disabilities that are "based on blanket stereotypes." Instead, any restrictions "must be tailored to particularized concerns about individual residents."<sup>138</sup> Moreover, the FHAA's reasonable accommodation provision may preclude a municipality from determining that an individual is a direct threat if there are reasonable means to accommodate his disability that would eliminate any direct threat.<sup>139</sup>

### **The Statute of Limitations**

The FHAA requires that suits be filed no later than two years after the occurrence or termination of an alleged discriminatory housing practice.<sup>140</sup> If the individual has filed a HUD complaint, however, the two-year statute of limitations does not run while the HUD proceedings are pending.<sup>141</sup>

### **Ripeness and Exhaustion**

It is well-settled that an individual need not file a federal administrative proceeding with HUD before filing a federal lawsuit under the FHAA.<sup>142</sup> It is also well-settled that an individual need not exhaust state remedies before filing a FHAA action in federal court against a state or municipal government under 42 U.S.C. § 1983.<sup>143</sup>

While exhaustion of administrative remedies is not required, many federal courts have now held that an individual cannot proceed with a FHAA action before s/he has received a final negative decision from a local official or body that has final authority to apply the challenged zoning law (e.g., a zoning hearing board or planning commission) because, absent such a decision, the case would not be "ripe."<sup>144</sup> Undue delay in consideration of an application may be sufficient to make a case ripe.<sup>145</sup> There are several exceptions to the ripeness doctrine in the FHAA context:

- \* Individuals need not present disparate treatment claims, such as facial challenges to zoning laws, to local decision-makers before pursuing federal FHAA claims.<sup>146</sup> For example, if a town has a law that prohibits group homes from operating within 2,000 feet of each other and a provider wants to operate a group home within 1,500 feet of an existing he can immediately file a federal FHAA lawsuit to challenge the validity of the facially discriminatory statute. The provider may not, however, assert that the town violated the FAA's reasonable accommodation provision by failing to waive the 2,500 foot spacing requirement unless the provider first requests such a waiver from the local decision-maker with final authority to make such a determination.
- \* Individuals who are challenging the local variance procedures need not pursue such procedures.<sup>147</sup>
- \* Individuals need not request action by a final decision-maker if such action would be futile.<sup>148</sup>

In those instances when an initial zoning decision is necessary for the case to be ripe, a party can proceed with a FAA claim in court after a decision on his zoning application and he need not pursue further administrative or state court appeals. The case is "ripe" after the initial

denial of the application and requiring further procedures would impose an impermissible exhaustion of remedies requirement.<sup>149</sup>

### **Abstention and Res Judicata**

Once an individual has a proceeding pending before a state administrative or judicial body, there are serious ramifications for potential FAA claims in federal court if an individual or provider chooses to pursue state zoning remedies beyond any initial request for a variance, permit, or similar permission. If the individual chooses to bring a FAA claim in federal court while his or her state zoning procedures are pending before administrative or judicial tribunals, the federal court may be -- but is not always -- required to abstain until the state proceedings are completed.<sup>150</sup> Additionally, the federal court may find that the plaintiff is precluded from raising any FAA claims in federal court that he did raise -- or even claims he could have but chose not to raise -- in the state proceedings.<sup>151</sup>

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## NOTES

1. 42 U.S.C. §§ 3601-3631.
2. Though this booklet focuses on zoning issues, you should note that other types of local land use laws may also be subject to challenge under the FHAA. For example, in *McGary v. City of Portland*, 386 F.3d 1259, 1264 (9th Cir. 2004), the court held that the plaintiff could pursue an FHAA challenge to the City's enforcement of its nuisance ordinance pursuant to which the City ordered plaintiff -- who had AIDS and was periodically hospitalized -- to clean his front yard and, when he failed, the City cleaned the yard, charged the plaintiff to do so, and imposed a lien on his property.
3. The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act can also be used to challenge discriminatory zoning actions. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574, 579-80 (2d Cir. 2003); *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WL 292179 at \* 6 (N.D. Ga. Feb. 7, 2006); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at \*5 (D. Neb. Dec. 22, 2005); *Dadian v. Village of Wilmette*, No. 98 C 3731, 1999 WL 299887 at \*4-\*5 (N.D. Ill. May 4, 1999) (collecting cases). *Contra Kessler Institute for Rehabilitation v. Mayor of Essex Fells*, 876 F. Supp. 641, 655 (D.N.J. 1995); *Robinson v. City of Friendswood*, 890 F. Supp. 616, 620 (S.D. Tex. 1995). The ADA and Section 504 are the only federal laws that can be used to challenge discriminatory zoning actions that affect non-residential property uses (e.g., rehabilitation facilities). E.g., *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (1999); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48-49 (2d Cir. 1997); *A Helping Hand, L.L.C. v. Baltimore County*, CCB-92-2568, 2005 WL 2453062 at \* 8 (D. Md. Sept. 30, 2005); *First Step, Inc. v. City of New London*, 247 F. Supp. 2d 135, 149-53 (D. Conn. 2003).
4. H.R. Rep. No. 100-711, at 13 (1988) (quoted in *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069 (N.D. Ill. 1996)).
5. 24 C.F.R. §§ 100.50(b), 100.70(a).
6. See *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-732, 737 n.11 (1995); *Alexander v. Riga*, 208 F.3d 419, 425 (3d Cir. 2000), cert. denied, 531 U.S. 1069 (2001); *Samaritan Inns, Inc. v. Dist. of Columbia*, 114 F.3d 1227, 1234 (D.C. Cir. 1997); *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069 (N.D. Ill. 1996).
7. *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 200 (5th Cir. 2000) (collecting cases).
8. 42 U.S.C. § 3602(h).

9. 24 C.F.R. § 100.201.
10. *E.g., Keys Youth Services, Inc. v. City of Olathe*, 52 F. Supp. 2d 1284, 1297-1300 (D. Kan. 1999) (holding that youngsters with learning disabilities and severe emotional disorders were protected by the FHAA), *reconsideration denied*, 67 F. Supp. 2d 1228 (D. Kan. 1999), *aff'd in part, rev'd in part on other grounds*, 248 F.3d 1267 (10th Cir. 2001); *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp. 2d 721, 723 (E.D. La. 1999) (holding that persons with Alzheimer's Disease were protected by the FHAA), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 683 (E.D. Pa. 1999) (holding that persons with brain injury were protected by the FHAA). *But see Caron v. City of Pawtucket*, 307 F. Supp. 2d 364, 368 (D.R.I. 2004) (old age, by itself, is not a disability). However, the Supreme Court has held that "mitigating" measures must be considered in determining whether a person is substantially limited in his major life activities so as to be protected by federal disabilities laws. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Thus, a person with diabetes that is controlled completely with medication will not be deemed a person with a disability.
11. 42 U.S.C. § 3602(h); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46-48 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002). In determining whether a person is "currently" using illegal drugs, the courts have held that the benchmark is the date of the alleged discrimination that was the basis for the lawsuit; illegal drug use after the lawsuit is filed would not warrant dismissal. *See Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 608-09 (D.N.J. 2000).
12. 42 U.S.C. § 3602(h). *E.g., Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002).
13. *See San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *Smith & Lee Associates, Inc. v. City of Taylor*, 13 F.3d 920, 924 (6th Cir. 1993), *app. following remand*, 102 F.3d 781 (6th Cir. 1996); *Cohen v. Township of Cheltenham*, 174 F. Supp.2d 307, 320-21 (E.D. Pa. 2001); *United States v. City of Chicago Heights*, No. 99 C 4461, 1999 WL 1068477 at \*3 (N.D. Ill. Nov. 19, 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at \*6-\*7 (E.D. Pa. July 30, 1998); *United States v. Borough of Audubon*, 797 F. Supp. 353, 357 (D.N.J. 1991), *aff'd mem.*, 968 F.2d 14 (3d Cir. 1992); *see also Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).
14. 42 U.S.C. § 3604(f)(1) (emphasis added).
15. 42 U.S.C. § 3604(f)(2) (emphasis added).

16. 42 U.S.C. § 3604(f)(3)(A) (emphasis added).
17. 42 U.S.C. § 3604(f)(3)(B).
18. *Alexander v. Riga*, 208 F.3d 419, 426-27 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001).
19. 42 U.S.C. § 3617. A defendant may be found liable for violating Section 3617 without being found liable for any other violation of the FHAA. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613 n.7 (D.N.J. 2000).
20. *E.g.*, *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477-78 (9th Cir. 1998) (refusing to grant summary judgment for city in case alleging that city officials retaliated against plaintiff after plaintiff proposed using property to provide residential housing for persons with mental illness); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1238-39 (D.C. Cir. 1997) (nonprofit corporation entitled to recover damages for delayed capital contributions caused by city's improper interference with construction permits for facility for former drug and alcohol abusers); *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613-14 (D.N.J. 2000) (refusing to dismiss claim against township and police department accused of campaign of harassment intended to drive out persons living in houses for recovering substance abusers and holding that violence or physical coercion are not a prerequisite to such a claim); *cf. Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48-49 (2d Cir. 1997) (affirming preliminary injunction pursuant to Americans with Disabilities Act and Rehabilitation Act barring city from interfering with rehabilitation center's occupation of new site).
21. *E.g.*, *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532 (5th Cir. 1996) (nonprofit corporation stated claim against city for refusal to issue necessary permits for treatment center for emotionally disturbed women due to deed restriction); *Martin v. Constance*, 843 F. Supp. 1321, 1325-26 (E.D. Mo. 1994) (enjoining neighbors from attempting to enforce restrictive covenant against group home); *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) (attempt to enforce restrictive covenant to prevent house from being used as group home violated FHAA); *Hill v. Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996) (enforcement of restrictive covenant to bar group home for people with AIDS would violate FHAA).
22. In one case, the court refused to impose liability against neighbors whose vehement opposition to a group home based on stereotypes and prejudice caused the provider to cancel the purchase of a home in the area. *Salisbury House, Inc. v. McDermott*, No. 96-CV-6486, 1998 WL 195693 (E.D. Pa. Mar. 24, 1998). In that case, the court, concerned about potential First Amendment issues, held that only the use of some sort of force or compulsion would be sufficient to establish liability for interference under the FHAA when only speech was involved. *Id.* at \*13; *see also Michigan Protection & Advocacy Service, Inc.*

- v. Babin*, 18 F.3d 337, 347-48 (6th Cir. 1994) (neighbor's purchase of property to prevent it from being used as a group home did not violate FHAA); *Pathways, Inc. v. Dunne*, 172 F. Supp.2d 357, 365-66 (D. Conn. 2001) (discussing application of *Noerr-Pennington* doctrine to preclude FHAA challenge to actions of neighbors to use government channels, including state court proceedings, to stop group home), *aff'd in part, rev'd in part on other grounds*, 329 F.3d 108 (2d Cir. 2003).
23. See *Ventura Village, Inc. v. City of Minneapolis*, 318 F. Supp. 2d 822, 827-28 (D. Minn. 2004) (rejecting neighbors' claim that city violated FHA by allowing group home because it would result in segregation of the residents based on race and disability), *aff'd*, 419 F.3d 725 (8th Cir. 2005).
  24. H. Rep. No. 100-711, at 24 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 2173, 2185.
  25. *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 851 (S.D. Ohio 1996).
  26. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1295 (D. Md. 1993).
  27. *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170, 177 (3d Cir. 2005); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 225 (D.D.C. 2003); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774 (E.D.N.Y. 1999).
  28. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 611 (D.N.J. May 16, 2000).
  29. 411 U.S. 792 (1973); see also *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-10 (1993).
  30. See *Sanghvi v. City of Claremont*, 328 F.3d 532, 536 & n.3 (9th Cir.), *cert. denied*, 540 U.S. 1075 (2003); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 273 (10th Cir. 2001); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997); *Ring v. Interstate Mortg., Inc.*, 984 F.2d 924, 926 (8th Cir. 1993).
  31. Where a plaintiff has direct evidence of discriminatory intent, it is not necessary to resort to the *McDonnell Douglas* burden shifting scheme. See *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985); *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 1273 n.6 (10th Cir. 2001).
  32. See *Sanghvi v. City of Claremont*, 328 F.3d 532, 536 (9th Cir.), *cert. denied*, 540 U.S. 1075 (2003); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th

- Cir. 1997); *Asbury v. Brougham*, 866 F.2d 1276, 1280 (10th Cir. 1989); *Selden Apartments v. U.S. Dep't of Housing & Urban Development*, 785 F.2d 152, 159 (6th Cir. 1986); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1978).
33. *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 401 (2d Cir. 1998).
  34. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 797 (3d Cir. 1990).
  35. *Weldon v. Kraft, Inc.*, 896 F.2d 793, 797 (3d Cir. 1990). The plaintiff's prima facie case, combined with sufficient evidence that the defendant's proffered justification for the action is false, may permit the court to conclude that defendant's action was discriminatory without more direct evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000).
  36. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 612 (D.N.J. 2000) (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 255-56 (1977)).
  37. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003); *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WL 292179 at \*7 (M.D. Ga. Feb. 7, 2006); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at \*6 (D. Neb. Dec. 22, 2005); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774 (E.D.N.Y. 1999) (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977)); *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 612 (D.N.J. 2000); see also *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), cert. denied, 537 U.S. 813 (2002) (noting that discriminatory intent can be inferred from totality of circumstances, including historical background of decision, sequence of events, and contemporaneous statements by decision-making body).
  38. *United States v. City of Chicago Heights*, No. 99 C 4461, 1999 WL 1068477 at \*5 (N.D. Ill. Nov. 19, 1999).
  39. *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48-52 (2d Cir.), cert. denied, 537 U.S. 813 (2002); see also *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 579-80 (2d Cir. 2003) (factors showed that denial of permit for group home for recovering substance abusers was motivated by discriminatory intent).
  40. *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1500 (W.D. Wash. 1997).
  41. *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 850-52 (S.D. Ohio 1996).

42. *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3rd Cir. 1993).
43. *Easter Seal Society of New Jersey, Inc. v. Township of North Bergen*, 798 F. Supp. 228, 234 (D.N.J. 1992).
44. *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1211-16 (D. Conn. 1992).
45. *United States v. Borough of Audubon*, 797 F. Supp. 353, 359-62 (D.N.J. 1991), *aff'd mem.*, 968 F.2d 14 (3d Cir. 1992).
46. *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 133-35 (N.D.N.Y. 1992); *see also United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220, 224 (D.P.R. 1991) (granting preliminary injunction against zoning agency's refusal to give permission to operate nursing home for persons with severe mental and physical disabilities in residential area where decision was based on neighborhood pressure); *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Administration*, 740 F. Supp. 95, 103-06 (D.P.R. 1990) (holding that denial of special use permit for AIDS hospice was the result of discriminatory animus due to community opposition and thus violated the Act); *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720, 732 (S.D. Ill. 1989) (granting preliminary injunction against zoning authority's refusal to issue use permit to create home for persons with AIDS where the refusal was attributable to community opposition).
47. *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991).
48. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 611-13 (D.N.J. 2000).
49. *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774-76 (E.D.N.Y. 1999).
50. *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 221 (3d Cir. 1998) (citing portion of unpublished district court's opinion that defendants did not appeal).
51. *Byrom v. Charlotte County*, No. 204CV365FTM29DNF, 2005 WL 2219379 at \*7 (M.D. Fla. Sept. 12, 2005).
52. *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 225-28 (D.D.C. 2003).
53. *See, e.g., Hamm v. City of Gahanna*, 109 Fed. Appx. 744, 747-49 (6th Cir. 2004) (holding that the city did not violate the FHA by refusing to re-zone to allow the plaintiffs to construct on their property group homes for people who are elderly

and have disabilities since the evidence indicated that the decision was based on the city's desire to protect property values and the community opposition was based on concerns about property values rather than the disabilities of the residents); *Sanghvi v. City of Claremont*, 328 F.3d 532, 536-37 (9th Cir.) (upholding jury verdict that city did not intentionally discriminate against operators of residential facility for people with Alzheimer's disease by refusing to allow expansion of the facility and connection to the city's sewer system unless the operators agreed to annexation), *cert. denied*, 540 U.S. 1075 (2003); *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437, 439 (7th Cir. 1999) (holding that decision not to re-zone a lot to allow developer to build a number of wheelchair-accessible units was not the result of intentional discrimination because it was not "actuated by a dislike of handicapped people" and the denial of the developer's plan, even though the defendant had allowed some higher-density developments in the area, was not so anomalous as to support an inference of discrimination); *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WL 292179 at \*7-\*8 (M.D. Ga. Feb. 7, 2006) (rejecting claim that city's denial of plaintiffs' plan to open group care facility for persons who are elderly or have disabilities was not intentional discrimination (even though the city misclassified the use under its zoning code) because the city's concern was not the disabilities of the prospective clients but the operation of a business in a single family neighborhood); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at \*6-\*7 (D. Neb. Dec. 22, 2005) (finding no evidence of intentional discrimination in decision to deny special use permit for group residence for recovering substance abusers since the decision was motivated by concerns that the group home would contravene the spacing ordinance that limited the number of group homes in a certain area rather than the disabilities of the residents); *Barry v. Town of Rollinsford*, No. 02-147M, 2003 WL 22290248 at \*5-\*6 (D.N.H. Oct 6, 2003) (holding that the refusal to allow an assisted living facility was not result of intentional discrimination because it was motivated by concern about the size of the facility rather than the residents' disabilities), *app. dismissed*, 106 Fed. Appx. 738 (1st Cir. 2004); *Keys Youth Services, Inc. v. City of Olathe*, 75 F. Supp. 2d 1235, 1243-45 (D. Kan. 1999) (holding that decision not to allow 10-person program for troubled youth with emotional and learning disabilities was not motivated by the disabilities of the potential residents, but, rather, by public safety concerns in light of evidence that residents of similar programs in the area engaged in anti-social and aggressive behavior), *aff'd*, 248 F.3d 1267 (10th Cir. 2001).

54. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 289 (6th Cir. 1996).
55. *Community Services, Inc. v. Wind Gap Municipal Authority*, 42 F.3d 170, 177 (3d Cir. 2005); *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500-01 & n.16 (10th Cir. 1995); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 643 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069 (N.D. Ill. 1996); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd mem.*, 995

F.2d 217 (3d Cir. 1993).

56. Many courts have held that laws may be facially discriminatory even though they do not expressly use words such as "handicap" or "disability" if the laws' main targets and impact are people with disabilities. This is true even though the laws also may have an incidental impact on non-disabled people. See *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp.2d 208, 222 (D.D.C. 2003); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 644 n.12 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069-70 (N.D. Ill. 1996). Recently, however, the Court of Appeals for the Third Circuit in *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 U.S. 170 (3d Cir. 2005) held that a "technically neutral proxy" will only be deemed to be facially discriminatory if the focus is on disability status. *Id.* at 177-79. The court concluded that the defendant's "personal care home" classification was not a proxy for disability, finding that it could have encompassed the elderly, juveniles, the homeless, battered women or ex-offenders and, thus, did not necessarily mean "home for the disabled or handicapped." *Id.* at 179; see also *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp.2d 376, 388-89 & n.20 (E.D. Pa. 1999) (rejecting facial discrimination challenge to zoning ordinance where the ordinance did not expressly treat persons with disabilities different from others and did not even mention personal care homes or senior assisted living homes).
57. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 643 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1072 (N.D. Ill. 1996); *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 620 (D.N.J. 1994) (citing, *inter alia*, *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978)).
58. See *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 843 (N.D. Ill. 2001); *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 851 (S.D. Ohio 1996); *Association for Advancement of the Mentally Handicapped v. City of Elizabeth*, 876 F. Supp. 614, 620 (D.N.J. 1994) (quoting *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978)). In examining the zoning law's justification, there is a dispute as to whether a facially discriminatory zoning law will be valid under the FHAA if it has a benign purpose. Compare *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 94-95 (8th Cir. 1991) (upholding dispersion requirement for group homes against FHAA challenge because it advanced the goals of deinstitutionalization and integration), with *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504-05 (10th Cir. 1995) (stressing that on remand in FHAA zoning case that court "should be chary about accepting the justification that a particular restriction upon the handicapped really advances their housing opportunities rather than discriminates against them in housing," but accepting that narrowly tailored restrictions that meet the needs of particular individuals could be

acceptable under the FHAA if the benefits clearly outweigh the burdens), *Larkin v. Michigan*, 89 F.3d 285, 291 (6th Cir. 1996) (holding that "integration is not a sufficient justification for maintaining permanent quotas under ... the FHAA"), *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1498-99 (W.D. Wash. 1997) (rejecting argument that integration justified dispersion requirement for group homes), and *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 (D. Md. 1993) ("integration is not an adequate justification under the FHAA").

59. *See Association for Advancement of the Mentally Handicapped v. City of Elizabeth*, 876 F. Supp. 614, 621-22 n.6 (D.N.J. 1994); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 n.9 (D. Md. 1993); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993).
60. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 289-92 (6th Cir. 1996) (holding that 1,500 foot dispersion requirement violated the FHAA); *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1496-1500 (W.D. Wash. 1997); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 644-46 (D.N.J. 1996) (holding that dispersion requirements were discriminatory classifications); *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 618, 621-25 (D.N.J. 1994) (holding that dispersion requirement that precluded community residents for six or more persons within 1,500 feet of an existing residence for victims of domestic violence or a school or day care center violated FHAA); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 693-95 (E.D. Pa. 1992) (holding that dispersion requirement that precluded group homes within 1,000 feet of each other violated FHAA), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *cf. Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 950-55 (E.D. Wis. 1998) (holding that density and dispersion requirements were not facially invalid but that they were preempted by FHAA). *Contra Familystyle of St. Paul v. St. Paul*, 923 F.2d 91, 94-95 (8th Cir. 1991) (holding that statute requiring group homes to be located at least one-quarter mile from each other absent a conditional use or special use permit was not invalid under FHAA because the statute advanced the purposes of deinstitutionalization and integration).
61. *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 844-45 (N.D. Ill. 2001).
62. *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069-78 (N.D. Ill. 1996).
63. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 656-59 (W.D. Pa. 2003); *In re Millcreek Township Zoning Ordinance No. 87-24*, 4 D & C 4th 449, 457-61 (Pa. Ct. Com. Pl. July 25, 1989).

64. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500-01 & n.16 (10th Cir. 1995).
65. *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 46-48 (6th Cir. 1992).
66. *Ardmore, Inc. v. City of Akron, Ohio*, Case No. 90-CV-1083, slip op. at 10 (N.D. Ohio Aug. 2, 1990).
67. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296-97 (D. Md. 1993); see also *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 292 (6th Cir. 1996).
68. *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 19 F. Supp. 2d 567, 571-72 (N.D. W.Va. 1998).
69. *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 221-25 (D.D.C. 2003).
70. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574-75 (2d Cir. 2003); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 467 (3d Cir. 2002); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 655 (W.D. Pa. 2003).
71. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 52-53 (2d Cir.), cert. denied, 537 U.S. 813 (2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 467 (3d Cir. 2002). Other courts have adopted a somewhat different formulation, holding that it is appropriate to look at: (1) the strength of the showing that the action adversely affects people with disabilities; (2) whether there is some evidence of discriminatory intent; (3) the government's interest in taking the action; and (4) whether the aggrieved person seeks to compel the government to provide housing or merely seeks to restrain it from interfering with individual property owners. See *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) ((establishing general standard for assessing disparate impact adopted in a race discrimination case); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (same standard in race discrimination case), cert. denied, 434 U.S. 1025 (1978); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1295 (D. Md. 1993) (applying *Smith* test in handicap discrimination case under the FHA).
72. See *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 655-56 (W.D. Pa. 2003); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1182-85 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 461 (D.N.J. 1992); *United States v. Schuylkill Township*, C.A. No. 90-2165, 1990 U.S. Dist. LEXIS 15555 at \*25-\*32 (E.D. Pa. Nov. 16, 1990).
73. See *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp. 2d 376, 389 (E.D. Pa. 1999); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp.

- 2d 762, 776-77 (E.D.N.Y. 1999); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 136 (N.D.N.Y. 1992).
74. *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 688, 690 (N.D.N.Y. 1999).
75. *Tsombanidis v. West Haven Fire Dep't*, 352 F. 3d 565, 575-78 (2d Cir. 2003).
76. See *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 53 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002) (holding that disparate impact theory is inapplicable when the plaintiff does not challenge a facially neutral policy); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (holding that disparate impact analysis should be utilized only for laws that apply to people with and without disabilities to determine whether their impact on people with disabilities constitutes discrimination).
77. See *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290-92 (6th Cir. 1996) (holding that licensing requirement that barred issuance of license to adult foster care facility if it was within 1,500 feet of another facility violated FHAA); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 697-99 (E.D. Pa. 1992) (holding that 1,000 foot spacing requirement violated FHAA because, *inter alia*, it had disparate impact on people with disabilities), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993). *Contra Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 93-95 (8th Cir. 1991) (holding that dispersion requirement served valid purpose of promoting integration of people with disabilities and, therefore, did not have a disparate impact that violated the FHAA).
78. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1297-99 (D. Md. 1993).
79. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1299-1300 (D. Md. 1993).
80. *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1216-21 (D. Conn. 1992).
81. *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Administration*, 740 F. Supp. 95, 106-07 (D.P.R. 1990); *Baxter v. City of Belleville*, 720 F. Supp. 720, 732-33 (S.D. Ill. 1989).
82. 42 U.S.C. § 3604(f)(3)(B).
83. *United States v. City of Philadelphia*, 838 F. Supp. 223, 229 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994).
84. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996); *United States v. City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993) (quotation

omitted), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994). The Tenth Circuit has indicated that the FHAA's reasonable accommodation requirement applies to laws that are "generally applicable" and not to those that only affect persons with disabilities. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-02 (10th Cir. 1995). This analysis seems at odds with the approach of many other courts, which have used the FHAA's reasonable accommodation requirement to require municipalities to waive facially discriminatory ordinances in particular instances rather than take the more drastic approach of declaring an entire law to be invalid.

85. *Good Shepherd Manor Foundation, Inc. v. City of Mومence*, 323 F.3d 557, 561-62 (7th Cir. 2003).
86. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Bd. of Adjustment*, 284 F.3d 442, 457 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 653 (W.D. Pa. 2003).
87. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 459 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002).
88. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 460 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 653 (W.D. Pa. 2003); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 834 (N.D. Ill. 2001). While it is relatively easy to show that an accommodation of a zoning restriction that precludes housing for people with disabilities is "necessary" to afford equal opportunity, it may be more problematic when the zoning restrictions at issue are not absolute. For example, in *Lapid-Laurel*, the plaintiff sought to construct a 95-bed nursing facility where the township objected to the size of the facility for the site and the surrounding neighborhood. The appellate court agreed that the plaintiff had to show that the size of the proposed facility was required to make it financially viable or medically effective in order to meet the "necessary" prong of the test, and concluded that it had failed to do so. 284 F.3d at 461.
89. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462 (3d Cir. 2002); *Smith & Lee Assoc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996); *Judy B. v. Borough of Tioga*, 889 F. Supp. 792 (M.D. Pa. 1995); *United States v. City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1186 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry*

- Hill*, 799 F. Supp. 450, 461 (D.N.J. 1992).
90. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462 (3d Cir. 2002).
  91. See *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785-87 (7th Cir. 2002).
  92. See *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 578-79 (2d Cir. 2003). As discussed below, federal courts generally apply the doctrine of "ripeness" to preclude any FHAA reasonable accommodation claims when the plaintiff had not requested an accommodation from local officials prior to filing suit.
  93. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 450-54 (3d Cir. 2002); cf. *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 1275-76 (10th Cir. 2001) (refusing to consider argument in favor of accommodation when the argument had not been presented to local officials). If the United States files a lawsuit to challenge a refusal to grant a reasonable accommodation, however, it may not be bound by the local administrative record. *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 830 (N.D. Ill. 2001).
  94. See *Cohen v. Township of Cheltenham*, 174 F. Supp. 2d 307, 314-16 (E.D. Pa. 2001).
  95. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 783-84 (7th Cir. 2002) (collecting cases); cf. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002) (burden shifting in reasonable accommodation employment case); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 457 (3d Cir. 2002) (plaintiff bears burden to show accommodation is necessary to afford equal opportunity and then the burden shifts to the defendant to show that the accommodation is unreasonable). *Contra Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603-04 (4th Cir. 1997) (plaintiff bears entire burden of proof on reasonable accommodation claim); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996) (same).
  96. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103-06 (3d Cir. 1996); see also *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WL 292179 at \*9 (M.D. Ga. Feb. 7, 2006) (city may have denied reasonable accommodation by refusing to allow small home for elderly and people with disabilities in a single family residential district).
  97. *United States v. City of Philadelphia*, 838 F. Supp. 223, 228-30 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994).
  98. *Judy B. v. Borough of Tioga*, 889 F. Supp. 792, 798-800 (M.D. Pa. 1995).
  99. *Smith & Lee Assoc. v. City of Taylor*, 102 F.3d 781, 794-96 (6th Cir. 1996).

100. *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993).
101. *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 435-38 (D.N.J. 1998).
102. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785-87 (7th Cir. 2002); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at \*7-\*8 (D. Neb. Dec. 22, 2005); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 832-42 (N.D. Ill. 2001); *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 955-59 (E.D. Wis. 1998); *"K" Care, Inc. v. Town of Lac du Flambeau*, 510 N.W.2d 697, 5 ADD 713, 717-22 (Wis. Ct. App. 1993); *United States v. Village of Marshall*, 787 F. Supp. 872, 878-79 (W.D. Wis. 1991).
103. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 652-55 (W.D. Pa. 2003); *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp.2d 721, 724-25 (E.D. La. 1999), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp.2d 676, 684-86 (E.D. Pa. 1999); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1185-86 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 & n.2 (D.N.J. 1992); *Parish of Jefferson v. Allied Health Care, Inc.*, Civil Action No. 91-1199, 1992 U.S. Dist. LEXIS 9124 at \*15-\*19 (E.D. La. June 10, 1992).
104. *Good Shepherd Manor Foundation, Inc. v. City of Mombence*, 323 F.3d 557, 562-64 (7th Cir. 2003); *see also Sanghvi v. City of Claremont*, 328 F.3d 532, 538 (9th Cir.), *cert. denied*, 540 U.S. 1075 (2003) (city's requirement that facility accede to annexation to secure sewer hook-up for expansion of facility for people with disabilities was not a denial of a reasonable accommodation since the requirement would not burden the residents but only had economic consequences for the provider).
105. *Howard v. City of Beavercreek*, 276 F.3d 802, 806-07 (6th Cir. 2002).
106. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462-66 (3d Cir. 2002).
107. *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 604-06 (4th Cir. 1997).
108. *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 152-53 (2d Cir. 1999).
109. *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437, 439-41 (7th Cir. 1999). While the Seventh Circuit indicated that a zoning ordinance that merely increased the cost of housing for everyone need not be waived, *id.* at

- 440-41, other courts have indicated that an accommodation of zoning laws may be necessary if the financial impact would eliminate the housing opportunity for persons with disabilities (not merely make it more expensive). *E.g.*, *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp.2d 721, 724 (E.D. La. 1999), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 686 (E.D. Pa. 1999); *cf. Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 689-90 (N.D.N.Y. 1999) (while rejecting reasonable accommodation claim, the court indicated that evidence that the program would not be economically viable absent accommodation might have yielded a different outcome).
110. *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 689-90 (N.D.N.Y. 1999).
  111. *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178-79 (5th Cir. 1996).
  112. *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251-52 (8th Cir.), *cert. denied*, 519 U.S. 816 (1996).
  113. *Brandt v. Village of Chebanse*, 82 F.3d 172, 174-75 (7th Cir. 1996).
  114. *Erdman v. City of Fort Atkinson*, 84 F.3d 960, 962-64 (7th Cir. 1996).
  115. *Thornton v. City of Allegan*, 863 F. Supp. 504, 510 (W.D. Mich. 1993).
  116. *Hamm v. City of Gahanna*, 109 Fed. Appx. 744, 749-50 (6th Cir. 2004).
  117. *Barry v. Town of Rollinsford*, No. 02-147M, 2003 WL 22290248 at \*7 (D.N.H. Oct. 6, 2003), *app. dismissed*, 106 Fed. Appx. 738 (1st Cir. 2004).
  118. 42 U.S.C. § 3613(a)(1)(A).
  119. *See Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 n.2 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332-42 (6th Cir. 2002); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 221-22 (3d Cir. 1998); *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1281-82 (3d Cir. 1993); *Byrom v. Charlotte County*, No. 204CV365FTM29DNF, 2005 WL 2219379 at \*4 (M.D. Fla. Sept. 12, 2005); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 651 (W.D. Pa. 2003); *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 2573 F. Supp. 2d 208, 221 (D.D.C. 2003); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 425 (D.N.J. 1998).
  120. *See San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995).

121. 42 U.S.C. § 3610(a)(1)(A)(i).
122. 42 U.S.C. § 3610(g)(1).
123. 42 U.S.C. § 3610(b)(1).
124. 42 U.S.C. § 3610(g)(2).
125. The complainant may choose whether HUD will prosecute the complaint through administrative review or judicial proceedings. 42 U.S.C. § 3612(a).
126. 42 U.S.C. § 3612.
127. 24 C.F.R. § 103.400(a)(3).
128. 42 U.S.C. § 3613(a)(1).
129. 42 U.S.C. § 3613(a)(2); see also *In re Millcreek Township Zoning Ordinance No. 87-24*, 4 D. & C.4th 449, 461 (Pa. Ct. Com. Pl. 1989).
130. 42 U.S.C. § 3613(b).
131. 42 U.S.C. § 3613(c)(1); see also *Riga v. Alexander*, 208 F.3d 419, (3d Cir. 2000) (indicating that nominal damages are available under FHAA even absent proof of actual injury and that punitive damages are available without proof of egregious or malicious misconduct), *cert. denied*, 531 U.S. 1069 (2001); *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 222-24 (3d Cir. 1998) (holding that court does not have discretion to decline to award compensatory damages under FHAA; it must award such damages to the extent they are established); *Samaritan Inns, Inc. v. Dist. of Columbia*, 114 F.3d 1227, 1234-38, 1239 (D.C. Cir. 1997) (discussing compensatory damages and holding that punitive damages are available under FHAA and warranted in the circumstances).
132. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The Supreme Court, though, did indicate that punitive damages may be available against municipalities if it can be established that the taxpayers are directly responsible for perpetrating an outrageous violation of civil rights. *Id.* at 267 n.29. The Supreme Court has also held that punitive damages cannot be recovered under the ADA or Section 504 of the Rehabilitation Act. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). The courts have not definitively addressed the question of whether punitive damages are available in actions against municipalities under the FHAA. Compare *Dadian v. Village of Wilmette*, No. 98 C 3731, 1999 WL 299887 at \*3 (N.D. Ill. May 4, 1999) (punitive damages are available against municipal government), with *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of Asbury Park*, 152 F.3d 217, 224-25 (3d Cir. 1994) (questioning without deciding whether punitive damages can be awarded against municipality).

133. 42 U.S.C. § 3613(c)(2).
134. 42 U.S.C. § 3607(b)(1).
135. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-738 (1995).
136. 42 U.S.C. § 3604(f)(9). Similar "direct threat" provisions are also included in the Americans with Disabilities Act. 42 U.S.C. §§ 12113(b); 12183(b)(3).
137. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995).
138. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995); see also *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 622-23 (D.N.J. 1994).
139. *Roe v. Sugar River Mills Associates*, 820 F. Supp. 636, 639 (D.N.H. 1993) (discussing direct threat requirement in landlord-tenant context).
140. 42 U.S.C. § 3613(a)(1)(A); see also *Community Interactions-Bucks County, Inc. v. Township of Bensalem*, 5 ADD 933 (E.D. Pa. 1994).
141. 42 U.S.C. § 3613(a)(1)(B); see also *Comorato v. Fox & Lazo of Pennsylvania, Inc.*, 2 ADD 858 (E.D. Pa. 1993) (discussing equitable tolling of statute of limitations), *aff'd mem.*, 27 F.3d 556 (3d Cir. 1994).
142. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 102-09 & n.11 (1979); *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp.2d 686, 688 (N.D.N.Y. 1999); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 433 (D.N.J. 1998).
143. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1982); *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp.2d 686, 688 (N.D.N.Y. 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at \*5 (E.D. Pa. July 30, 1998).
144. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 451-52 n.5 (3d Cir. 2002) (dicta); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir.), *cert. denied*, 519 U.S. 816 (1996); *United States v. Village of Palatine*, 37 F.3d 1230, 1233 (7th Cir. 1994); *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp.2d 376, 385-88 (E.D. Pa. 1999); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1260-62 (E.D. Va. 1993); see also *Smith & Lee Associates v. City of Taylor*, 13 F.3d at 929-30 (holding that city could not simply issue a letter granting a reasonable accommodation when the local zoning law did not permit such a procedure and, instead, any reasonable accommodation would require either "spot zoning" or an amendment of the zoning law); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 726, 771-72 (E.D.N.Y. 1999) (holding that case was ripe where enactment of revised zoning law was "tantamount to a final denial" of a special use permit). *But see*

- Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp.2d 686, 689 (N.D.N.Y. 1999) (holding that case was ripe after town issued enforcement notices against residential provider).
145. *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 199-200 (5th Cir. 2000).
  146. See *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 452 n.5 (3d Cir. 2002); *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp. 2d 376, 388-89 (E.D. Pa. 1999). See generally *Psidium v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (in due process "takings" case, the court noted that facial challenges to ordinances or regulations are generally ripe the moment the challenged ordinance or regulation is passed).
  147. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 452 n.5 (3d Cir. 2002).
  148. See *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 343-44 (6th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 452 n.5 (3d Cir. 2002); *United States v. Village of Palatine*, 37 F.3d 1230, 1233-34 (7th Cir. 1994); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 770 (E.D.N.Y. 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at \*6 (E.D. Pa. July 30, 1998); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 425-28 (D.N.J. 1998); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1261 (E.D. Va. 1994); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).
  149. *Bryant Woods Inn Inc. v. Howard County*, 124 F.3d 597, 601-02 (4th Cir. 1997) (holding that FAA claim filed by group home operator who sought to expand size of program was "ripe" after the zoning board denied his request for expansion and that he was not required to pursue an appeal of that decision either under an "exhaustion" doctrine or a "ripeness" requirement); *cf. Community Interactions-Bucks County, Inc. v. Township of Bensalem*, 8 ADD 276, 278-79 (E.D. Pa. 1994) (refusing to dismiss FAA claim where complaint alleged that defendant refused to issue necessary building permit).
  150. *E.g., Pathways, Inc. v. Dunne*, 329 F.3d 108 (2d Cir. 2003) (holding that *Younger* abstention did not preclude court's consideration of FHAA claims since the state proceedings had concluded); *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1074-75 (6th Cir. 1998) (holding that *Younger* abstention was appropriate where an action to enforce local land use ordinance against rooming house operator was pending in state court); *Cohen v. Township of Cheltenham*, 174 F. Supp.2d 307, 317-19 (E.D. Pa. 2001) (rejecting claims of *Burford*, *Younger*, and *Colorado River* abstention); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 430-33 (D.N.J. 1998) (rejecting *Pullman* and

*Colorado River* abstention arguments and, more importantly, rejecting *Younger* abstention on the basis that *Younger* does not apply when the proceedings pending are non-coercive (i.e., not enforcement proceedings initiated by the government) but, rather, are "remedial" proceedings initiated by the plaintiff in the federal action); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at \*2-\*4 (E.D. Pa. July 30, 1998) (holding that *Colorado River* abstention was not warranted and that *Younger* abstention was not justified where the federal plaintiff was the party to instigate the state administrative and judicial proceedings).

151. See, e.g., *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 428-30 (D.N.J. 1998) (rejecting res judicata argument in FAA case). Discussion of the doctrines of claim and issue preclusion are beyond the scope of this booklet. In considering an FAA claim, however, you must consider the potential impact of these issues when there are or were state proceedings, such as a hearing before a local zoning hearing board or state court.