

11-0262



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

May 15, 2001

To: All California Mayors:

Re: Adoption of A Reasonable Accommodation Procedure

Both the federal Fair Housing Act ("FHA") and the California Fair Employment and Housing Act ("FEHA") impose an affirmative duty on local governments to make reasonable accommodations (*i.e.*, modifications or exceptions) in their zoning laws and other land use regulations and practices when such accommodations "may be necessary to afford" disabled persons "an equal opportunity to use and enjoy a dwelling." (42 U.S.C. § 3604(f)(3)(B); see also Gov. Code, §§ 12927(c)(1), 12955(l).)¹ Although this mandate has been in existence for some years now, it is our understanding that only two or three local jurisdictions in California provide a process specifically designed for people with disabilities and other eligible persons to utilize in making such requests. In my capacity as Attorney General of the State of California, I share responsibility for the enforcement of the FEHA's reasonable accommodations requirement with the Department of Fair Employment and Housing. Accordingly, I am writing to encourage your jurisdiction to adopt a procedure for handling such requests and to make its availability known within your community.²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Further, and perhaps even more importantly, it may well be that reliance on these alternative procedures, with their different governing criteria, serves at least in some circumstances to encourage community opposition to projects involving desperately needed housing for the disabled. As you are well aware, opposition to such housing is often grounded on stereotypical assumptions about people with disabilities and apparently equally unfounded concerns about the impact of such homes on surrounding property values.⁹ Moreover, once triggered, it is difficult to quell. Yet this is the very type of opposition that, for example, the typical conditional use permit procedure, with its general health, safety, and welfare standard, would seem rather predictably to invite, whereas a procedure conducted pursuant to the more focused criteria applicable to the reasonable accommodation determination would not.

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

Sincerely,

BILL LOCKYER
Attorney General

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

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

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