City of Brisbane
Planning Commission Agenda Report

TO: Planning Commission For the Meeting of 2/10/11

FROM: Tim Tune, Senior Planner, via ~~John~~ JAS Swiecki, Community Development Director

SUBJECT: Zoning Text Amendment RZ-2-11 to Amend Brisbane Municipal Code Title 17, Chapter 17.32, Regarding Requests for Reasonable Accommodations for Housing for Persons with Disabilities and Height Limit Exceptions; City of Brisbane, applicant

Request: A new section is proposed to be added to the Municipal Code to provide an administrative procedure by which general exceptions to the Zoning Ordinance could be approved for reasonable accommodations for housing for persons with disabilities as required by State law. This would be intended to meet needs that cannot be addressed by the existing Accessibility Improvement Permit procedure for setback exceptions and the similar procedure now proposed for height limit exceptions.

In amending the height limit exceptions, an additional provision is proposed for solar energy systems to be installed atop existing buildings, and a number of outdated provisions are proposed to be eliminated.

Recommendation: Recommend that the City Council adopt the draft ordinance, via adoption of Resolution RZ-2-11.

Environmental Determination: A Negative Declaration was adopted by the City Council January 18, 2011, for the 2007-2014 Housing Element, including Program H.B.3.d which the proposed ordinance would implement. The alteration of existing facilities and the construction of small structures are categorically exempt from the California Environmental Quality Act per State CEQA Guidelines Sections 15301 and 15303. The exceptions to the use of these categorical exemptions referenced in Section 15300.2 do not apply.

Background: California Government Code Section 65583(c)(3) requires that the Housing Element include a program which will:

> Address and, where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing, including housing for all income levels and housing for persons with disabilities. The program shall remove constraints to, and provide reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities.

Note that "disability" as defined by the California Fair Employment and Housing Act (California Government Code Section 12955.3) includes mental disabilities as well as physical ones such as impaired mobility. According to the 2000 U.S. Census, approximately 14% of Brisbane's population has a disability.

The State Attorney General has advised that, under the federal Fair Housing Act and the California Fair Employment and Housing Act, all jurisdictions should adopt a procedure for handling requests for reasonable accommodations, modifications or exceptions to zoning and other land use regulations and practices, when necessary to afford disabled persons "an equal opportunity to use and enjoy a dwelling" (see attached). He further advises against reliance upon standard variance or use permit procedures that use findings that may be insufficient under fair housing laws. He states that the reasonable accommodations procedure should deal with "whether a requested accommodation is reasonable within the meaning of fair housing laws," which the FHA defines as not imposing "undue financial and administrative burdens" on the municipality or requiring a "fundamental alteration in the nature" of the City's zoning regulations which, according to Robert Fields' "A Handbook for Reasonable Accommodation," would changes in the primary purpose of the applicable rules, policies or procedures, and the practical components necessary to achieve this purpose.

The recently adopted 2007-2014 Housing Element contains the following program regarding constraints on providing housing for persons with disabilities:

> Program H.B.3.d Adopt a general provision to allow ministerial approval by the Community Development Director, subject to a minimal fee, of exceptions to the Zoning Ordinance for reasonable accommodation for housing for persons with disabilities per Government Code Section 65583(c)(3), and specifically amend the height limit exceptions in the zoning ordinance to allow for approval of Accessibility Improvement Permits for elevators and accessible-van garages needed by persons with disabilities to exceed the applicable height limit.

Under the Housing Element's adopted timelines, this program is to be implemented by the end of this year.

Staff Analysis: Setback exception procedures to accommodate accessibility improvements for persons with disabilities are already provided in Brisbane Municipal Code Section 17.32.070.A.1.f. The proposed height limit exception for accessibility improvements would generally follow this same format. The Zoning Administrator, following a noticed public hearing, would be authorized to grant exceptions to the height limit to accommodate accessibility improvements such as elevators and wheelchair van garage spaces, upon making required findings regarding the necessity for the exception, minimizing any visual impacts, avoiding

adverse impacts upon adjacent properties, and construction in compliance with building and fire codes.

To address any other possible requests for "reasonable accommodations," a procedure is proposed to meet special needs that cannot be addressed through the height limit and setback exceptions, based in part upon the City of San Jose's Requests for Reasonable Accommodation process (attached), which was specifically cited by the State Attorney General along with efforts by the City of Long Beach and Mental Health Advocacy Services, Inc., of Los Angeles. This would be added as a new Section 17.32.080

Amending Municipal Code Section 17.32.060 provides an opportunity to review the existing height limit exceptions. These provisions have not been updated since 1989.

BMC Section 17.32.060.A allows chimneys no more than 3 ft. wide or deep to exceed the height limit by no more than 4 ft., but changes to the Building Code have resulted in conflicts with this provision. In the 2001 Edition of the California Building Code, the new requirement for a spark arrester atop chimneys typically added approximately 1 ft. to their height, which the Code already required to be at least 2 ft. taller than any part of the building within 10 ft. To take these Building Code standards into account, this provision would be revised to allow chimneys no more than 3 ft. wide or deep to exceed the height limit by no more than 5 ft. except as required to comply with the California Building Code.

BMC Section 17.32.060.B allows "cupolas, flag poles, monuments, radio and other towers, water tanks, church steeples, mechanical appurtenances and similar structures" to exceed the height limit through Planning Commission approval of a Use Permit, rather than the more onerous Variance. This section would be amended to note the provisions provided for wireless telecommunications facilities (cell towers) in BMC Section 17.32.035. Specifically, BMC Section 17.32.035.G.3 requires approval of a Variance for such facilities to exceed 70 ft. in height, while BMC Section 17.32.035.D.f allows expansion of an existing support structure up to 70 ft. through approval of a Telecommunications Administrative Permit.

A simplified height exception procedure is proposed for solar energy systems installed atop existing buildings. It would be modeled on the formats adopted for Telecommunications Administrative Permits (BMC Section 17.32.032.D) and Sign Permits (BMC Section 17.36.060.C.2) issued by the Zoning Administrator. If the Zoning Administrator determines that the proposed system would not have a specific adverse impact upon the public health and safety, as provided by California Government Code Section 65850.5 and Health and Safety Code Section 17959.1(a), ten-days notice of the intended approval would be mailed to property owners and occupants immediately adjacent to and across the street from the site. They would then have the opportunity to comment in writing on the proposal before final action is taken.

BMC Section 17.32.060.C provides that, in districts with a height limit less than 35 ft., various types of institutional buildings may exceed the applicable height limit by 1 ft. for each 1 ft. the front, rear and side yards are increased beyond the minimum standard. This provision in its current form dates back before the height limits in the R-1, R-2 and R-3 District were lowered to 28-30 ft. in 1989, to a time when the City actually had no zoning districts with a height limit less than 35 ft. Given the effort the City put into lowering these height limits, it would appear that any non-residential building that would exceed them should be subject to Variance as well as Design Permit approval. Accordingly, this subsection is proposed to be repealed.

BMC Section 17.32.060.D allows buildings in non-residential districts to exceed the height limit through Use Permit approval, provided that the floor area ratio does not exceed the maximum possible under the applicable height limit. This is another example of a situation that would more appropriately be addressed through Variance and Design Permit approval. This subsection is also proposed to be repealed.

BMC Section 17.32.060.E, added in 1989, permits a garage or carport on a downslope lot to exceed the height limit to a maximum height of 35 ft. This provision has been superseded by the height regulation incorporated into each of the residential zoning districts in 2002 that allows garages to be constructed to a height of 15 ft. above the elevation of the center of the street, so long as the total height of the garage and any permitted living area underneath does not exceed the district's height limit (see BMC Sections 17.06.040.G.2, 17.08.040.G.2, 17.10.040.G.2 & 17.12.040.G.2). This subsection is now proposed to be deleted to avoid confusion.

BMC Section 17.32.060.F, also added in 1989, allows a gable or hipped roof in any R District to exceed the height limit by 3 to 5 ft., if the midpoint of the slope of the roof does not exceed the height limit. This method of measuring the height of a pitched roof at its midpoint was subsequently incorporated into the definition of "height, structures" (BMC Section 17.02.400.A) in 1998, so that it is no longer necessary here. The maximum limits were not included in the height regulations specified in each of the residential zoning districts (BMC Sections 17.06.040.G.1, 17.08.040.G.1, 17.10.040.G.1 & 17.12.040.G.1), so this subsection is also proposed to be deleted to avoid confusion.

Attachments:

- Draft Resolution RZ-4-10
- Draft Ordinance (Redline Version)
- Letter from State Attorney General Bill Lockyer, 5/15/01
- San Jose Municipal Code Chapter 20.160 and Process for Requests for Reasonable Accommodation
- Long Beach Municipal Code Division XIII—Reasonable Accommodation

Attachments (continued):

Mental Health Advocacy Services, Inc.'s "Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California"

California Government Code Section 65850.5

Health and Safety Code Section 17959.1(a)

draft

RESOLUTION NO. RZ-2-11

RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF BRISBANE RECOMMENDING ZONING TEXT AMENDMENT RZ-2-11 TO THE CITY COUNCIL, SUCH AMENDMENTS PERTAINING TO CITY OF BRISBANE MUNICIPAL CODE TITLE 17, ZONING, CHAPTER 17.32, REGARDING REQUESTS FOR REASONABLE ACCOMMODATIONS FOR HOUSING FOR PERSONS WITH DISABILITIES AND HEIGHT LIMIT EXCEPTIONS

WHEREAS, 2007-2014 Housing Element Program H.B.3.d calls for adoption of a provision in the Zoning Ordinance for reasonable accommodation for housing for persons with disabilities and for amendment of the height limit exceptions to allow for approval of Accessibility Improvement Permits for elevators and accessible-van garages needed by persons with disabilities to exceed the applicable height limit; and

WHEREAS, Policy 116 directs the City to recognize the special needs of persons with disabilities; and

WHEREAS. 1994 General Plan Policies 4 and 5 and Program 22a direct the City to consider Zoning Ordinance amendments to address building height issues with clear standards and the least intrusive necessary for the public health and safety consistent with State and Federal law; and

WHEREAS, on February 10, 2011, the Planning Commission held a public hearing on the draft ordinance; and

WHEREAS, the minutes of the Planning Commission meeting of February 10, 2011, are attached and incorporated by reference as part of this resolution; and

WHEREAS, a Negative Declaration was adopted by the City Council January 18, 2011, for the 2007-2014 Housing Element, including Program H.B.3.d which the proposed ordinance would implement; and

WHEREAS, the proposed updating of the height limit exceptions is categorically exempt from the California Environmental Quality Act (CEQA) per Sections 15301 and 15303 of the State CEQA Guidelines; the exceptions to the use of this categorical exemption referenced in Section 15300.2 do not apply.

NOW, THEREFORE, based upon the evidence presented, both written and oral, the Planning Commission of the City of Brisbane hereby RECOMMENDS that the City Council adopt the attached ordinance.

_____
JAMEEL MUNIR
Chairman

I hereby certify that the foregoing Resolution No. RZ-2-11 was duly and regularly passed and adopted by the Brisbane Planning Commission at a regular meeting thereof held on February 10, 2011, by the following roll call vote:

AYES:
NOES:
ABSENT:

_____
JOHN SWIECKI
Community Development Director

DRAFT
ORDINANCE NO. ___

AN ORDINANCE OF THE CITY OF BRISBANE AMENDING SECTION 17.32.060 OF THE MUNICIPAL CODE REGARDING HEIGHT LIMIT EXCEPTIONS AND ADDING SECTION 17.32.080 REGARDING REQUESTS FOR REASONABLE ACCOMMODATIONS FOR HOUSING FOR PERSONS WITH DISABILITIES

The City Council of the City of Brisbane hereby ordains as follows:

SECTION 1: Section 17.32.060 of Chapter 17.32, General Use Regulations, is amended to read as follows:

§17.32.060 – Exceptions—Height limit. A. Chimneys which do not exceed three (3) feet in width or depth may exceed the height limit by no more than five (5) feet except as required to comply with the California Building Code.

B. Where cupolas, flag poles, monuments, radio and other towers, water tanks, church steeples, mechanical appurtenances and similar structures are permitted in a district, height limits therefore may be exceeded upon the securing of a use permit. Wireless telecommunications facilities shall be subject to the height exception procedures set forth in Section 17.32.035.

C. Solar energy systems, including those for water heating as well as photovoltaic purposes, to be installed atop existing buildings may exceed the height limit through approval of an administrative permit by the zoning administrator. If the zoning administrator determines that the granting of the permit would not result in a specific adverse impact upon the public health and safety, the zoning administrator shall give written notice of the intended approval to property owners and occupants on both sides of, to the rear of and directly across the street from the site on which the system is proposed to be located. The notice shall generally describe the nature, design and location of the proposed system and advise the recipients that they may submit written comments on the intended decision by a certain date, which shall be not less than ten (10) days from the date of mailing the notice. The notice shall also advise the recipients that they have the right to appeal a decision of the zoning administrator to the planning commission. The zoning administrator shall send a copy of the final decision on the application to each person who has submitted written comments within the time prescribed in the notice.

D. Exceptions to the height limit to accommodate accessibility improvements (such as elevators and wheelchair van garage spaces) may be allowed upon the granting of an accessibility improvement permit by the zoning administrator, following the conduct of a hearing with ten (10) days notice thereof being given to the owners of all adjacent properties. The zoning administrator may issue the accessibility improvement permit if he or she finds and determines that:

1. The exception is necessary to meet special needs for accessibility of a person having a disability which impairs his or her ability to access the property.

2. Visual impacts of the accessibility improvements exceeding the height limit will be minimized.

3. The accessibility improvements will not create any significant adverse impacts upon adjacent properties in terms of loss of privacy, noise or glare.

4. The accessibility improvements will be constructed in a sound and workmanlike manner, in compliance with all applicable provisions of the building and fire codes.

SECTION 2: Section 17.32.080 of Chapter 17.32, General Use Regulations, is added to read as follows:

§17.32.080 – Requests for reasonable accommodations. Modifications or exceptions to the regulations set forth in Title 17 may be requested as reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities, if the accommodation would not impose an undue financial or administrative burden upon the City and would not require a fundamental alteration in the nature of the applicable regulation. Such requests may be granted by the zoning administrator through application for an accessibility improvement permit, following the conduct of a hearing with ten (10) days notice thereof being given to the owners of all adjacent properties. The zoning administrator may issue the accessibility improvement permit if he or she finds and determines that:

A. The accommodation is necessary to meet special needs for a person having a disability and cannot be addressed through the exceptions under Sections 17.32.060 and 17.32.070.

B. Any visual impacts of the accommodation will be minimized.

C. The accommodation will not create any significant adverse impacts upon adjacent properties in terms of loss of privacy, noise or glare.

D. Any construction resulting from the accommodation will be done in a sound and workmanlike manner, in compliance with all applicable provisions of the building and fire codes.

SECTION 3: Where a use permit, design permit, building permit or variance approval has been issued through final action by the City prior to the effective date of this Ordinance, the holder of such permit or approval may proceed to construct the improvements or establish the use authorized by such permit or approval and the same shall be exempted from any conflicting regulations that may be contained in this Ordinance.

SECTION 4: If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Brisbane hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that one or more sections, subsections, sentences, clauses or phrases may be held invalid or unconstitutional.

SECTION 5: This Ordinance shall be in full force and effect thirty days after its passage and adoption.

* * *

The above and foregoing Ordinance was regularly introduced and after the waiting time required by law, was thereafter passed and adopted at a regular meeting of the City Council of the City of Brisbane held on the _____ day of _____, 2011, by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

_____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

REDLINE VERSION OF PROPOSED
CHANGES TO BRISBANE MUNICIPAL CODE SECTION 17.32.060
AND ADDITION OF BIRSBANE MUNICIPAL CODE SECTION 17.32.080
(additions to the current regulations shown in *italics* and deletions shown in ~~strikethrough~~)

17.32.060 – Exceptions—Height limit. A. Chimneys which do not exceed three (3) feet in width or depth may exceed the height limit by no more than ~~four (4)~~ *five (5) feet except as required to comply with the California Building Code*.

B. Where cupolas, flag poles, monuments, radio and other towers, water tanks, church steeples, mechanical appurtenances and similar structures are permitted in a district, height limits therefore may be exceeded upon the securing of a use permit. *Wireless telecommunications facilities shall be subject to the height exception procedures set forth in Section 17.32.035*.

C. *Solar energy systems, including those for water heating as well as photovoltaic purposes, to be installed atop existing buildings may exceed the height limit through approval of an administrative permit by the zoning administrator. If the zoning administrator determines that the granting of the permit would not result in a specific adverse impact upon the public health and safety, the zoning administrator shall give written notice of the intended approval to property owners and occupants on both sides of, to the rear of and directly across the street from the site on which the system is proposed to be located. The notice shall generally describe the nature, design and location of the proposed system and advise the recipients that they may submit written comments on the intended decision by a certain date, which shall be not less than ten (10) days from the date of mailing the notice. The notice shall also advise the recipients that they have the right to appeal a decision of the zoning administrator to the planning commission. The zoning administrator shall send a copy of the final decision on the application to each person who has submitted written comments within the time prescribed in the notice.*

~~In any district with a height limit of less than thirty-five (35) feet, public and semipublic buildings, communication equipment buildings and structures, schools, churches, hospitals and other institutions permitted in such districts may be erected to a height exceeding thirty-five (35) feet, provided that the front, rear and side yards shall be increased by one (1) foot for each foot by which such building exceeds the height limit established for such district.~~

D. *Exceptions to the height limit to accommodate accessibility improvements (such as elevators and wheelchair van garage spaces) may be allowed upon the granting of an accessibility improvement permit by the zoning administrator, following the conduct of a hearing with ten (10) days notice thereof being given to the owners of all adjacent properties. The zoning administrator may issue the accessibility improvement permit if he or she finds and determines that:*

1. The exception is necessary to meet special needs for accessibility of a person having a disability which impairs his or her ability to access the property.

2. Visual impacts of the accessibility improvements exceeding the height limit will be minimized.

3. The accessibility improvements will not create any significant adverse impacts upon adjacent properties in terms of loss of privacy, noise or glare.

4. The accessibility improvements will be constructed in a sound and workmanlike manner, in compliance with all applicable provisions of the building and fire codes.

~~Upon securing of a use permit, any building in any C, O-A, H-1, M, or P-D district may be erected to a height exceeding that specified for such district, provided that the ratio of the square footage of building to gross land area shall not be increased beyond that possible for a building erected within the height limit specified in the district.~~

~~E. On a downslope lot, a garage or carport may exceed the height limit to a maximum height of thirty-five (35) feet.~~

~~F. In any R-district, a gable or hipped roof may exceed the applicable height limit to a maximum height as prescribed in the following table if the midpoint of its slope measured from the peak of the roof to that point vertically above the highest exterior wall (including dormer~~

~~Applicable Height Limit~~	~~Maximum Roof Height~~
~~28 feet~~	~~32 feet~~
~~30 feet~~	~~35 feet~~
~~35 feet~~	~~38 feet~~

~~walls) does not exceed the height limit:~~

17.32.080 Requests for reasonable accommodations. Modifications or exceptions to the regulations set forth in Title 17 may be requested as reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities, if the accommodation would not impose an undue financial or administrative burden upon the City and would not require a fundamental alteration in the nature of the applicable regulation. Such requests may be granted by the zoning administrator through application for an accessibility improvement permit, following the conduct of a hearing with ten (10) days notice thereof being given to the owners of all adjacent properties. The zoning administrator may issue the accessibility improvement permit if he or she finds and determines that:

A. The accommodation is necessary to meet special needs for a person having a disability and cannot be addressed through the exceptions under Sections 17.32.060 and 17.32.070.

B. Any visual impacts of the accommodation will be minimized.

C. The accommodation will not create any significant adverse impacts upon adjacent properties in terms of loss of privacy, noise or glare.

D. Any construction resulting from the accommodation will be done in a sound and workmanlike manner, in compliance with all applicable provisions of the building and fire codes.

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

May 15, 2001

RE: Adoption of A Reasonable Accommodation Procedure

Dear

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]

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[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-

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[3]See 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].

[4]The 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.*)

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

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).

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[6]See, *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.)

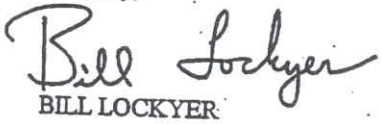
[7] See 42 U.S.C. § 3604(f)(3)(B); Gov. Code, §§ 12987(a), 12989.3(f).

[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].)

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 step[10] 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

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[9]Numerous 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.

CHAPTER 20.160

REQUESTS FOR REASONABLE ACCOMMODATION

20.160.010 Purpose

It is the policy of the City of San Jose to provide reasonable accommodation for persons with disabilities seeking fair access to housing in the application of its zoning laws. The purpose of this Chapter is to provide a process for making a request for reasonable accommodation.

20.160.020 Application

A. Any person who requires reasonable accommodation, because of a disability, in the application of a zoning law which may be acting as a barrier to fair housing opportunities may do so on a form to be provided by the Director.

B. If the project for which the request is being made also requires some other planning permit or approval, then the applicant shall file the request together with the application for such permit or approval.

20.160.030 Required Information

The applicant shall provide the following information:

1. Applicant's name, address and telephone number;

2. Address of the property for which the request is being made;

3. The current actual use of the property;

4. The zoning code provision, regulation or policy from which accommodation is being requested;

5. The bases for the claim that the individual is considered disable under the Fair Housing Act and why the accommodation is necessary to make the specific housing available to the individual.

20.160.040 Notice of Request for Accommodation

Written Notice that a Request for Reasonable Accommodation shall be given as follows:

1. In the event that there is no approval sought other than the request for reasonable accommodation, the Notice shall be mailed to the owners of record of all

properties which are immediately adjacent to the property which is the subject of the Request.

2. In the event that the Request is being made in conjunction with some other process, the Notice shall be transmitted along with the notice of the other proceeding.

20.160.050 Grounds for Accommodation

In making a determination regarding about the reasonableness of a requested accommodation, the following factors shall be considered:

1. Special need created by the disability;

2. Potential benefit that can be accomplished by the requested modification;

3. Potential impact on surrounding uses;

4. Physical attributes of the property and structures;

5. Alternative accommodations which may provide an equivalent level of benefit;

6. In the case of a determination involving a one-family dwelling, whether the household would be considered a single housekeeping unit if it were not using special services that are required because of the disabilities of the residents;

7. Whether the requested accommodation would impose an undue financial or administrative burden on the City; and

8. Whether the requested accommodation would require a fundamental alteration in the nature of a program.

20.160.060 Notice of Proposed Decision

1. Notice of the proposed decision shall be made in the same manner as provided above.

2. Within ten (10) days of the date the Notice is mailed, any person may make a request for a Director's Hearing upon a proposed decision.

3. If no request for hearing is received the proposed decision shall become a final Director's Decision.

20.160.070 Director's Hearing

The Director shall conduct a hearing on the Request for Reasonable Accommodation at which all reasonable evidence and credible testimony shall be considered.

20.160.080 Notice of Director's Decision

A. Within thirty (30) days after the Hearing, the Director shall issue a decision granting the request, including any reasonable conditions, or denying the request.

B. The Notice of Decision shall contain the Director's factual findings, conclusions and reasons for the decision.

C. The Notice of Decision shall be made in the same manner as set forth in the previous section.

20.160.090 Appeal to Planning Commission

A. Within thirty (30) days after the Notice of Director's Decision, any person may appeal in writing to the Planning Commission.

B. All appeals shall contain a statement of the grounds for the appeal.

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Website: www.sanjoseca.gov/planning

Process for Requests for REASONABLE ACCOMMODATION

Policy:
Effective Date: April 3, 1998. It is the policy of the City of San Jose to provide reasonable accommodation for persons with disabilities seeking fair access to housing in the application of its zoning laws, policies, and processes. A person with disabilities is someone who has a "physical or mental impairment which substantially limits one or more of such person's major life activities." Laws, which protect persons with disabilities against discrimination, include within their protection, persons who are recovering from addictions to alcohol or narcotics so long as they are not currently using the substances.

Process:
If no other land use permit is required, you may submit a request for Reasonable Accommodation directly to the Development Services Center at 200 E. Santa Clara St. 2nd floor. Staff can FAX you a copy of the application by calling the Planning Division at 408-535-3555. If a land use permit is also required, then the request for Reasonable Accommodation should be submitted concurrently with the land use permit (e.g., Conditional Use Permit). When submitted concurrently, the procedure will be the same as for the land use permit and you should refer to the land use permit application for the appropriate procedures, including noticing and hearing. Typically, such permits require an appointment for submittal.

Procedure:

1. The applicant submits a Request for Reasonable Accommodation along with associated application fee.

2. Within **thirty (30)** days of the application, a Notice of Decision will be issued by the Director of Planning and mailed to the applicant, adjacent property owners/ occupants and any requesting party. During the thirty day time-frame, additional information may be requested by staff and a site visit may be scheduled.

3. Within ten (10) days of the Notice of Decision being mailed, any person may make a request in writing for a Director's Hearing. If no request is received, then the decision of the Director of Planning will be final.

4. If a hearing is requested, such hearing will take place at the next reasonably available Director's Hearing. Director's Hearings are scheduled every Wednesday (except for the first Wednesday of the month) in the City Council Chambers at 9:00 a.m. The Director shall issue a decision granting the request, including any reasonable conditions, or denying the request and include the Director's factual findings, conclusions and reasons for the decision. The decision will be mailed to the applicant and adjacent property owners and/or occupants.

5. Within thirty (30) days of the Notice of the Director's decision, any person may appeal in writing to the Planning Commission. Any such appeal should be mailed to the Planning Commission in care of the Department of Planning, Building and Code Enforcement. All appeals shall contain a statement of the grounds for appeal.

6. The Planning Commission shall hold a Public Hearing on the appeal. Planning Commission public hearings are held approximately two (2) Wednesday evening per month at 6:30 p.m. The decision of the Planning Commission shall be final. Copies of the resolution of the Planning Commission decision will be sent to the applicant, the appealing party, and any adjacent property owners and occupants.

See page 2 for a flowchart of the Process.

Grounds for Reasonable Accommodation:
In making a determination regarding the reasonableness of a requested accommodation, the following factors shall be considered:

- Special needs created by the disability
- Potential benefit that can be accomplished by the requested modification
- Potential impact on surrounding uses
- Physical attributes of the property and structures
- Alternative accommodations which may provide an equivalent level of benefit
- In the case of a determination involving a single family dwelling, whether the household would be considered a single housekeeping unit if it were not using special services that are required because of the disabilities of the residents
- Whether the requested accommodation would impose an undue financial or administrative burden on the City

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- Whether the requested accommodation would require a fundamental alteration in the nature of a program

Definitions:
The following definitions (Chapter 20.200) may be helpful to review prior to applying for a Reasonable Accommodation Request:

Dwelling, one family or one-family dwelling is a detached building of permanent character placed in a permanent location which is designed or used for residential occupancy by one family. A single mobilhome on a foundation system on a single lot is included within this definition. All rooms within a one-family dwelling must be integral to each other.

Family is one or more persons occupying a premises and living as a Single Housekeeping Unit.

Residential Care Facility is a facility licensed by the State of California where care, services, or treatment is provided to persons living in a community residential setting.

Residential Service Facility is a residential facility, other than a Residential Care Facility or a Single Housekeeping Unit, where the operator receives compensation for the provision of personal services, in addition to housing, including but not limited to, protection, supervision, assistance, guidance, training, therapy or other non-medical care.

Single Housekeeping Unit is the functional equivalent of a traditional family; whose members are a nontransient interactive group of persons jointly occupying a single dwelling unit, including the joint use of common areas, and sharing household activities and responsibilities such as meals, chores, and expenses.

Zoning Districts:
A request for Reasonable Accommodation may be submitted on behalf of any disabled person(s) from any City of San Jose Zoning Code provision or policies. The attached table, entitled "Table-A", provides a general guide to uses and the appropriate zoning districts.

Any questions regarding the Reasonable Accommodation procedure should be addressed to the City of San Jose, Department of Planning, Building, and Code Enforcement at 408-535-3555.

To arrange an accommodation under the Americans With Disabilities Act to participate in any public meeting, please call 408-535-3555 at least 48 hours before the meeting.

REASONABLE ACCOMMODATION PROCESS FLOWCHART

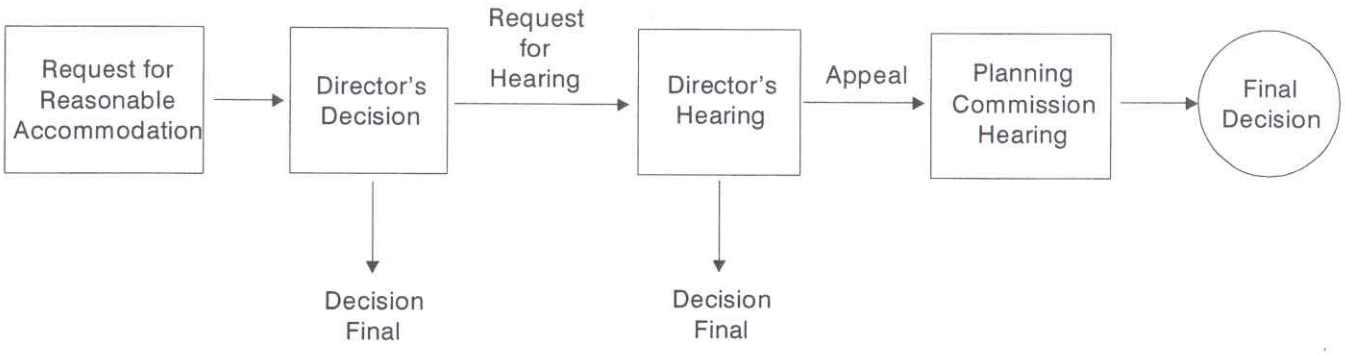

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TABLE A

USE/ZONING DISTRICT	R-1	R-2	R-M	R-MH	COMMERCIAL
Single Family Dwelling (Single Housekeeping Unit)	P	P	P	CUP	No
Residential Care Facility ≤6 (State License)	P	P	P	P	No
Residential Service Facility ≤6 (No State License)	P	P	P	P	No
Residential Care Facility >6 (State License)	No	No	CUP	CUP	CUP
Residential Service Facility >6 (No State License)	No	No	CUP	CUP	CUP

P -Permitted

No -Not Permitted

CUP -Conditional Use Permit

Note: Zoning Ordinance provisions are subject to requests for Reasonable Accommodation.

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Request for REASONABLE ACCOMMODATION

(pursuant to SJMC Chapter 20.160)

Under Section 20.160.010 of the San Jose Municipal Code, the City of San Jose seeks to provide reasonable accommodation for persons with disabilities seeking fair access to housing in the application of City zoning laws. The purpose of this application form is to commence the process for making a request for reasonable accommodation.*

FILE NUMBER ***(to be completed by staff)*** **RA**		RECEIPT # _____
NAME OF APPLICANT/Relationship to person(s) with disability ***(Please Print)***		AMOUNT _____
DAYTIME PHONE NUMBER ( )	FAX NUMBER ( )	DATE _____ BY _____
AFFILIATION OR ORGANIZATION: *(if applicable)*		
ADDRESS OF PROPERTY:	ASSESSOR'S PARCEL NUMBER (APN):	
MAILING ADDRESS: *(if different from above)*		
PROPERTY OWNER: *(if different from above)*	PROPERTY OWNER'S MAILING ADDRESS:	
CURRENT USE OF THE PROPERTY:		

1. **Request For Accommodation:**

   a. Specify any requested accommodations to a code, policy or practice of the City of San Jose. Please cite the applicable code provisions and the accommodation requested from the provision.

   b. What is the basis for the claim that the person or persons on behalf of which this application is being made is considered Disabled under the Fair Housing Act?

   c. Why is the accommodation necessary to make specific housing available to those persons?

**** Please feel free to answer questions on a separate page(s) and use additional pages as necessary.***

REASONABLE ACCOMMODATION REQUEST

2. **Please provide information regarding each of the following criteria:**

   a. Special needs created by the disability.

   b. Potential benefit that can be accomplished by the requested modification.

   c. Potential impact on surrounding uses.

   d. Concise physical description of the property. Please attach floor plan and site plan (need not be to scale, but please dimension site plan and indicate parking).

   e. Alternative accommodations which may provide an equivalent level of benefit.

   f. In the case of a determination involving a single family dwelling, whether the household would be considered a Single Housekeeping Unit if it were not using special services that are required because of the disabilities of the residents.

   g. Whether the requested accommodation would impose an undue financial or administrative burden on the City.

   h. Whether the requested accommodation would require a fundamental alteration in the nature of a program.

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.

REASONABLE ACCOMMODATION REQUEST

3. **Other Information:**

a. Do you have a county, state or federal license or certification with respect to the use of property? If yes, attach a copy of applicable document(s). ☐ Yes ☐ No

b. Are any alterations planned to the property? ☐ Yes ☐ No
If yes, please describe.

c. Will the property be identified by a name or sign? ☐ Yes ☐ No

d. Will the property contain a staff office? ☐ Yes ☐ No

e. Does the property have on-site parking? ☐ Yes ☐ No
If yes, how many spaces? _____

f. Please describe all services to be offered on the premises:

g. Do you provide services at the property to non-residents? ☐ Yes ☐ No

h. Proposed maximum number of residents on the property:

Adults: _____ Children: _____ Typical length of stay for residents: _____

i. Proposed number of staff members:

Total Staff: _____ Resident: _____ Non-Resident: _____

j. Have any neighbors been contacted regarding this proposal? ☐ Yes ☐ No
If yes, describe how they were contacted.

k. If neighbors have immediate concerns regarding residents or the operation of the facility, who should they contact?

Name: _____ Telephone Number: _____

4. Please attach a list of the adjacent property owners. Adjacent is defined as sharing a property line or located directly across the street from the proposed location. You will also need to provide two (2) sets of stamped envelopes addressed to the adjacent property owners and occupants. A self help area is available at the Planning Department to assist you in locating property owner addresses. Please do not include a return address on the envelopes as Planning staff will use the envelopes to mail the required notices.

Signature of Applicant	Date

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REASONABLE ACCOMMODATION REQUEST

Date:_____

Recommendation(s) of the Advisory Committee:	
The recommendation of the Advisory Committee on the request for a Reasonable Accommodation Request is to: ☐ Grant ☐ Grant with Conditions ☐ Deny	
If the Advisory Committee recommends to the Grant with Conditions, the following terms apply:	
The request for a Reasonable Accommodation is: ☐ Granted ☐ Granted with Conditions Noted Below ☐ Denied	
Findings:	
Signature	Date

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.

Division XIII. - Reasonable Accommodation

21.25.1301 - Purpose.
21.25.1303 - Definitions.
21.25.1305 - Notice to the public of availability of accommodation process.
21.25.1307 - Requesting reasonable accommodation.
21.25.1309 - Jurisdiction.
21.25.1311 - Required findings.
21.25.1313 - Appeals.
21.25.1315 - Reasonable accommodation relating to requests for increased occupancy of group homes.
21.25.1317 - Fee.

21.25.1301 - Purpose.

It is the policy of the City, pursuant to the Federal Fair Housing Amendments Act of 1988, to provide people with disabilities reasonable accommodation in rules, policies, practices and procedures that may be necessary to ensure equal access to housing. The purpose of this Division is to provide a process for individuals with disabilities to make requests for reasonable accommodation in regard to relief from the various land use, zoning, or building laws, rules, policies, practices and/or procedures of the City.
(Ord. C-7639 § 1, 1999).

21.25.1303 - Definitions.

A. **Act.** The Fair Housing Amendments Act of 1988.
B. **Applicant.** An individual making a request for reasonable accommodation pursuant to this Division.
C. **Code.** The Long Beach Municipal Code.
D. **Department.** The Department of Planning and Building of the City of Long Beach.
E. **Disabled Person.** Any person who has a physical or mental impairment that substantially limits one or more major life activities; anyone who is regarded as having such impairment; or anyone who has a record of such impairment. People who are currently using illegal substances are not covered under the Act or this Division unless they have a separate disability.
F. **Group Home.** Refers to any and all facilities which are regulated by the provisions of the California Community Care Facilities Act (Health & Safety Code Section 1500 et seq.), the California Residential Care Facilities for the Elderly Act (Health & Safety Code Section 1569) or any alcoholism or drug abuse recovery or treatment facility as defined by Health & Safety Code Section 11834.02 or any successor statutes.
G. **Increased Occupancy.** Refers to a request to increase the number of individuals permitted or licensed by State or local law to occupy a group home.

(Ord. C-7639 § 1, 1999).

21.25.1305 - Notice to the public of availability of accommodation process.

The Department of Planning and Building shall prominently display in both the Development Services Center and the Planning Bureau a notice advising those with disabilities or their representatives that they may request a reasonable accommodation hearing in accordance with the procedures established in this Division.
(Ord. C-7639 § 1, 1999).

21.25.1307 - Requesting reasonable accommodation.

A. In order to make specific housing available to an individual with a disability, a disabled person or representative may request reasonable accommodation relating to the various land use, zoning, or building laws, rules, policies, practices and/or procedures of the City.
B. If an individual needs assistance in making the request for reasonable accommodation, or appealing a determination regarding reasonable accommodation, the Department will endeavor to provide the assistance necessary to ensure that the process is accessible to the applicant or representative. The applicant shall be entitled to be represented at all stages of the proceeding by a person designated by the applicant.

C. A request for reasonable accommodation in laws, rules, policies, practices and/or procedures may be filed on an application form provided by the Department at any time that the accommodation may be necessary to ensure equal access to housing.

(Ord. C-7639 § 1, 1999).

21.25.1309 - Jurisdiction.

A. **Zoning Officer/Building Official.** The Zoning Officer, or Building Official, as appropriate, shall have the authority to consider and act on requests for reasonable accommodation. When a request for reasonable accommodation is filed with the Department, it will be referred to the Zoning Officer or Building Official for review and consideration. The Zoning Officer or Building Official shall issue a written determination within thirty (30) days of the date of receipt of a completed application and may (1) grant the accommodation request, (2) grant the accommodation request subject to specified nondiscriminatory conditions, or (3) deny the request. All written determinations shall give notice of the right to appeal and the right to request reasonable accommodation on the appeals process, if necessary. The notice of determination shall be sent to the applicant by certified mail, return receipt requested.

B. If necessary to reach a determination on the request for reasonable accommodation, the Zoning Officer or Building Official may request further information from the applicant consistent with this Division, specifying in detail what information is required. In the event a request for further information is made, the thirty (30) day period to issue a written determination shall be stayed until the applicant responds to the request.

(Ord. C-7639 § 1, 1999).

21.25.1311 - Required findings.

The following findings must be analyzed, made and adopted before any action is taken to approve or deny a request for reasonable accommodation and must be incorporated into the record of the proceeding relating to such approval or denial:

A. The housing, which is the subject of the request for reasonable accommodation, will be used by an individual protected under the Act.

B. The request for reasonable accommodation is necessary to make specific housing available to an individual protected under the Act.

C. The requested reasonable accommodation will not impose an undue financial or administrative burden on the City.

D. The requested accommodation will not require a fundamental alteration of the zoning or building laws, policies and/or procedures of the City.

E. For housing located in the coastal zone, a request for reasonable accommodation under this Section shall be approved by the City if it is consistent with Subsections 21.25.1311.A through 21.25.1311.D above, and the certified Local Coastal Program. Where a request for reasonable accommodation is not consistent with the certified Local Coastal Program, the City may waive compliance with an otherwise applicable provision of the Local Coastal Program and approve the request for reasonable accommodation if the City finds:

1. The requested reasonable accommodation is consistent, to the maximum extent feasible, with the certified Local Coastal Program; and,
2. There are no feasible alternative means for providing an accommodation at the property that would provide greater consistency with the certified Local Coastal Program.

(Ord. C-7726 § 2, 2001; Ord. C-7639 § 1, 1999).

21.25.1313 - Appeals.

A. Within thirty (30) days of the date the Zoning Officer or Building Official issues a written determination, the applicant requesting the accommodation may appeal an adverse determination or any conditions or limitations imposed in the written determination.

B. All appeals shall contain a statement of the grounds for the appeal.

C. Appeals shall be to the Planning Commission who shall hear the matter and render a determination as soon as reasonably practicable, but in no event later than sixty (60) days after an appeal has been filed. All determinations on appeal shall address and be based upon the same findings required to be made in the original determination from which the appeal is taken.

D. An applicant may request reasonable accommodation in the procedure by which an appeal will be conducted.

(Ord. C-7639 § 1, 1999).

21.25.1315 - Reasonable accommodation relating to requests for increased occupancy of group homes.

A. All requests for reasonable accommodation relating to increased occupancy of a group home shall be filed first with the City's Zoning Officer.

B. The Zoning Officer may hold a hearing on a request for reasonable accommodation relating to the increased occupancy of a group home, or may instead, at his/her sole discretion, refer the application to the Planning Commission for hearing. If the Zoning Officer acts on a request for reasonable accommodation pursuant to this Section, the Zoning Officer shall hear the matter and issue a written determination within thirty (30) days of the date of receipt of a completed application. If the Planning Commission acts on a request for reasonable accommodation pursuant to this Section, the Planning Commission shall hear the matter and render a determination as soon as reasonably practicable, but in no event later than sixty (60) days of receipt of a completed application.

C. Notice of hearing pursuant to this Section shall be provided not less than fourteen (14) days prior to the hearing and shall be mailed or delivered to all owners of real property as shown on the latest equalized assessment roll within three hundred feet (300') of the real property that is the subject of the hearing. In all cases under this Section, the applicant shall bear the cost of the radius mailing.

D. The Zoning Officer or Planning Commission acting pursuant to this Section, shall (1) grant the accommodation request, (2) grant the accommodation request subject to specified nondiscriminatory conditions, including, but not limited to, a condition requiring the applicant to show proof of any required State license for the activity or occupancy contemplated, or (3) deny the request.

E. The Zoning Officer or Planning Commission, as appropriate, shall explain, in writing, the basis of the determination including the Zoning Officer's or Planning Commissioner's findings on the criteria set forth in Section 21.25.1311. All written determinations shall give notice of the right to appeal and the right to request reasonable accommodation on the appeals process, if necessary. The notice of the determination shall be sent to the applicant by certified mail, return receipt requested.

F. Within thirty (30) days of the issuance of a written determination on the hearing conducted pursuant to this Section, any aggrieved party within the meaning of this Code, may file an appeal from the determination of the Zoning Officer or Planning Commission. Appeals from a determination of the Zoning Officer shall be to the Planning Commission, appeals from a determination of the Planning Commission shall be to the City Council. All appeals shall contain a statement of the grounds for the appeal.

G. Appeals to the Planning Commission or City Council pursuant to this Section shall be heard as soon as reasonably practicable, but in no event later than sixty (60) days after an appeal has been filed. All determinations on appeal shall address and be based upon the same findings required to be made in the original determination from which the appeal is taken.

(Ord. C-7639 § 1, 1999).

21.25.1317 - Fee.

There shall be no fee imposed in connection with a request for reasonable accommodation under the provisions of this Division, except that a fee equivalent to the fee imposed for an administrative use permit shall be required if the application for reasonable accommodation relates to an increase in the occupancy of a group home.

(Ord. C-7639 § 1, 1999).

Fair Housing Reasonable Accommodation:

A Guide to Assist Developers and Providers of Housing for People with Disabilities in California

Mental Health Advocacy Services, Inc.

Project funded by a grant from the
U.S. Department of Housing and Urban Development
Fair Housing Initiatives Program
Education and Outreach Initiative --
Disability Component
(Grant # FH400G03019)

MENTAL HEALTH ADVOCACY SERVICES, INC.

Mental Health Advocacy Services, Inc. (MHAS) is a private, non-profit public interest law office that has provided legal services to people with mental and developmental disabilities since 1977. In addition to assisting individual clients, MHAS serves as a resource to the community by providing training and technical assistance to consumers, advocates, and attorneys, as well as public and private agencies.

One of MHAS' priorities is to increase access to housing for people with disabilities. A primary focus of MHAS' fair housing advocacy is helping non-profit developers overcome barriers to the development of critically needed affordable housing. MHAS has worked with affordable housing developers in almost every phase of the project approval process, from attending meetings with planning officials to developing fair housing educational materials to address neighborhood opposition.

This guide was developed as part of MHAS' 2004-05 "Getting It Built" project, which was funded by a grant from the U.S. Department of Housing & Urban Development's Fair Housing Initiatives Program. The project has provided fair housing training and technical assistance to affordable housing developers and other organizations involved in the development of housing for people with disabilities in seven southern California counties: Los Angeles, Orange, Riverside, San Diego, Santa Barbara, Ventura and Fresno Counties.

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Los Angeles, CA 90010
(213) 389-2077
www.mhas-la.org

February 2005

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INTRODUCTION

Despite over a decade of progress in fighting unlawful discrimination, today affordable housing developers face many challenges in getting housing for people with disabilities built. All too often, one of the most significant challenges is overcoming local land use and zoning regulations and practices that restrict or even prohibit the development and siting of housing for people with disabilities. Likewise, housing providers who wish to use existing housing in residential zones that is appropriate for people with disabilities are also frequently restricted by local regulations that impede such a use.

This guide has been prepared for those who develop or provide affordable housing for people with disabilities to explain how fair housing laws can be used to overcome restrictive local land use and zoning regulations. Fair housing laws, particularly the reasonable accommodation provisions, have often been overlooked by developers and providers as a way of remedying obstacles in the provision of housing. First, the guide provides an overview of fair housing laws, explaining how these civil rights laws protect people with disabilities in housing and, more specifically, how housing developers and providers can use the reasonable accommodation provisions of the law in getting their housing built. Next, the guide explains how housing developers and providers should make requests for reasonable accommodations and the legal basis by which local governments should evaluate those requests. Lastly, the guide offers some examples of the reasonable accommodations that housing developers and providers may need and, based on case law, have a likelihood of obtaining from local government.

FAIR HOUSING LAWS PROTECT THE DEVELOPMENT AND USE OF HOUSING FOR PEOPLE WITH DISABILITIES

The Law Prohibits Discriminatory Land Use and Zoning Regulations that Deny Housing Opportunities to People with Disabilities

The federal **Fair Housing Amendments Act of 1988** (the Act) makes it illegal to discriminate in housing against individuals based on their race, color, religion, gender, national origin, familial status (families with children) or disability.[1] The Act prohibits local governments from making housing opportunities unavailable to people with disabilities through discriminatory land use and zoning rules, polices, practices and procedures. The legislative history of the Act recognizes that zoning code provisions have discriminated against people with disabilities by limiting opportunities to live in the community in congregate or group living arrangements.

> While state and local governments have authority to protect safety and health and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals to live in communities. This has been accomplished by such means as the enactment or imposition of . . . land use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against people with disabilities.[2]

(Emphasis added.)

G.2.32.

> ***A person with a disability*** *is someone who has a physical or mental impairment that limits a major life activity; has a record of such impairment; or is regarded as having such an impairment.*[3] *People in recovery for substance abuse are also protected by fair housing laws; however, current users of illegal controlled substances are not protected by fair housing laws unless they have a separate disability.*[4]

California's own fair housing statute, the **Fair Employment and Housing Act** (FEHA), prohibits discrimination on the same bases as federal law and also four additional bases: marital status, ancestry, sexual orientation and source of income.[5] The FEHA explicitly prohibits discriminatory "public or private land use practices, decisions and authorizations" including, but not limited to, "zoning laws, denials of permits, and other [land use] actions . . . that make housing opportunities unavailable" to people with disabilities.[6] In enacting state fair housing laws, the California Legislature made the following findings, which recognized that land use practices have discriminated against group living arrangements for individuals with disabilities:

a. That public and private land use practices, decisions, and authorizations have restricted, in residentially zoned areas, the establishment and operation of group housing, and other uses.

b. That people with disabilities . . . are significantly more likely than other people to live with unrelated people in group housing.

c. That this act covers unlawful discriminatory restrictions against group housing for these people.[7]

The protections afforded people with disabilities also extend to those associated with them. Providers and developers of housing for people with disabilities have "standing" to file a court action alleging a violation under either federal or state fair housing laws or seek administrative relief from a federal agency (U.S. Department of Housing and Urban Development) or state agency (California Department of Fair Employment and Housing). The federal Fair Housing Amendments Act is much broader than other civil rights laws in that anyone suffering a "distinct and palpable injury" as the result of another's discriminatory act may sue. The injured party does not need to be the target of discrimination.[8] Thus, persons prevented from providing housing for individuals with disabilities because of a municipality's discriminatory acts have standing to sue under the Act or FEHA.[9]

Proving Discrimination Under Fair Housing Laws

The federal Act and California's FEHA prohibit both intentional discrimination and zoning rules and regulations that have the effect of discriminating against housing for people with disabilities. This two-pronged basis is particularly important in relation to the development and use of housing for people with disabilities. In many instances, zoning regulations that are facially neutral have an adverse impact that results in the denial of housing opportunities to people with disabilities.

Intentional Discrimination - *When a local government's land use or zoning code illegally singles out and treats housing for people with disabilities in an adverse manner, it is intentionally discriminating.*

When a local government's land use or zoning code illegally singles out and treats housing for people with disabilities in an adverse manner, it is intentionally discriminating. For example, a zoning provision that specifically prohibits the development of group homes for people with disabilities in single family residential zones is discriminatory on its face. To prove discriminatory intent, an individual need only show that disability was one of the factors considered by the city or county in making a land use or zoning decision.[10] Intentional discrimination may include actions or decision-making that is motivated by stereotypes, prejudices, unfounded fears or misperceptions about people with disabilities. Elected officials that adopt the discriminatory animus of neighborhoods or communities may face liability under fair housing laws.[11]

Discriminatory Effect - *Discrimination may also be established by proving that a particular practice has a disparate impact on people with disabilities. Discriminatory intent need not be proven.*

Discrimination may also be established by proving that a particular practice has a disparate impact on people with disabilities. Discriminatory intent need not be proven. Effect, not motivation, is the touchstone.[12] For example, a zoning ordinance limiting the number of unrelated persons that may reside together in a single family residential zone through a restrictive definition of "family," without singling out any particular group, has the effect of discriminating against people with disabilities who frequently live together in congregate living arrangements.

Both of the foregoing examples of zoning regulations are illegal under fair housing laws because, either intentionally, or in effect, the restrictions deny housing opportunities to people with disabilities. While case law has established that a federal fair housing law violation may be proven through disparate impact, California law has codified that a victim may establish liability solely on the basis of discriminatory effect.[13] Land use and zoning regulations that are intentionally discriminatory must be eliminated from a local zoning code; a city or county may be liable if it continues to rely on provisions that violate fair housing laws. Local governments should also remove from their zoning code regulations that have an adverse or disparate impact on housing for people with disabilities. However, for developers and providers of housing for people with disabilities who need to move forward on a particular project, often the most expedient method is to seek a reasonable accommodation. Nevertheless, an offer of reasonable accommodation will not cure an intentionally discriminatory zoning regulation.[14]

DEVELOPERS AND PROVIDERS OF HOUSING FOR PEOPLE WITH DISABILITIES MAY SEEK REASONABLE ACCOMMODATIONS TO OVERCOME LAND USE AND ZONING RESTRICTIONS

Local Governments Must Make Reasonable Accommodations in Their Land Use and Zoning Regulations for Housing for People with Disabilities

In addition to not discriminating against people with disabilities, under both federal and state fair housing laws cities and counties have an affirmative duty to provide **reasonable accommodation** in land use and zoning rules, policies, practices and procedures where it may be necessary to provide individuals with disabilities equal opportunity in housing.[15] While fair housing laws intend that all people have equal access to housing, the law also recognizes that people with disabilities may need extra tools to achieve equality. Reasonable accommodation is one of the tools that is intended to further housing opportunities for people with disabilities.

For developers and providers of housing for people with disabilities who are often confronted with siting or use restrictions, reasonable accommodation provides a means of requesting from the local government flexibility in the application of land use and zoning regulations or, in some instances, even a waiver of certain restrictions or requirements because it is necessary to achieve equal access to housing.[16] Cities and counties are required to consider requests for accommodations related to housing for people with disabilities and provide the accommodation when it is determined to be "reasonable" based on fair housing laws and the case law interpreting the statutes.

Examples of reasonable accommodations involving land use, zoning and building requirements:

- *A special needs housing developer wishes to develop a 12-unit multi-family building in a low density commercial zone, bordered by a residential district, because the property is within close proximity to the mental health services which will be used by the residents with disabilities. The developer seeks a waiver of the prohibition against residential uses in commercial zones.*
- *A housing provider or developer seeks from its local government waiver of a residential fence height restriction so that many of the residents of the home, who because of their mental disabilities fear unprotected spaces, may use the backyard.*
- *A housing provider requests deviation from the code for installation of a wheelchair ramp at an existing home that will be used by people with disabilities.*

The Reasonable Accommodation Analysis: How Requests Will Be Evaluated

A statutorily based four-part analysis is used in evaluating requests for reasonable accommodation related to land use and zoning matters and is incorporated in those reasonable accommodation procedures which have been adopted thus far by California jurisdictions. This analysis gives great weight to furthering the housing needs of people with disabilities and also considers the impact or effect of providing the requested accommodation on the City and its overall zoning scheme. Developers and providers of housing for people with disabilities must be ready to address each element of the following four-part analysis.

- The housing that is the subject of the request for reasonable accommodation is for people with disabilities as defined in federal or state fair housing laws;
- The reasonable accommodation requested is necessary to make specific housing available to people with disabilities who are protected under fair housing laws;
- The requested accommodation will not impose an undue financial or administrative burden on the local government; and
- The requested accommodation will not result in a fundamental alteration in the local zoning code.

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Initially, developers and providers of housing for people with disabilities must establish that the housing is specifically for people with disabilities. In most instances, this threshold requirement can be met by describing generally the use of the dwelling, such as licensed residential care facility, home for transitional age youth with disabilities, or sober living home for those in recovery. An applicant seeking a reasonable accommodation is not required to identify the nature or severity of the disabilities of the residents.[17] In California, housing developers and providers should rely on the FEHA definition of "disability" because it is more inclusive than the federal Act definition.[18]

Second, the accommodation sought must be <u>necessary</u> to make the specific housing available to people with disabilities. To establish that the accommodation is necessary, it must be shown that, without the accommodation, people with disabilities will be denied the equal opportunity to live in a residential neighborhood.[19] In other words, "but for the accommodation," the housing would not be available and a housing opportunity for people with disabilities would be denied. Determining whether an accommodation is necessary entails a "fact specific inquiry regarding each such request," meaning that

Housing developers and providers have obtained accommodations to increase the number of residents based on economic necessity, but a court would require very specific evidence that the number of residents proposed for the housing was necessary to make the project economically viable.

each request is evaluated based on the particular set of facts.[20] For example, housing developers and providers have obtained accommodations to increase the number of residents based on economic necessity but, as discussed in the Examples section (see page 11), a court would require very specific evidence that the number of residents proposed for the housing was necessary to make the project economically viable.

Once a developer or housing provider establishes protection under the law and that the requested accommodation is necessary, then the accommodation must be provided unless the local government presents persuasive evidence that doing so would either create an undue burden or result in a fundamental alteration of the zoning code. Establishing either of these burdens makes the accommodation "unreasonable" and is the basis for denying the requested accommodation. As for "undue burden," in the land use and zoning context many requests for accommodation will be requests to modify or waive a regulation or procedure. It costs a jurisdiction nothing to a waive a rule, meaning that " . . . the accommodation amounts to nothing more than a request for non-enforcement of a rule." In those instances, a city would not be likely to demonstrate undue burden.[21]

In addition to not imposing an undue financial or administrative burden, a reasonable accommodation must also not result in the fundamental alteration in the nature of a program.[22] In the land use and zoning context, "fundamental alteration in the nature of the program" means an alteration so far-reaching that it would change the essential zoning scheme of a municipality. The courts have generally held that the granting of an exception for one dwelling that provides housing for people with disabilities does not change the residential character of a neighborhood and therefore does not result in a fundamental alteration in the nature of a program.[23]

In those instances in which a local government intends to deny a requested accommodation because it would be a burden or result in a fundamental alteration, it is appropriate for the jurisdiction to engage in an "interactive process" (a requisite in employment discrimination cases) and propose an alternative accommodation that could achieve a comparable result. While the case law is unclear as to whether a local government is required to do so, in practice local governments often negotiate an alternative accommodation.[24]

Developers and Providers Should Seek Reasonable Accommodations Instead of Using Existing Entitlement Procedures

Today, many local governments have yet to adopt fair housing reasonable accommodation procedures, and they continue to instruct developers and housing providers that exceptions to land use or zoning regulations are provided through a conditional use permit or variance process. There are a number of reasons why developers and providers of housing for people with disabilities should not use existing entitlement procedures when they need to deviate from land use and zoning regulations.

The first reason that existing entitlement procedures should be rejected is that both the conditional use permit and variance processes involve a public notice and hearing which often creates a forum for neighborhood opposition that may unduly influence decision-makers. And, a number of courts have held that a fair housing reasonable accommodation is not provided by requiring a developer or provider of housing for people with disabilities to submit to a conditional use permit or variance process. Going through such a process has a discriminatory effect because it requires a public notice and hearing that can stigmatize prospective residents with disabilities.[25] The courts have also recognized that the variance process is lengthy, costly and burdensome.[26]

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Developers and providers of housing for people with disabilities know well that the public nature of the conditional use permit and variance process can be a catalyst for organizing opposition, and NIMBY sentiments can delay or even stop the development or siting of housing for people with disabilities. Strong opposition can persuade an elected official to vote against a housing project or lead a developer or housing provider to abandon a project because of the hostility that future residents with disabilities will have to face in the neighborhood. A reasonable accommodation procedure is unlikely to have the degree of public notification and hearing process that is found in virtually all entitlement procedures.

The second reason that existing conditional use permit and variance processes should be avoided is that both entitlement procedures apply the wrong standard in determining whether to grant or deny the requested relief. Issuance of a conditional use permit requires a determination that the proposed use will not be materially detrimental to the character of the immediate neighborhood and that it will be in harmony with the various elements and objectives of the local government's General Plan. Equally problematic from a fair housing perspective is that a local government may impose any conditions on the use of the property that are deemed necessary to ensure this compatibility.

To obtain a variance, an applicant must make a showing of "hardship" based on certain unique physical characteristics of the subject property. In contrast, a request for reasonable accommodation must establish that relief from the zoning code is necessary for individuals with disabilities to have equal access to use and enjoy housing. A jurisdiction cannot comply with its duty to provide reasonable accommodation if it applies a standard that looks at the physical characteristics of the property instead of considering need based on the disabilities of the residents of the housing.

In a fair housing reasonable accommodation procedure, once an applicant establishes that the accommodation is necessary to overcome barriers related to disability, the request should be granted unless a jurisdiction can demonstrate that the accommodation will impose an undue financial or administrative burden on the jurisdiction or that the accommodation will result in a fundamental alteration of the local zoning code. These two factors require that the city or county demonstrate that the requested accommodation is "unreasonable." In the variance process, the focus is shifted away from the needs of people with disabilities. The local government will determine whether granting the variance will be "materially detrimental to the public welfare, or injurious to the property or improvements in the same zone or vicinity in which the property is located." In a reasonable accommodation procedure, the possible adverse impacts in the surrounding areas cannot defeat the needs of the people with disabilities to have access to housing.

In May 2001, California's Attorney General, Bill Lockyer, sent a letter to every California city and county, encouraging them to amend their zoning ordinances to add a procedure for handling requests for reasonable accommodations made pursuant to state and federal fair housing laws.

The importance of local governments adopting reasonable accommodation procedures for local land use and zoning regulations received statewide attention in May 2001 from California's Attorney General, Bill Lockyer. Mr. Lockyer sent a letter to the mayor of every California city and the president of every county board of supervisors, encouraging them to amend their zoning ordinances to add a procedure for handling requests for reasonable accommodations made pursuant to state and federal fair housing laws. The Attorney General counsels against exclusive reliance on existing variance or conditional use permit procedures for handling requests for reasonable accommodations because they do not use fair housing legal standards, and, furthermore, local jurisdictions have an affirmative duty to provide reasonable accommodation. The Attorney General also recognizes that community opposition is invited through a conditional use permit process, and such opposition is often grounded in stereotypical assumptions about people with disabilities and unfounded concerns about the impact of such housing on surrounding property values. A copy of the Attorney General's letter is included at the end of this guide (see page 17).

How to Make a Request for Reasonable Accommodation if the Local Government Does Not Have a Written Procedure for Doing So

Local governments have an affirmative duty to consider requests for reasonable accommodation regardless of whether they have a written procedure in place for making such a request. Initially, an inquiry should be made to the local government's planning department to determine whether there is an established procedure for seeking an accommodation. If there is not a written procedure, then the request for reasonable accommodation should be made in writing. A developer or provider of housing for people with disabilities requesting a reasonable accommodation must be prepared to address each of the points of analysis set forth above.

> *It is highly recommended that, should a local government assert that a developer or provider must make a request for reasonable accommodation within an entitlement process, an attorney knowledgeable about fair housing laws should be consulted to protect both the developer's and residents' rights.*

While directly requesting a reasonable accommodation is the recommended approach, some local governments may assert that the request for reasonable accommodation will be considered only within the established entitlement procedure or only after a determination has been made on the variance or conditional use permit. Although fair housing advocates and attorneys do not believe this is the legally correct position to take, the case law is unsettled in this area. Therefore, it is highly recommended that, should a local government assert that a developer or provider must make a request for reasonable accommodation within an entitlement process, an attorney knowledgeable about fair housing laws should be consulted to protect both the developer's and residents' rights.

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EXAMPLES OF REASONABLE ACCOMMODATIONS IN LAND USE AND ZONING

Many developers and providers of housing for people with disabilities will want to request an accommodation to overcome local zoning code provisions that restrict the siting and use of housing for people with disabilities in low density residential zones based on the number of residents in the home. There are also many other accommodations that may be appropriate including, for example, a reduction in the number of parking spaces required for a development, or waiver of regulations related to the physical structure of a dwelling or yard area.

The following examples represent some of the more likely accommodations that developers and providers may need for housing for people with disabilities. This is not an exhaustive list; many other exceptions to land use and zoning regulations may be needed depending on the particular housing. The case authority provided for many of the examples involves variances or conditional use permits because no reasonable accommodation procedure existed in the jurisdiction at the time the matter was litigated. In some instances, housing providers requested a reasonable accommodation within a variance process.

Increasing the Number of Residents in Housing for People with Disabilities

Both developers and providers of housing for people with disabilities may need a reasonable accommodation from a local government to site or use housing for people with disabilities in a single family or other low density residential zone. Despite federal and state fair housing laws and California case law, some local governments continue to use an illegal definition of "family" that distinguishes between related and unrelated individuals and limits the number of unrelated persons that may reside together to constitute a "family." While not singling out people with disabilities on its face, such a definition may have a disparate impact on housing for people with disabilities because it effectively restricts the number of unrelated persons with disabilities who may reside together in single family and other low density residential zones.[27]

The case law supports granting reasonable accommodation to overcome a restrictive definition of "family" so that people with disabilities can live together in a group home setting in a single family or other low density residential zone.[28] A developer or provider must establish that, without the accommodation, people with disabilities will be denied equal opportunity to live in a residential neighborhood.[29] The courts have held that a reasonable accommodation that results in an increase in the number of residents at a home does not result in an undue burden on the local government, nor does it undermine the residential character of the neighborhood or the local zoning scheme.[30]

The courts have granted increases in the number of residents at a home or permitted a home to exceed the number of unrelated persons living together in single family residential zones based on "economic necessity." [31] A housing provider must establish through budgets, including income and expense accountings, that his or her home must have a certain number of residents to be financially sound; "conclusory allegations without evidence are insufficient to support an increase in the number of residents based on economic viability."[32] The financial necessity argument has been unsuccessful where the increase requested is great (i.e., a doubling in the number of residents) or the housing already has a large number of residents.[33]

The courts have recognized that an increased number of people residing in a home may be necessary for therapeutic purposes.

A housing developer or provider may also seek a reasonable accommodation to increase the number of residents for therapeutic purposes. The courts have recognized that, for therapeutic purposes, an increased number of people residing in a home may be necessary for a congregate or group living arrangement to effectively assist people with disabilities.[34]

Extending the Footprint of the Housing

A reasonable accommodation request may seek waiver of land use or zoning restrictions that, for aesthetic reasons or to preserve homeowners' views, impose a limit on the footprint of a dwelling in relation to lot size. A housing developer or provider may need to increase the footprint of a dwelling to make the interior accessible to wheelchair users who will reside at the premises. Whether the accommodation will be granted depends on the particular facts of the case analyzed under the factors set forth above.

Relief From Side Yard Requirements

A developer may seek changes related to side yard and backyard zoning code requirements or substitution of side yard footage for rear yard footage, and it is unlikely to be considered either an undue burden or fundamental alteration.[35] This type of accommodation may be necessary to install ramps to meet the needs of persons with disabilities who use wheelchairs.

Fence Height Restrictions

Housing providers have been granted exceptions to fence height restrictions when greater privacy was necessary for a person with a disability to use and enjoy the outdoors at a residence. In reviewing a request for reasonable accommodation related to a height restriction, the local government must consider the need of the applicant but

will also likely compare the requested fence height to other fences within the same block, as well as emergency access to the premises. A housing provider should be prepared to address these concerns when seeking a waiver of a fence height requirement.

Reduction in Parking Requirements

Housing developers and providers may seek a reduction in the number of parking spaces required at housing for people with disabilities based on the number of residents who drive or have cars.[36] While some local governments have standardized a procedure for seeking a parking reduction, it is recommended that those developing or providing housing for people with disabilities seek an exception through a reasonable accommodation request. Local governments have a statutory duty to provide a reasonable accommodation, and the applicant should not be required to submit to a public process.

Waiver of Concentration and Dispersal Rules

The concerns of neighbors based on stereotypes about people with disabilities are not a legal basis for defeating a request for accommodation of this type or any other.

Many local governments continue to have regulations that seek to disperse group homes to avoid "overconcentration" of housing for people with disabilities in particular neighborhoods. The State of California requires that licensed residential care facilities be separated by a distance of 300 feet. However, local governments may waive this distance requirement and permit these licensed homes to be in closer proximity.[37] While some states' spacing requirement rules have been struck down as illegal under fair housing laws because they imposed too great a separation (i.e., 1,500 feet), California's restriction has not been challenged. The courts have waived dispersal requirements as an accommodation where it was determined to be reasonable and not burdensome to a municipality. The concerns of neighbors based on stereotypes about people with disabilities are not a legal basis for defeating a request for accommodation of this type or any other.[38]

Reasonable Accommodation Under the Americans with Disabilities Act

Developers and providers of non-residential services, including mental health treatment programs or multi-service centers for people with disabilities, may obtain reasonable accommodations under the Americans with Disabilities Act. Fair housing laws provide protections to residential dwellings and generally do not cover non-residential programs.

Title II of the Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities by state and local governments, including the programs and services offered by a jurisdiction's housing development, planning and zoning agencies.[39] The ADA has a broad scope and complements the federal Fair Housing Amendments Act in covering certain non-traditional housing such as government-operated homeless shelters as well as social services offices and treatment programs serving people with disabilities.[40] Title II protects against discriminatory land use and zoning decisions made by local governments against development of these uses. In addition, entities associated with people with disabilities are protected from discrimination under the ADA.

Title II of the ADA, like the Fair Housing Amendments Act, requires that local governments make reasonable modifications in "policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making modifications would fundamentally alter the nature of the service, program or activity."[41] The ADA term "reasonable modification" is essentially synonymous with the fair housing phrase "reasonable accommodation." The requirement that cities and counties make reasonable modification under Title II of the ADA means that those who develop and provide non-residential treatment programs to people with disabilities, either associated with or independent of housing, may seek modifications under Title II of the ADA to ensure equal opportunity for participation in programs and activities.

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Final Thoughts

This guide has been prepared to inform developers and providers of the fair housing laws that protect housing for people with disabilities and to encourage them to seek reasonable accommodations from their local governments when such accommodations are necessary to ensure equal access to housing. While this general guide provides an overview of the law, it is not a substitute for specific legal advice, which is often necessary when faced with obstacles to developing or providing housing for people with disabilities. We encourage those faced with housing development challenges to seek legal counsel knowledgeable of fair housing laws early on so that they may most effectively use the law to overcome obstacles to developing or providing housing to people with disabilities.

Endnotes

[1] 42 U.S.C. §§ 3601 et seq.
[2] H.R. Rep. No 711, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2185.
[3] Cal. Gov't. Code §§ 12955.3. While the federal Act requires a "substantial impairment," California's more inclusive definition of disability is controlling in this state because federal law provides that nothing in the Act "shall be construed to invalidate or limit any law of the State that grants, guarantees, or protects the same rights as are granted by [the Fair Housing Act]." 42 U.S.C.§ 3615.
[4] 42 U.S.C. § 3602(h); United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992); Oxford House v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993).
[5] Cal. Gov't. Code §§12900 et seq.
[6] Cal. Gov't. Code § 12955(l).
[7] Stats. 1993 ch. 1277, § 18.
[8] San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470 (9th Cir. 1998) (citing to Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)).
[9] Epicenter of Steubenville v. City of Steubenville, 924 F. Supp. 845 (S.D. Ohio 1996); Judy B. v. Borough of Tioga, 889 F. Supp. 792 (M.D. Pa 1995).
[10] Oxford House-C v. City of St. Louis, 843 F. Supp. 1566 (E.D. Mo. 1994); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285 (D.Md. 1993).
[11] People Helpers Foundation, Inc. v. City of Richmond, 789 F. Supp. 725 (E.D. Va. 1992), 12 F.3d 1321 (4th Cir. 1993) (appeal as to damages); Assoc. Of Relatives & Friends of AIDS Patients v. Regs. & Permits Admin., 740 F. Supp. 95 (D.P.R. 1990).
[12] Seivert v. Mill Valley, 1992 U.S. Dist. LEXIS 14727, (N.D. Cal.) (citing to Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977)); See also Martin v. Constance, 843 F. Supp. 1321 (E.D. Mo. 1994).
[13] Cal. Gov't. Code § 12955.8(b); Broadmoor San Clement Homeowners v. Nelson, 25 Cal. App. 4th 1 (4th Dist. 1994).
[14] The Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997); Hovsons Inc. v. Township of Brick, 89 F. 3d 1096 (3rd Cir. 1996); Bangerter v. Orem City Corp., 46 F. 3d 1491 (10th Cir. 1995).
[15] 42 U.S.C. § 3604(f)(3)(B); Cal. Gov't. Code § 12927(c)(1).
[16] Turning Point, Inc. v. Caldwell, 74 F.3d 941 (9th Cir. 1996).
[17] Under both federal and state fair housing laws it is unlawful to make an inquiry of a person with a disability or one associated with him as to the nature or severity of the disability. 24 C.F.R.§ 100.202; Cal. Gov't. Code § 12955 (b).
[18] See Note 3, advising that the more inclusive definition of "disability" under FEHA should be relied upon.
[19] City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002).
[20] U.S. v. California Mobile Home Park Management Co. (California Mobile Home I), 29 F.3d 1413 (9th Cir. 1994); Department of Justice Memorandum to National League of Cities (March 4, 1996).
[21] Geibler v. M&B Assocs., 343 F. Supp. 1143 (9th Cir. 2003) (rejecting the reasoning in Hemisphere Building Co. v. Village or Richton Park, 171 F.3d 437 (7th Cir. 1999) and Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2nd Cir. 1998)).

[22] Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361 (1979).
[23] Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781 (6th Cir. 1996) (and related cases); Martin v. Constance, 843 F. Supp. 1321 (E.D. Mo. 1994); Oxford House v. Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993).
[24] Joint Statement of Department of Housing and Urban Development and Department of Justice: Reasonable Accommodation Under Fair Housing Laws (May 17, 2004) (available at www.hud.gov). At least one case, outside of the 9th Circuit, has held that the interactive process is not required in reasonable accommodation determinations. Lapid-Laurel v. Zoning Board of Adjustment of Town of Scotch Plains, 284 F.3d 442 (3rd Cir. 2002).
[25] Stewart McKinney Foundation v. Town of Fairfield, 790 F. Supp. 1197 (D.Conn. 1992); Horizon House Development Svcs. v. Township of Upper South Hampton, 804 F. Supp. 683 (E.D. Penn. 1992).
[26] *Id.*
[27] In City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 164 Cal. Rptr. 539 (1980), which preceded the enactment of federal and state fair housing laws, the California Supreme Court held that based on constitutionally guaranteed privacy rights, zoning code definitions of "family" cannot distinguish between related and unrelated individuals nor limit the number of unrelated persons that may reside together to constitute a "family." Fair housing laws also hold that restrictive definitions of "family" have an adverse impact on housing for people with disabilities. See Oxford House Inc. v. Babylon, 819 F. Supp. 1179 (E.D. N.Y. 1993); Oxford House v. Township of Cherry Hill, 799 F. Supp 450 (D.N.J. 1992); United States v. Schuylkill Township, 1991 WL 117394 (E.D. Pa. 1990), reconsideration denied (E.D. Pa. 1991).
[28] Dr. Gertrude A. Barber Center v. Peters Township, 273 F. Supp. 2d 643 (W.D. Penn. 2003).
[29] Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002).
[30] U.S. v. Village of Marshall, 787 F. Supp. 872 (W.D. Wis. 1992); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991).
[31] Geibeler v. M&B Assocs., *supra*, note 21, at 1152 (approving of Smith & Lee Assocs.v. City of Taylor, 102 F.3d 781 (6th Cir. 1996)); See also Edmonds, *supra*, note 19, at 803-806.
[32] Advocacy and Resource Center v. Town of Chazy, 62 F. Supp. 2d 686 (NYND 1999).
[33] Town & Country Adult Living v. Village/Town of Mt. Kisko, 2003 WL 21219794 (SDNY).
[34] Dr. Gertrude A. Barber Ctr., Inc. v. Peters Twp., 273 F. Supp. 2d 643 (W.D. Penn 2003); Lapid-Laurel v. Zoning Bd. Of Adjustments, 284 F.3d 442 (3rd Cir. 2002); Brandt v. Village of Chebanse, 82 F.3d 172 (7th Cir. 1996).
[35] U.S. v. City of Philadelphia, 838 F. Supp. 223 (E.D. Penn. 1993).
[36] U.S. v. Commonwealth of Puerto Rico, 764 F. Supp. 220 (D.P.R. 1991).
[37] California Community Care Facilities Act, Health & Safety Code § 1520.5.
[38] Citizens for a Balanced City v. Plymouth Congregational Church, 672 N.W. 2d 13 (Minn. 2003); United States v. Marshall, 787 F. Supp. 872 (W.D. Wis. 1992).
[39] 42 U.S.C. § 12101 et seq.
[40] Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999).
[41] 28 C.F.R. § 35.130(b)(7)

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LETTER OF CALIFORNIA ATTORNEY GENERAL BILL LOCKYER SUPPORTING REASONABLE ACCOMMODATION PROCEDURES

COPY

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
ATTORNEY GENERAL

May 15, 2001

The Honorable William Ted Hartz
Mayor of Adelanto
P.O. Box 10
Adelanto, CA 92301

RE: Adoption of A Reasonable Accommodation Procedure

Dear Mayor Hartz:

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]

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[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].)

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-

[3] See 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].

[4] The 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.*)

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

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).

G.2.41.

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[6]See, *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].)

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 step[10] 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

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[9]Numerous 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.

§ 65850.5. Local agencies not to adopt ordinances creating barriers to solar energy systems; Building permits

(a) The implementation of consistent statewide standards to achieve the timely and cost-effective installation of solar energy systems is not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution, but is instead a matter of statewide concern. It is the intent of the Legislature that local agencies not adopt ordinances that create unreasonable barriers to the installation of solar energy systems, including, but not limited to, design review for aesthetic purposes, and not unreasonably restrict the ability of homeowners and agricultural and business concerns to install solar energy systems. It is the policy of the state to promote and encourage the use of solar energy systems and to limit obstacles to their use. It is the intent of the Legislature that local agencies comply not only with the language of this section, but also the legislative intent to encourage the installation of solar energy systems by removing obstacles to, and minimizing costs of, permitting for such systems.

(b) A city or county shall administratively approve applications to install solar energy systems through the issuance of a building permit or similar nondiscretionary permit. Review of the application to install a solar energy system shall be limited to the building official's review of whether it meets all health and safety requirements of local, state, and federal law. The requirements of local law shall be limited to those standards and regulations necessary to ensure that the solar energy system will not have a specific, adverse impact upon the public health or safety. However, if the building official of the city or county has a good faith belief that the solar energy system could have a specific, adverse impact upon the public health and safety, the city or county may require the applicant to apply for a use permit.

(c) A city or county may not deny an application for a use permit to install a solar energy system unless it makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. The findings shall include the basis for the rejection of potential feasible alternatives of preventing the adverse impact.

(d) The decision of the building official pursuant to subdivisions (b) and (c) may be appealed to the planning commission of the city or county.

(e) Any conditions imposed on an application to install a solar energy system shall be designed to mitigate the specific, adverse impact upon the public health and safety at the lowest cost possible.

(f)(1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities.

(2) A solar energy system for heating water shall be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agency. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification shall be for the entire solar energy system and installation.

(3) A solar energy system for producing electricity shall meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(g) The following definitions apply to this section:

(1) "A feasible method to satisfactorily mitigate or avoid the specific, adverse impact" includes, but is not limited to, any cost-effective method, condition, or mitigation imposed by a city or county on another similarly situated application in a prior successful application for a permit. A city or county shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code.

(2) "Solar energy system" has the same meaning set forth in paragraphs (1) and (2) of subdivision (a) of Section 801.5 of the Civil Code.

(3) A "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

Added Stats 2004 ch 789 § 4 (AB 2473).

G.2.42.

§ 17959.1. Issuance of permit by city or county; Denial of permit; Standards of system

(a) A city or county shall administratively approve applications to install solar energy systems though the issuance of a building permit or similar nondiscretionary permit. However, if the building official of the city or county has a good faith belief that the solar energy system could have a specific, adverse impact upon the public health and safety, the city or county may require the applicant to apply for a use permit.

(b) A city or county may not deny an application for a use permit to install a solar energy system unless it makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. This finding shall include the basis for the rejection of potential feasible alternatives of preventing the adverse impact.

(c) Any conditions imposed on an application to install a solar energy system must be designed to mitigate the specific, adverse impact upon the public health and safety at the lowest cost possible.

(d)(1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities.

(2) A solar energy system for heating water shall be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agency. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification shall be for the entire solar energy system and installation.

(3) A solar energy system for producing electricity shall meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(e) The following definitions apply to this section:

(1) "A feasible method to satisfactorily mitigate or avoid the specific, adverse impact" includes, but is not limited to, any cost effective method, condition, or mitigation imposed by a city or county on another similarly situated application in a prior successful application for a permit. A city or county shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code.

(2) "Solar energy system" has the meaning set forth in paragraphs (1) and (2) of subdivision (a) of Section 801.5 of the Civil Code.

(3) A "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

Added Stats 2004 ch 789 § 6 (AB 2473).

Former Sections:

Former § 17959.1, relating to prohibitions on local ordinances unreasonably restricting solar energy systems, was added Stats 1978 ch 1154 § 7 and repealed Stats 2004 ch 789 § 5 (AB 2473).

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender®) ch 579 "Zoning And Planning".

8 Witkin Summary (10th ed) Constitutional Law § 1009.