

# Zoning Hearing Board

## City of Erie, Pennsylvania

### March 14, 2023

### -Agenda-

The regular meeting of the Zoning Hearing Board will be held Tuesday, March 14, 2023 at 1:00 PM in City Council Chambers, 626 State Street, Erie PA. The meeting is also accessible via Zoom Webinar [instructions below]. For more information about the Zoning Hearing Board, please visit the City of Erie website at: <https://cityof.erie.pa.us/government/authorities-boards-and-commissions/#ZHB>

#### 1. MEETING CALL TO ORDER

#### 2. ROLL CALL AND DECLARATION OF QUORUM

Member Name	Present	Absent
Laura Guncheon, Chair		
Jeffrey Johnson, Vice Chair		
Edward Dawson		
Selena N. King		
VACANT		

#### 3. APPROVAL OF February 14, 2023 MEETING MINUTES

#### 4. APPEALS TO BE HEARD

**Appeal No. 12,282** by Patricia Luciano, concerning a property located at 1727 W 31<sup>th</sup> Street [Index # 19-6232-305] in an R-1 Low-Density Residential zoning district. The appellant is requesting a Dimensional Variance for a side yard setback for a new proposed attached garage. Per Section 205 of the City of Erie Zoning Ordinance, the minimum requirement is 5', the appellant is requesting '0'.

#### 5. ADJOURNMENT

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To participate via Zoom, you must pre-register for the Zoom webinar and join from a PC, Mac, iPad, iPhone or Android device. Register for this webinar at – <https://events.zoom.us/ev/Aj35bfqYLdFuck54Lwugpc7S2r3ngKoC9yXelloLELbBkFQe6hP9~AggLXsr32QYFiq8BIYLZ5I06Dg>

NOTE: Persons with a disability who wish to be heard and require accommodation please contact (814) 870-1111 at least 48 hours in advance so that arrangements can be made.

**CITY OF ERIE  
ZONING HEARING BOARD APPLICATION**

Appeal #: \_\_\_\_\_ Index #: \_\_\_\_\_ Hearing Date/Time: \_\_\_\_\_

**Property Information**

Property Address: 1727 W. 31 ST

Zoning District: \_\_\_\_\_ Current Land Use: \_\_\_\_\_

Has a previous application of appeal been filed? Yes / No Appeal No(s) \_\_\_\_\_

**Owner / Applicant Information**

Name of Owner: PATRICIA LUCIANO

Owner Address: 1727 W. 31 ST

City: ERIE State: PA Zip Code: 16508

Telephone: 814-504-9672 Email: PJLUCKY1727@AOL.COM

Name of Applicant (if different from owner): \_\_\_\_\_

Relationship to Owner: \_\_\_\_\_

Telephone: \_\_\_\_\_ Email: \_\_\_\_\_

**Type of Application / Appeal**

- Variance – Type:  Use  Dimensional  
 Special Exception Use  
 Change of Non-Conforming Use  
 Appeal of Determination of Zoning Officer

Proposed Use or Improvement: Use and Improvement of Property

I/We believe that the Board should approve this request because... (Attach a separate narrative as needed – please refer to the quick tip guidance on the following page)

See Attached Papers

I/We hereby certify that all the above statements and the statements contained in any attached plans submitted here within are true to the best of my/our knowledge and belief.

PATRICIA LUCIANO  
Owner or Applicant Name [please print]

Patricia Luciano  
Owner or Applicant Signature

2-19-23  
Date

## APPLICATION MATERIALS CHECKLIST

- Completed Owner / Applicant Information
- Completed Proposal / Improvement Description
- Completed Reasons / Justification Narrative
- Project Site Plan and/or Renderings (as applicable)
- Owner / Applicant signature on the application form
- \$300.00 application fee (check/money order made payable to "City of Erie")

The application and supplemental information listed above may be emailed to [zoning@erie.pa.us](mailto:zoning@erie.pa.us) (preferred). Applications may also be mailed to the address below, or dropped off at City Hall via a mail slot located at the State Street entrance labeled "Permits". Please label the submission "ATTN: Zoning – Room 407".

The next Zoning Hearing Board Meeting will be 3-14-23

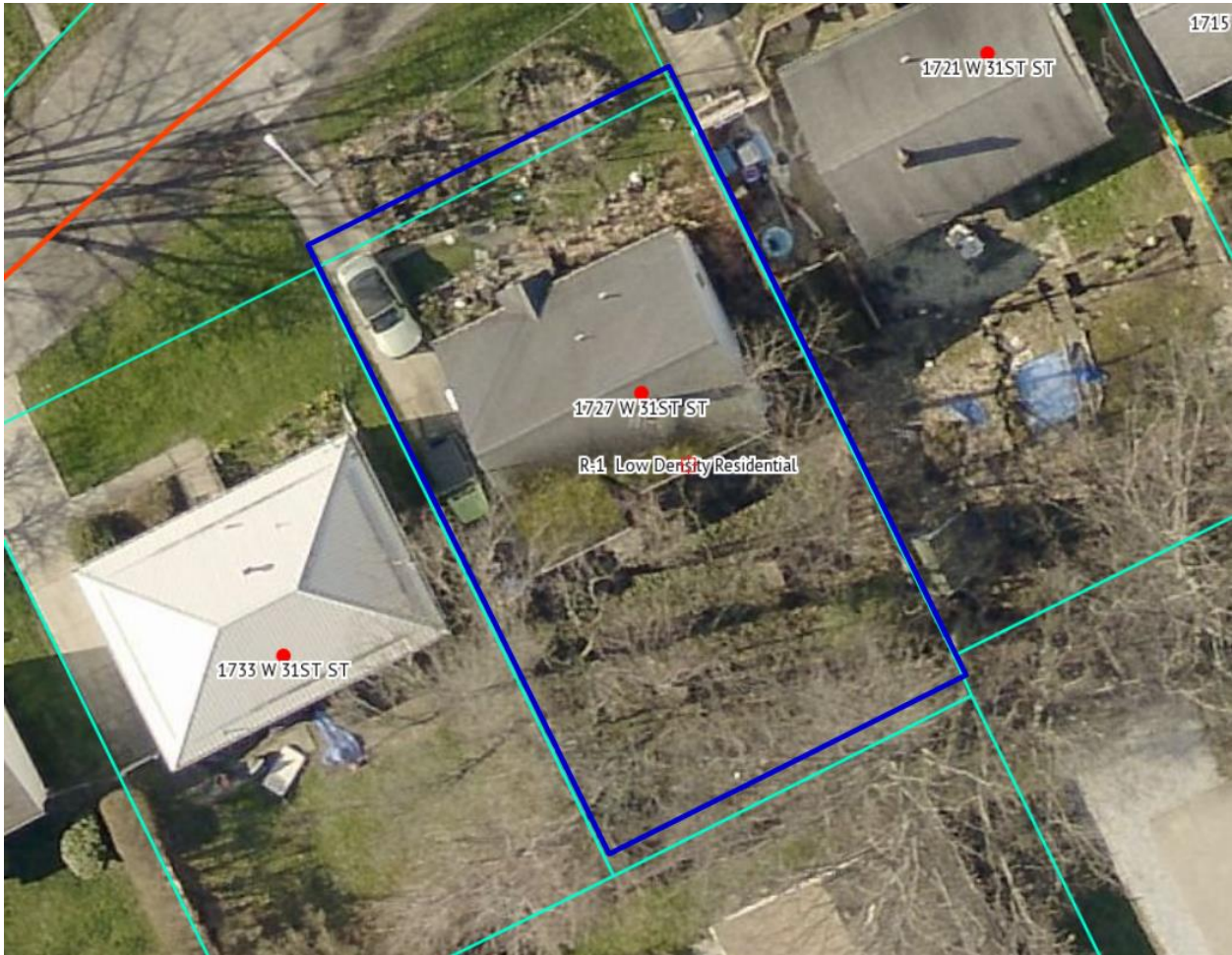
The application deadline for the next meeting is 2-21-23

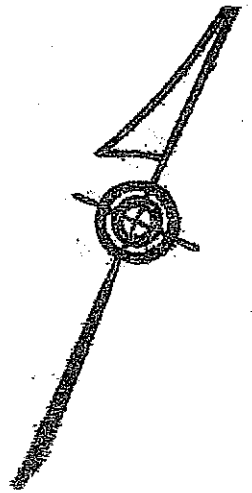
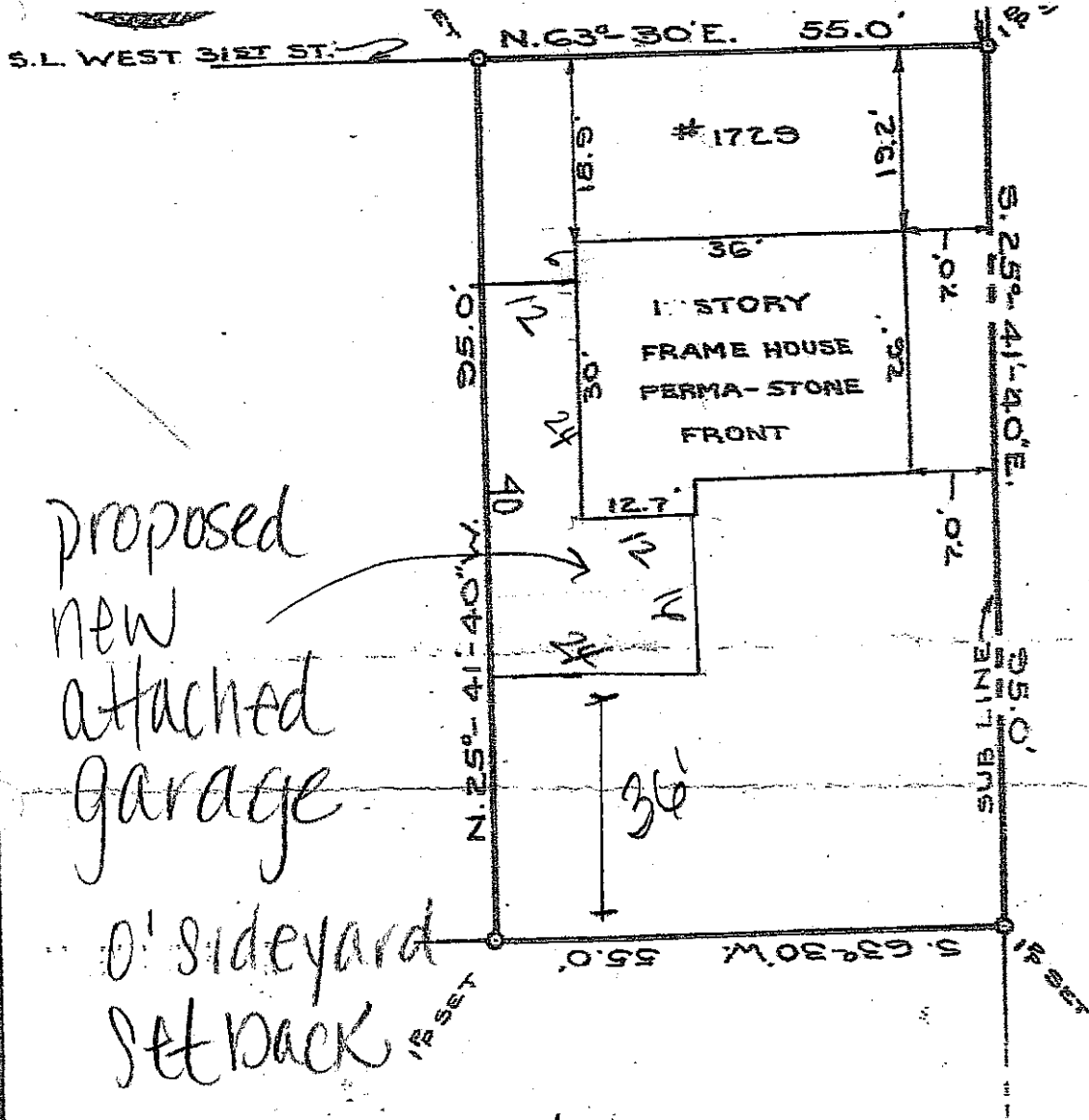
## ZONING HEARING BOARD QUICK TIPS

1. The Zoning Hearing Board meets on the second Tuesday of each month at 1:00PM. All application materials must be submitted to the Zoning Office at least three [3] weeks prior to the hearing.
2. The applicant must be in attendance at the hearing, and be prepared to present the appeal and answer questions from the board.
3. The most important section of the application required to be completed is the response to the statement that reads: "I/We believe that the Board should approve this request because..." This is typically attached separately with the application as a narrative stating the proposed appeal / request which describes the reasons and justification for the Board to consider its approval. The narrative must demonstrate the presence of a hardship that prohibits the property from being used in accordance with the City Zoning Ordinance regulations. Include reasons and justification that refer to the zoning law and the specific hardships the law has imposed on developing the property.
4. The attached brochure, *Zoning Hearing Board Procedures*, is to be used as a guide to complete the narrative. Most importantly, it lists the variance / hardship criteria which the Board uses as guidance when deciding whether to grant a variance. Please provide answers to **each** of the criteria areas in the narrative.

Additional information on the Zoning Hearing Board can be found on the City's website at: <https://cityof.erie.pa.us/zoning-hearing-board/>

# 1727 W 31<sup>st</sup> St. 19-6232-305





proposed  
new  
attached  
garage

0' sideyard  
setback

36' rear yard  
setback

ARF

APPLICATION FOR BUILDING PERMIT and/or ZONING CERTIFICATE  
City of Erie, Pennsylvania

Fee \$ \_\_\_\_\_

Paid

Property Index No. \_\_\_\_\_

Appeal No. \_\_\_\_\_

Building Change I, the undersigned, hereby make application to construct an \_\_\_\_\_ on  
my property located at \_\_\_\_\_

Use Change I, the undersigned, hereby make application to use my property located at \_\_\_\_\_  
for \_\_\_\_\_

ZONING DISTRICT: \_\_\_\_\_ No. of Buildings intended: \_\_\_\_\_ No. of Stories: \_\_\_\_\_

Extreme Height as planned above curb: \_\_\_\_\_ Permitted: \_\_\_\_\_

Front Yard Available: \_\_\_\_\_ Required: \_\_\_\_\_

Front Yard Available (Corner lot): \_\_\_\_\_ Required: \_\_\_\_\_

Side Yard Available (Combined): \_\_\_\_\_ Required: \_\_\_\_\_

Side Yard Available (Least): \_\_\_\_\_ Required: \_\_\_\_\_

Rear Yard Available: \_\_\_\_\_ Required: \_\_\_\_\_

Lot Area per Family Available: \_\_\_\_\_ Required: \_\_\_\_\_

Lot Coverage: \_\_\_\_\_ Maximum: \_\_\_\_\_

Off Street Parking Spaces Available: \_\_\_\_\_ Required: \_\_\_\_\_

Size of Detached Access. Structure: \_\_\_\_\_ Maximum: \_\_\_\_\_

Conforming  Non-Conforming \_\_\_\_\_

Special Conditions: \_\_\_\_\_

*The general shape of my lot and location of all existing and proposed buildings are accurately set forth in the plan on the back of this sheet.*

Approved \_\_\_\_\_ Owner: \_\_\_\_\_

Denied \_\_\_\_\_ Address: \_\_\_\_\_ Zip \_\_\_\_\_

Telephone \_\_\_\_\_ Date \_\_\_\_\_ 20 \_\_\_\_\_

Applicant Signature: \_\_\_\_\_ Relation to Owner: \_\_\_\_\_

Reasons for refusal: \_\_\_\_\_

**APPEAL FOR HEARING TO THE ZONING HEARING BOARD:**

I, the undersigned owner, hereby make application for a hearing in regard to the building as per the plan and data herein shown, which does not comply with Zoning Ordinance No. 80-2005 and amendments hereto.

Owner's Signature \_\_\_\_\_

Appeal heard \_\_\_\_\_ 20 \_\_\_\_\_ Signed \_\_\_\_\_

Approved \_\_\_\_\_ 20 \_\_\_\_\_

Denied \_\_\_\_\_ 20 \_\_\_\_\_

**-SEE ATTACHED DECISION-**

City of Erie Zoning  
626 State Street  
Erie, PA 16501

RE: 1727 West 31<sup>st</sup> Street  
Erie, PA 16508

Dear City of Erie Zoning:

My name is Patricia Luciano and I reside at 1727 West 31<sup>st</sup> Street in Erie. I have lived here for almost 51 years. I am disabled suffering from COPD, emphysema, and small vein disease. Being out in the elements for any length of time affects my breathing negatively. I have been widowed since December 2021. My intent is to stay in my house for many years to come. In order to do so, I am trying to build a garage that will be enclosed to my back door giving me a safe path between my vehicle and house. In addition, due to my disabilities, I have great difficulty cleaning off my car in the winter. Having an enclosure from my back door garage will protect me and my vehicles from the elements. The enclosed path from my back door to my vehicle will also enhance my safety now that I live alone.

This build will be on the property line of my neighbor Eric Laughner, address 1733 West 31<sup>st</sup> Street, Erie, PA 16508. I have spoken to Mr. Laughner about my plans, and he is supportive. He has no issues with the garage being built at his property line.

I am available to further discuss my plans and needs for this project. I can be reached at 814-504-9672.

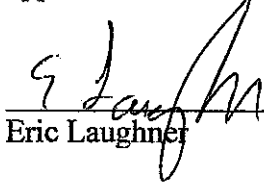
Sincerely,



Patricia Luciano

.....

I, Eric Laughner, reside at 1733 West 31<sup>st</sup> Street, Erie, PA 16508. I have spoken to Patricia Luciano about her plans to enclose her back patio and build a garage. I understand that the garage will be along my property line. I have no issues with this. I support the built and her application for a variance due to the property line issue.

  
Eric Laughner

Date 2-14-23

LUCIANO, Patricia A (id #369, dob: 03/06/1952)



**Return to Work**

**Patient:** Luciano, Patricia A

**DOB:** 03/06/1952

**Address:** 1727 W 31st St  
Erie, PA 16508-1245

**Date:** 02/09/2023

**Patient ID:** 369

To Whom it May Concern:

I am currently treating Patricia Luciano for her poorly controlled chronic venous insufficiency even with her compression garments.

Any questions please contact the office.

Sincerely,



Electronically Signed by: JOSEPH M. DIFRANCO, DPM



**DISABILITY RIGHTS**  
PENNSYLVANIA

(800) 692-7443 (Voice)  
(877) 375-7139 (TDD)  
[www.disabilityrightspa.org](http://www.disabilityrightspa.org)

ORG

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

### **I. INTRODUCTION**

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

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

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

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

The Act protects people with "handicaps." The term "handicap" is defined broadly and includes those individuals with physical or mental impairments which substantially limit one or more of their major life activities.<sup>viii</sup> "Major life activities" include, but are not limited to, caring for one's self, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>ix</sup> Many people with disabilities, especially those who live in residential placements, will readily meet this standard (e.g., people with mental retardation, organic brain syndrome, emotional or mental illness, significant hearing or visual impairment, severe physical disabilities, and AIDS).<sup>x</sup> Persons who are recovering from substance abuse are also considered to have a disability under the FHAA, but persons engaged in current illegal use of or addiction to controlled substances are not protected by the FHAA.<sup>xi</sup>

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

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

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

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

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

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

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

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

for people with disabilities, but such challenges are unlikely to be successful.<sup>xxiii</sup>

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

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

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

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

#### **Intentional Discrimination**

If the land use law or zoning decision is the result of an intention to discriminate against people with disabilities, it violates the FHAA. Intentional discrimination may be the product of discriminatory animus, e.g., stereotypes, fears about crime or diminution in property values, prejudice about people with disabilities, or a malicious desire to discriminate. As one court has explained: "Any discrimination in housing that is based on unsupported stereotypes, prejudices, fear stemming from ignorance or generalizations, or aversion toward the handicapped is illegal."<sup>xxv</sup> Intentional discrimination also includes acts simply "motivated by or based

on consideration of the protected status itself" and that are not based upon discriminatory animus.<sup>xxxvi</sup> A plaintiff need not prove that discrimination was the sole motivating factor in the challenged action; it is sufficient that he show that discrimination was a motivating factor.<sup>xxxvii</sup>

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

Generally, in an FHAA case alleging intentional discrimination, courts apply the burden-shifting framework for proof established in *McDonnell Douglas Corp. v. Green*<sup>xxxix</sup> (concerning employment discrimination based on race and gender),<sup>xxx</sup> at least when there is no direct proof of discriminatory intent.<sup>xxxi</sup> Under this burden-shifting scheme, the plaintiff must establish that: (1) he is a member of a protected class; (2) he applied for and was qualified for the housing opportunity; (3) he was rejected for the housing opportunity; and (4) the housing opportunity remained available.<sup>xxxii</sup> The fourth element alternatively may be established by showing that the rejection occurred in circumstances that gave rise to an inference of unlawful discrimination.<sup>xxxiii</sup> After the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce evidence that shows some legitimate, nondiscriminatory reason for its action.<sup>xxxiv</sup> If the defendant meets that burden, then the ultimate burden of proof switches back to the plaintiff to demonstrate that the defendant's reasons were not the true reasons, but, rather, were a pretext for discrimination.<sup>xxxv</sup>

Ultimately, "[t]he determination of whether an action is based on 'discriminatory intent' requires a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"<sup>xxxvi</sup> As evidence that a challenged action was motivated by discriminatory intent, courts may consider: (1) the discriminatory impact of the action; (2) the historical background of the action; (3) the sequence of events leading up to the action; (4) departures from normal procedures; and (5) departures from normal substantive criteria.<sup>xxxvii</sup> Further, a municipality may be liable for actions that deny housing opportunities because of discriminatory animus

by its constituents, i.e., "for effectuating the discriminatory wishes of the body politic," even though the local officials did not themselves inflame, direct, or encourage such discriminatory sentiments.<sup>xxxviii</sup>

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

- Denial of special use permit for halfway house for recovering alcoholics may have been result of intentional discrimination. Statements by decision-makers reflected that the decision was based on the identity of the clients and that the legitimate reasons advanced by the city (e.g., safety concerns) could have been pretextual since the city allowed the development of a child-care project on the same property on which the halfway house was to be developed.<sup>xxxix</sup>
- Circumstantial evidence showed a city's discriminatory animus against individuals with disabilities. The original version of the city's zoning ordinance banned all youth homes from residential neighborhoods and was only amended after a state administrative body found the ordinance to be discriminatory. The city also amended its ordinance to remove language about integration of special needs housing and replaced it with language about avoiding concentration of such housing and protecting residential neighborhoods from adverse impacts. In addition, the city had no youth homes within its residential areas.<sup>xl</sup>
- A one-year moratorium on new adult care facilities for persons with disabilities was held to be a "classic case of discriminatory treatment because ... the ordinance was passed with the intent to discriminate against" persons with mental impairments.<sup>xli</sup>
- A court found evidence of discriminatory intent in enacting a zoning ordinance requiring that group homes be separated by at least 1,000 feet where the evidence established that the officials imposed the requirement in response to community fears and concerns about property values.<sup>xlii</sup>
- The denial of a permit to allow renovations for a group home for people who are mentally ill and substance abusers was held to be the result of

intentional discrimination in violation of the Act where the decision was based on objections to the residents' handicaps.<sup>xliii</sup>

- Requiring a zoning application for a special exception to provide a residence for persons who are HIV-positive was deemed to be the result of intentional discrimination where there was significant community opposition, the residence met the town's zoning criteria for a "family" residence, and the zoning officials departed from normal procedures in considering the issue.<sup>xliii</sup>
- Zoning officials' requirement that group home apply for variance and local government's issuance of summonses for noise and parking violations were the result of discriminatory intent. The intent was revealed by community opposition and the fact that no similar citations had previously been issued.<sup>xliii</sup>
- Amendment of a zoning ordinance in response to effort to create group home for persons who are HIV-positive that generated intense community opposition was result of unlawful discriminatory intent.<sup>xliii</sup>
- Zoning officer's reversal of initial decision that group home for recovering substance abusers was a permitted use under the zoning ordinance following expression of neighborhood and City Council opposition evidenced discriminatory animus in violation of the Act.<sup>xliii</sup>
- Excessive police activity and regulatory actions designed to force residents out of home for recovering substance abusers stated claim for intentional discrimination under FHAA given statements of officials that they objected to the residences.<sup>xliii</sup>
- A town's amendment of its zoning ordinance to bar an assisted living facility in a particular zone following expressions of community hostility evidenced discriminatory intent in violation of the FHAA.<sup>xliii</sup>
- Statute that placed special burdens on boarding homes (e.g., requiring new certificates of inspection each time a new resident moved in; posting bond to cover relocation costs in case the facility was forced to close; and requiring homes to obtain zoning permission even when they

are in properly zoned areas) was "freighted with discriminatory intent" and violated the FHAA.<sup>i</sup>

- The county's requirement that a provider of housing for recovering substance abusers could locate such housing only in one type of zoning district and even then only if it received a special exception may reflect intentional discrimination when such limitations were not required by the county's zoning law.<sup>ii</sup>
- The District of Columbia's treatment of a group home for people with disabilities as a treatment facility rather than a family (even though it met the zoning law's definition of family) constituted intentional discrimination since it was due to widespread and vocal community opposition.<sup>iii</sup>

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

### **Discriminatory Classifications**

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

If a zoning law is discriminatory on its face,<sup>vi</sup> the burden is on the defendant to justify the discriminatory classification.<sup>vii</sup> The "justification must serve, in theory and in practice, a legitimate, bona fide interest of the ... defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."<sup>viii</sup> The fact that a facially discriminatory zoning law may also apply to certain types of facilities for non-disabled persons does not detract from the discriminatory nature of the classification.<sup>ix</sup> Several FHAA cases have addressed discriminatory classifications, holding:

- Dispersion requirements mandating that group homes be separated by a particular distance are discriminatory classifications that violate the Act.<sup>ix</sup>

that they be operated only by non-profit organizations; that there can be no more than one person per room; and that they be subject to special inspections violate the FHAA.<sup>lxi</sup>

- Application of fire code which required sprinkler system and fire alarm monitoring system to group home for persons with mental illness (who had no problems with evacuation in case of emergency) simply because the house was deemed a residential board and care facility under the fire code was held to be a discriminatory classification in violation of the FHAA.<sup>lxii</sup>
- A zoning ordinance that excluded from single-family residential districts group homes for persons with disabilities was deemed to violate the Act.<sup>lxiii</sup>
- Reversing the dismissal of a FHAA claim challenging a statute that allowed permits for group homes to be conditioned on 24-hour supervision and establishment of a community advisory committee to hear neighbors' complaints, a federal appeals court held that the plaintiff had stated a valid claim under the Act that the statute constituted a discriminatory classification.<sup>lxiv</sup>
- A zoning ordinance that imposed rigorous safety requirements on homes for individuals with developmental disabilities and did not tailor those requirements to specific types of disabilities violated the Act.<sup>lxv</sup>
- A zoning ordinance that imposed certain requirements on "residential social service facilities" (including minimum spacing requirements, health and safety inspections and requirements, and informational requirements) was held to violate the Act.<sup>lxvi</sup>
- A zoning ordinance that required notice to neighbors of a group home's existence constituted a discriminatory classification in violation of the Act because it was not imposed on any other properly zoned residential unit.<sup>lxvii</sup>

- A regulation that required boarding home residents to be able to self-evacuate (and, therefore, required them to be ambulatory) might be an unlawful discriminatory classification under the FHAA.<sup>lxviii</sup>
- Requiring a six-person group home for people with disabilities to secure a certificate of occupancy when a six-person home that did not house people with disabilities did not have to secure such a certificate was a discriminatory classification under the FHAA.<sup>lxix</sup>

## **Disparate Impact**

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

One type of zoning law that often has been held to have a disparate impact on people with disabilities is a definition of the term "family" that allows any number of related persons to live together but limits the number of unrelated persons who may live together. Although such laws apply to groups of unrelated, non-disabled persons (e.g., college students, nuns, etc.), such laws may be deemed to have a disparate impact on persons with disabilities because usually such individuals need to live in group settings for both programmatic and financial reasons.<sup>lxxii</sup> The disparate impact analysis also has been utilized in finding that facially neutral zoning ordinances that have the effect of barring nursing facilities, congregate care facilities, or similar types of dwellings from the municipalities' residential areas have a disparate impact on people who have disabilities.<sup>lxxiii</sup>

It is not enough though, that a facially neutral zoning law has the effect of barring a particular use for people with disabilities to establish an unlawful disparate impact. For example, one court rejected a disparate impact claim

asserted against a zoning law that limited housing to family residences for up to four unrelated persons when the plaintiff wanted to use a residence in the district for a vacation home for between five and twenty-three persons with developmental disabilities at a time.<sup>lxxiv</sup> Another court rejected an FHAA claim that the fire department's application of fire code regulations for lodging and rooming homes to a group residence for people with disabilities had an unlawful disparate impact on people with disabilities.<sup>lxxv</sup>

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

- Spacing or dispersion requirements for group homes have been held to create a disparate impact on people with disabilities in violation of the FHAA.<sup>lxxvii</sup>
- A requirement that group homes be subject to evaluation by a "program review board" prior to issuance of a group home license was determined to have a disparate impact on people with disabilities in violation of the FHAA.<sup>lxxviii</sup>
- A requirement that group homes include only "exceptional persons" (defined as persons with disabilities who are "capable of proper judgment in taking action for self-preservation under emergency conditions" and are "mobile and capable of exiting from a building, following instructions and responding to an alarm") was held to have a disparate impact on persons with disabilities in violation of the FHAA.<sup>lxxix</sup>
- Requiring a group home for persons who are HIV-positive to apply for special exception (when zoning commission did not require other unrelated groups of people to apply for special exceptions) was held to have a disparate impact on people with disabilities.<sup>lxxx</sup>

- The denial of special use permit for AIDS hospice was held to have a disparate impact on people with disabilities in violation of the Act.<sup>lxxxix</sup>

## **Reasonable Accommodation**

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

There are three elements to a reasonable accommodation claim. The requested accommodation must be (1) reasonable and (2) necessary (3) to provide equal opportunity.<sup>lxxxvi</sup> The concept of "equal opportunity" under the FHA generally means providing people with disabilities with the right to choose to live in single-family neighborhoods so as to end their exclusion from the American mainstream.<sup>lxxxvii</sup> An accommodation is "necessary" if, but for the accommodation, the plaintiff is likely to be denied an equal opportunity to enjoy the housing of his choice.<sup>lxxxviii</sup> An accommodation is "reasonable" if it does not impose an undue financial or administrative burden and does not undermine the zoning scheme.<sup>lxxxix</sup> Whether an accommodation is reasonable is a highly fact-specific inquiry.<sup>xc</sup> Speculation concerning potential burdens resulting from the accommodation is insufficient to render a requested accommodation unreasonable.<sup>xcii</sup>

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

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

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

- A municipality's refusal to permit a nursing home to operate in a mixed residential zone violated the reasonable accommodation mandate.<sup>xcvi</sup>
- Philadelphia's failure to grant a reasonable accommodation of its minimum side yard requirement for a single room occupancy facility for persons with mental illness and recovering substance abusers violated the reasonable accommodation provision.<sup>xcvii</sup>
- A municipality's failure to issue a variance to its zoning laws to allow the operation of a single room occupancy facility for persons with mental illness and recovering substance abusers in a commercial/industrial district was deemed likely to violate the reasonable accommodation provision.<sup>xcviii</sup>
- Noting the need for alternative housing for persons who are elderly and have disabilities and the economic inefficiency of operating adult foster care facilities for only six persons (as permitted by the existing law), a court held that the FHAA's reasonable accommodation provision required a city to take the steps necessary (through amendment of its zoning laws) to allow a 12-person adult care facility to operate.<sup>xcix</sup>
- A requirement that group homes obtain a variance to operate within 1,000 feet of another group home was deemed to be an insufficient accommodation where the variance process was lengthy, costly, and burdensome.<sup>c</sup>

- Refusal to waive requirements concerning sewage disposal that would allow operation of assisted living facility was likely a violation of the FHAA's reasonable accommodation requirement given the facility's workable proposal to address the sewage issue and the town's accommodation of such issues for other developments.<sup>ci</sup>
- Refusals to grant exceptions to spacing/dispersion requirements have been held to violate the FHAA's reasonable accommodation provision.<sup>cii</sup>
- Refusal to waive zoning laws that restrictively define "family" and/or limit the number of unrelated persons who may live together so as to bar operation of group facilities have been held to violate the FHAA's reasonable accommodation provision.<sup>ciii</sup>

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

- A court held that a city's refusal to turn water on for group home when the home refused to extend the water/sewer line to the edge of the property did not violate the reasonable accommodation requirement.<sup>civ</sup>
- A court held that a refusal to grant a variance to erect a 6-foot fence on a property to accommodate a person with post-traumatic stress disorder and a heart condition was not unlawful since the plaintiff did not establish that the fence would force him to move.<sup>cv</sup>
- Traffic safety issues and inadequate access for emergency vehicles raised by site plan for 95-bed nursing facility rendered the requested accommodation unreasonable.<sup>cvi</sup>
- A court held that a zoning board's refusal to allow a group home to expand from 8 to 15 persons did not violate the FHAA's reasonable accommodation requirement.<sup>cvi</sup>
- A court held that an accommodation to allow construction of an assisted living facility in a commercial district would not be reasonable since individuals with disabilities were not being denied any housing

opportunities available to non-disabled individuals, even though the town had re-zoned some parts of the commercial district to allow some residential uses.<sup>cviii</sup>

- A court held that a municipality did not violate the FHAA's reasonable accommodation requirement when it denied a developer's request for a waiver of density requirements to allow it to build accessible housing units for persons with disabilities since the developer's reason for the requested waiver -- concern about the increased cost of the units if the requirement was not waived -- was not a valid reason to justify a zoning accommodation.<sup>cix</sup>
- A court held that plaintiffs had failed to establish their reasonable accommodation claim to require the town to allow operation of a vacation residence for persons with mental retardation by waiving the law limiting to four the number of unrelated persons who can live together because plaintiffs had failed to prove that the residence would not be economically viable without a larger number of residents than allowed by the zoning law or that there was a need for such a program.<sup>cx</sup>
- A court held that the City's application of its zoning ordinance, which required group homes for five or more persons to seek a special exception to operate in the primary residential district, did not violate the FHAA's reasonable accommodation requirement.<sup>cxii</sup>
- A court held that a city's refusal to allow more than eight people to live in a group home did not violate the reasonable accommodation requirement since the city's zoning law permitted up to eight unrelated persons with disabilities to live together while it permitted only three unrelated, non-disabled persons to live together.<sup>cxiii</sup>
- A court held that it was not a reasonable accommodation to grant a variance to allow construction of a two-story, four-unit apartment building in residential district simply because the first-floor units would be accessible, stressing that the reasonable accommodation mandate did not require waiver of any zoning rule any time a developer wants to develop accessible housing.<sup>cxiii</sup>

- A court held that denial of a conditional use permit to construct a community-based residential facility was not a violation of the reasonable accommodation provision since the application was denied due to the inadequacy of the plans and because the proposal was inconsistent with the zoning scheme.<sup>cxiv</sup>
- A court rejected a reasonable accommodation claim challenging a city's denial of a special use permit to allow an adult foster care facility to operate in the central business district since the city stated it would assist the provider to locate another location.<sup>cxv</sup>
- A city did not violate the FHAA by refusing to allow the plaintiffs to re-zone their property to build four five-person homes for people who are elderly or have disabilities since the plaintiffs could have built as many as 15 three-person residences on their property without the city's permission and thus the accommodation was not necessary.<sup>cxvi</sup>
- The town's refusal to waive a requirement that the plaintiffs subdivide their property if they wanted to keep their own residence on the site of their proposed 21-unit assisted living facility and the requirement that the plaintiffs allow review of the plans did not violate the FHAA because waiver of those requirements were not necessary for the plaintiffs to establish the facility.<sup>cxvii</sup>

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

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

The FHAA permits any "aggrieved party" to complain of violations.<sup>cxviii</sup> This obviously includes individuals with disabilities who live in or would live in the housing. It also includes individuals who do not have handicaps but who live with those who do as well as entities that provide services to people with handicaps.<sup>cxix</sup> In order to assert a claim, a person or entity must show only that (1) there has been an actual or threatened injury; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury can be redressed by the requested relief.<sup>cxx</sup>

however, the matter involves the legality of local zoning or land use laws or ordinances and conciliation proves unsuccessful, HUD will not make a reasonable cause determination but, instead, will refer the investigative material to the United States Department of Justice.<sup>cxxvii</sup>

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

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

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

For more information on your rights or assistance in enforcing your rights under the Fair Housing Act, you can contact the Regional Fair Housing and Equal Opportunity Office of the Department of Housing and Urban Development at (215) 656-0663, ext. 3241 or (888) 799-2085 (voice) or (215) 656-3450 (TDD) or Disability Rights Pennsylvania at (800) 692-7443 (voice) or 877-375-7139 (TDD) or [intake@disabilityrightspa.org](mailto:intake@disabilityrightspa.org).

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

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

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

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

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

The FHAA exempts completely ordinances that restrict "the maximum number of persons permitted to occupy a dwelling."<sup>cxixiv</sup> Until 1995, many municipalities defended FHAA challenges to the limited number of unrelated persons who may live together by arguing that such restrictions were exempt from the FHAA because they constituted maximum occupancy limitations. In 1995, the Supreme Court settled the dispute and definitively ruled that such zoning ordinances were not exempt from the FHAA's reach (although the Court did not rule on the question of whether the application of such ordinances violated the FHAA).<sup>cxixv</sup> However, true occupancy limitations that serve health and safety purposes (i.e., those that link the number of persons, regardless of disability, to the size of the dwelling) may be exempt under the FHAA.

### **The Direct Threat Defense**

The FHAA provides that a dwelling need not be made available to a person "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."<sup>cxixvi</sup> This exception to the FHAA's prohibition on discrimination must be narrowly construed.<sup>cxixvii</sup> The FHAA's direct threat provision, therefore, does not permit a municipality to impose zoning restrictions on persons with disabilities that are "based on blanket stereotypes." Instead, any restrictions "must be tailored to particularized concerns about individual residents."<sup>cxixviii</sup> Moreover, the FHAA's

reasonable accommodation provision may preclude a municipality from determining that an individual is a direct threat if there are reasonable means to accommodate his disability that would eliminate any direct threat.<sup>cxxxix</sup>

## **The Statute of Limitations**

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

## **Ripeness and Exhaustion**

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

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

- Individuals need not present disparate treatment claims, such as facial challenges to zoning laws, to local decision-makers before pursuing federal FHAA claims.<sup>cxlvi</sup> For example, if a town has a law that prohibits group homes from operating within 2,000 feet of each other and a provider wants to operate a group home within 1,500 feet of an existing he can immediately file a federal FHAA lawsuit to challenge the validity of the facially discriminatory statute. The provider may not, however, assert that the town violated the FAA's reasonable accommodation provision by failing to waive the 2,500 foot spacing requirement unless

the provider first requests such a waiver from the local decision-maker with final authority to make such a determination.

- Individuals who are challenging the local variance procedures need not pursue such procedures.<sup>cxlvii</sup>
- Individuals need not request action by a final decision-maker if such action would be futile.<sup>cxlviii</sup>

In those instances when an initial zoning decision is necessary for the case to be ripe, a party can proceed with a FAA claim in court after a decision on his zoning application and he need not pursue further administrative or state court appeals. The case is "ripe" after the initial denial of the application and requiring further procedures would impose an impermissible exhaustion of remedies requirement.<sup>cxlix</sup>

### **Abstention and Res Judicata**

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

### **Contact Information**

If you need more information or need help, please contact Disability Rights Pennsylvania (DRP) at 800-692-7443 (voice) or 877-375-7139 (TDD). The email address is: [intake@disabilityrightspa.org](mailto:intake@disabilityrightspa.org).

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## NOTES

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

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- v. 24 C.F.R. §§ 100.50(b), 100.70(a).
- vi. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-732, 737 n.11 (1995); *Alexander v. Riga*, 208 F.3d 419, 425 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001); *Samaritan Inns, Inc. v. Dist. of Columbia*, 114 F.3d 1227, 1234 (D.C. Cir. 1997); *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069 (N.D. Ill. 1996).
- vii. *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 200 (5th Cir. 2000) (collecting cases).
- viii. 42 U.S.C. § 3602(h).
- ix. 24 C.F.R. § 100.201.
- x. *E.g., Keys Youth Services, Inc. v. City of Olathe*, 52 F. Supp. 2d 1284, 1297-1300 (D. Kan. 1999) (holding that youngsters with learning disabilities and severe emotional disorders were protected by the FHAA), *reconsideration denied*, 67 F. Supp. 2d 1228 (D. Kan. 1999), *aff'd in part, rev'd in part on other grounds*, 248 F.3d 1267 (10th Cir. 2001); *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp. 2d 721, 723 (E.D. La. 1999) (holding that persons with Alzheimer's Disease were protected by the FHAA), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 683 (E.D. Pa. 1999) (holding that persons with brain injury were protected by the FHAA). *But see Caron v. City of Pawtucket*, 307 F. Supp. 2d 364, 368 (D.R.I. 2004) (old age, by itself, is not a disability). However, the Supreme Court has held that "mitigating" measures must be considered in determining whether a person is substantially limited in his major life activities so as to be protected by federal disabilities laws. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Thus, a person with diabetes that is controlled completely with medication will not be deemed a person with a disability.
- xi. 42 U.S.C. § 3602(h); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46-48 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002). In determining whether a person is "currently" using illegal drugs, the courts have held that the benchmark is the

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date of the alleged discrimination that was the basis for the lawsuit; illegal drug use after the lawsuit is filed would not warrant dismissal. See *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 608-09 (D.N.J. 2000).

- xii. 42 U.S.C. § 3602(h). *E.g.*, *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002).
- xiii. See *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *Smith & Lee Associates, Inc. v. City of Taylor*, 13 F.3d 920, 924 (6th Cir. 1993), *app. following remand*, 102 F.3d 781 (6th Cir. 1996); *Cohen v. Township of Cheltenham*, 174 F. Supp.2d 307, 320-21 (E.D. Pa. 2001); *United States v. City of Chicago Heights*, No. 99 C 4461, 1999 WL 1068477 at \*3 (N.D. Ill. Nov. 19, 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at \*6-\*7 (E.D. Pa. July 30, 1998); *United States v. Borough of Audubon*, 797 F. Supp. 353, 357 (D.N.J. 1991), *aff'd mem.*, 968 F.2d 14 (3d Cir. 1992); see also *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).
- xiv. 42 U.S.C. § 3604(f)(1) (emphasis added).
- xv. 42 U.S.C. § 3604(f)(2) (emphasis added).
- xvi. 42 U.S.C. § 3604(f)(3)(A) (emphasis added).
- xvii. 42 U.S.C. § 3604(f)(3)(B).
- xviii. *Alexander v. Riga*, 208 F.3d 419, 426-27 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001).
- xix. 42 U.S.C. § 3617. A defendant may be found liable for violating Section 3617 without being found liable for any other violation of the FHAA. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613 n.7 (D.N.J. 2000).
- xx. *E.g.*, *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477-78 (9th Cir. 1998) (refusing to grant summary judgment for city in case alleging that city officials retaliated against plaintiff after plaintiff proposed using property to provide residential housing for persons

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with mental illness); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1238-39 (D.C. Cir. 1997) (nonprofit corporation entitled to recover damages for delayed capital contributions caused by city's improper interference with construction permits for facility for former drug and alcohol abusers); *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613-14 (D.N.J. 2000) (refusing to dismiss claim against township and police department accused of campaign of harassment intended to drive out persons living in houses for recovering substance abusers and holding that violence or physical coercion are not a prerequisite to such a claim); cf. *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48-49 (2d Cir. 1997) (affirming preliminary injunction pursuant to Americans with Disabilities Act and Rehabilitation Act barring city from interfering with rehabilitation center's occupation of new site).

xxi. *E.g., Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532 (5th Cir. 1996) (nonprofit corporation stated claim against city for refusal to issue necessary permits for treatment center for emotionally disturbed women due to deed restriction); *Martin v. Constance*, 843 F. Supp. 1321, 1325-26 (E.D. Mo. 1994) (enjoining neighbors from attempting to enforce restrictive covenant against group home); *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) (attempt to enforce restrictive covenant to prevent house from being used as group home violated FHAA); *Hill v. Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996) (enforcement of restrictive covenant to bar group home for people with AIDS would violate FHAA).

xxii. In one case, the court refused to impose liability against neighbors whose vehement opposition to a group home based on stereotypes and prejudice caused the provider to cancel the purchase of a home in the area. *Salisbury House, Inc. v. McDermott*, No. 96-CV-6486, 1998 WL 195693 (E.D. Pa. Mar. 24, 1998). In that case, the court, concerned about potential First Amendment issues, held that only the use of some sort of force or compulsion would be sufficient to establish liability for interference under the FHAA when only speech was involved. *Id.* at \*13; see also *Michigan Protection & Advocacy Service, Inc. v. Babin*, 18 F.3d 337, 347-48 (6th Cir. 1994) (neighbor's purchase of property to prevent it from being used as a group home did not violate FHAA); *Pathways, Inc. v. Dunne*, 172 F. Supp.2d 357,

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- 365-66 (D. Conn. 2001) (discussing application of *Noerr-Pennington* doctrine to preclude FHAA challenge to actions of neighbors to use government channels, including state court proceedings, to stop group home), *aff'd in part, rev'd in part on other grounds*, 329 F.3d 108 (2d Cir. 2003).
- xxiii. *See Ventura Village, Inc. v. City of Minneapolis*, 318 F. Supp. 2d 822, 827-28 (D. Minn. 2004) (rejecting neighbors' claim that city violated FHA by allowing group home because it would result in segregation of the residents based on race and disability), *aff'd*, 419 F.3d 725 (8th Cir. 2005).
- xxiv. H. Rep. No. 100-711, at 24 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 2173, 2185.
- xxv. *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 851 (S.D. Ohio 1996).
- xxvi. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1295 (D. Md. 1993).
- xxvii. *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170, 177 (3d Cir. 2005); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 225 (D.D.C. 2003); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774 (E.D.N.Y. 1999).
- xxviii. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 611 (D.N.J. May 16, 2000).
- xxix. 411 U.S. 792 (1973); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-10 (1993).
- xxx. *See Sanghvi v. City of Claremont*, 328 F.3d 532, 536 & n.3 (9th Cir.), *cert. denied*, 540 U.S. 1075 (2003); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 273 (10th Cir. 2001); *Gilligan v. Jamco*

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*Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997); *Ring v. Interstate Mortg., Inc.*, 984 F.2d 924, 926 (8th Cir. 1993).

- xxxi. Where a plaintiff has direct evidence of discriminatory intent, it is not necessary to resort to the *McDonnell Douglas* burden shifting scheme. See *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985); *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 1273 n.6 (10th Cir. 2001).
- xxxii. See *Sanghvi v. City of Claremont*, 328 F.3d 532, 536 (9th Cir.), *cert. denied*, 540 U.S. 1075 (2003); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997); *Asbury v. Brougham*, 866 F.2d 1276, 1280 (10th Cir. 1989); *Selden Apartments v. U.S. Dep't of Housing & Urban Development*, 785 F.2d 152, 159 (6th Cir. 1986); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1978).
- xxxiii. *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 401 (2d Cir. 1998).
- xxxiv. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 797 (3d Cir. 1990).
- xxxv. *Weldon v. Kraft, Inc.*, 896 F.2d 793, 797 (3d Cir. 1990). The plaintiff's prima facie case, combined with sufficient evidence that the defendant's proffered justification for the action is false, may permit the court to conclude that defendant's action was discriminatory without more direct evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000).
- xxxvi. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 612 (D.N.J. 2000) (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 255-56 (1977)).
- xxxvii. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003); *Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WL 292179 at \*7 (M.D. Ga. Feb. 7, 2006); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at \*6 (D. Neb. Dec. 22, 2005); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774 (E.D.N.Y. 1999) (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977)); *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 612 (D.N.J. 2000); see also *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir.), *cert. denied*, 537

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U.S. 813 (2002) (noting that discriminatory intent can be inferred from totality of circumstances, including historical background of decision, sequence of events, and contemporaneous statements by decision-making body).

- xxxviii. *United States v. City of Chicago Heights*, No. 99 C 4461, 1999 WL 1068477 at \*5 (N.D. Ill. Nov. 19, 1999).
- xxxix. *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48-52 (2d Cir.), cert. denied, 537 U.S. 813 (2002); see also *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 579-80 (2d Cir. 2003) (factors showed that denial of permit for group home for recovering substance abusers was motivated by discriminatory intent).
- xl. *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1500 (W.D. Wash. 1997).
- xli. *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 850-52 (S.D. Ohio 1996).
- xlii. *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3rd Cir. 1993).
- xliii. *Easter Seal Society of New Jersey, Inc. v. Township of North Bergen*, 798 F. Supp. 228, 234 (D.N.J. 1992).
- xliv. *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1211-16 (D. Conn. 1992).
- xlv. *United States v. Borough of Audubon*, 797 F. Supp. 353, 359-62 (D.N.J. 1991), *aff'd mem.*, 968 F.2d 14 (3d Cir. 1992).
- xlvi. *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 133-35 (N.D.N.Y. 1992); see also *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220, 224 (D.P.R. 1991) (granting preliminary injunction against zoning agency's refusal to give permission to operate nursing home for persons with severe mental and physical disabilities in residential area where decision was based on neighborhood pressure); *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits*

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- Administration*, 740 F. Supp. 95, 103-06 (D.P.R. 1990) (holding that denial of special use permit for AIDS hospice was the result of discriminatory animus due to community opposition and thus violated the Act); *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720, 732 (S.D. Ill. 1989) (granting preliminary injunction against zoning authority's refusal to issue use permit to create home for persons with AIDS where the refusal was attributable to community opposition).
- xlvi. *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991).
- xlviii. *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 611-13 (D.N.J. 2000).
- xlix. *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774-76 (E.D.N.Y. 1999).
- i. *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 221 (3d Cir. 1998) (citing portion of unpublished district court's opinion that defendants did not appeal).
- ii. *Byrom v. Charlotte County*, No. 204CV365FTM29DNF, 2005 WL 2219379 at \*7 (M.D. Fla. Sept. 12, 2005).
- iii. *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 225-28 (D.D.C. 2003).
- liii. *See, e.g., Hamm v. City of Gahanna*, 109 Fed. Appx. 744, 747-49 (6th Cir. 2004) (holding that the city did not violate the FHA by refusing to re-zone to allow the plaintiffs to construct on their property group homes for people who are elderly and have disabilities since the evidence indicated that the decision was based on the city's desire to protect property values and the community opposition was based on concerns about property values rather than the disabilities of the residents); *Sanghvi v. City of Claremont*, 328 F.3d 532, 536-37 (9th Cir.) (upholding jury verdict that city did not intentionally discriminate against operators of residential facility for people with Alzheimer's disease by refusing to allow expansion of the facility and connection to the city's sewer system unless the operators agreed to annexation), *cert. denied*, 540 U.S. 1075 (2003); *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437, 439 (7th

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

- liv. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 289 (6th Cir. 1996).
- lv. *Community Services, Inc. v. Wind Gap Municipal Authority*, 42 F.3d 170, 177 (3d Cir. 2005); *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46

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F.3d 1491, 1500-01 & n.16 (10th Cir. 1995); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 643 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069 (N.D. Ill. 1996); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993).

- Ivi. Many courts have held that laws may be facially discriminatory even though they do not expressly use words such as "handicap" or "disability" if the laws' main targets and impact are people with disabilities. This is true even though the laws also may have an incidental impact on non-disabled people. See *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp.2d 208, 222 (D.D.C. 2003); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 644 n.12 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069-70 (N.D. Ill. 1996). Recently, however, the Court of Appeals for the Third Circuit in *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 U.S. 170 (3d Cir. 2005) held that a "technically neutral proxy" will only be deemed to be facially discriminatory if the focus is on disability status. *Id.* at 177-79. The court concluded that the defendant's "personal care home" classification was not a proxy for disability, finding that it could have encompassed the elderly, juveniles, the homeless, battered women or ex-offenders and, thus, did not necessarily mean "home for the disabled or handicapped." *Id.* at 179; see also *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp.2d 376, 388-89 & n.20 (E.D. Pa. 1999) (rejecting facial discrimination challenge to zoning ordinance where the ordinance did not expressly treat persons with disabilities different from others and did not even mention personal care homes or senior assisted living homes).
- Ivii. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 643 (D.N.J. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1072 (N.D. Ill. 1996); *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 620 (D.N.J. 1994) (citing, *inter alia*, *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978)).
- Iviii. See *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 843 (N.D. Ill. 2001); *Epicenter of Steubenville v. City of Steubenville*,

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924 F. Supp. 845, 851 (S.D. Ohio 1996); *Association for Advancement of the Mentally Handicapped v. City of Elizabeth*, 876 F. Supp. 614, 620 (D.N.J. 1994) (quoting *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978)). In examining the zoning law's justification, there is a dispute as to whether a facially discriminatory zoning law will be valid under the FHAA if it has a benign purpose. Compare *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 94-95 (8th Cir. 1991) (upholding dispersion requirement for group homes against FHAA challenge because it advanced the goals of deinstitutionalization and integration), with *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504-05 (10th Cir. 1995) (stressing that on remand in FHAA zoning case that court "should be chary about accepting the justification that a particular restriction upon the handicapped really advances their housing opportunities rather than discriminates against them in housing," but accepting that narrowly tailored restrictions that meet the needs of particular individuals could be acceptable under the FHAA if the benefits clearly outweigh the burdens), *Larkin v. Michigan*, 89 F.3d 285, 291 (6th Cir. 1996) (holding that "integration is not a sufficient justification for maintaining permanent quotas under ... the FHAA"), *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1498-99 (W.D. Wash. 1997) (rejecting argument that integration justified dispersion requirement for group homes), and *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 (D. Md. 1993) ("integration is not an adequate justification under the FHAA").

- lix. See *Association for Advancement of the Mentally Handicapped v. City of Elizabeth*, 876 F. Supp. 614, 621-22 n.6 (D.N.J. 1994); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 n.9 (D. Md. 1993); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993).
- ix. *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 289-92 (6th Cir. 1996) (holding that 1,500 foot dispersion requirement violated the FHAA); *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1496-1500 (W.D. Wash. 1997); *ARC of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 644-46 (D.N.J. 1996) (holding that dispersion requirements were discriminatory classifications);

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- Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 618, 621-25 (D.N.J. 1994) (holding that dispersion requirement that precluded community residents for six or more persons within 1,500 feet of an existing residence for victims of domestic violence or a school or day care center violated FHAA); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 693-95 (E.D. Pa. 1992) (holding that dispersion requirement that precluded group homes within 1,000 feet of each other violated FHAA), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *cf. Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 950-55 (E.D. Wis. 1998) (holding that density and dispersion requirements were not facially invalid but that they were preempted by FHAA). *Contra Familystyle of St. Paul v. St. Paul*, 923 F.2d 91, 94-95 (8th Cir. 1991) (holding that statute requiring group homes to be located at least one-quarter mile from each other absent a conditional use or special use permit was not invalid under FHAA because the statute advanced the purposes of deinstitutionalization and integration).
- ixi. *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 844-45 (N.D. Ill. 2001).
- ixii. *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069-78 (N.D. Ill. 1996).
- ixiii. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 656-59 (W.D. Pa. 2003); *In re Millcreek Township Zoning Ordinance No. 87-24*, 4 D & C 4th 449, 457-61 (Pa. Ct. Com. Pl. July 25, 1989).
- ixiv. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500-01 & n.16 (10th Cir. 1995).
- ixv. *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 46-48 (6th Cir. 1992).
- ixvi. *Ardmore, Inc. v. City of Akron, Ohio*, Case No. 90-CV-1083, slip op. at 10 (N.D. Ohio Aug. 2, 1990).
- ixvii. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296-97 (D. Md. 1993); *see also Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 292 (6th Cir. 1996).

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

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- Huntington*, 62 F. Supp. 2d 762, 776-77 (E.D.N.Y. 1999); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 136 (N.D.N.Y. 1992).
- lxxiv. *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 688, 690 (N.D.N.Y. 1999).
- lxxv. *Tsombanidis v. West Haven Fire Dep't*, 352 F. 3d 565, 575-78 (2d Cir. 2003).
- lxxvi. See *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 53 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002) (holding that disparate impact theory is inapplicable when the plaintiff does not challenge a facially neutral policy); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (holding that disparate impact analysis should be utilized only for laws that apply to people with and without disabilities to determine whether their impact on people with disabilities constitutes discrimination).
- lxxvii. See *Larkin v. Michigan Dep't of Social Services*, 89 F.3d 285, 290-92 (6th Cir. 1996) (holding that licensing requirement that barred issuance of license to adult foster care facility if it was within 1,500 feet of another facility violated FHAA); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 697-99 (E.D. Pa. 1992) (holding that 1,000 foot spacing requirement violated FHAA because, *inter alia*, it had disparate impact on people with disabilities), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993). *Contra Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 93-95 (8th Cir. 1991) (holding that dispersion requirement served valid purpose of promoting integration of people with disabilities and, therefore, did not have a disparate impact that violated the FHAA).
- lxxviii. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1297-99 (D. Md. 1993).
- lxxix. *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1299-1300 (D. Md. 1993).
- lxxx. *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1216-21 (D. Conn. 1992).

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Ixxxi. *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Administration*, 740 F. Supp. 95, 106-07 (D.P.R. 1990); *Baxter v. City of Belleville*, 720 F. Supp. 720, 732-33 (S.D. Ill. 1989).

Ixxxii. 42 U.S.C. § 3604(f)(3)(B).

Ixxxiii. *United States v. City of Philadelphia*, 838 F. Supp. 223, 229 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994).

Ixxxiv. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996); *United States v. City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993) (quotation omitted), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994). The Tenth Circuit has indicated that the FHAA's reasonable accommodation requirement applies to laws that are "generally applicable" and not to those that only affect persons with disabilities. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-02 (10th Cir. 1995). This analysis seems at odds with the approach of many other courts, which have used the FHAA's reasonable accommodation requirement to require municipalities to waive facially discriminatory ordinances in particular instances rather than take the more drastic approach of declaring an entire law to be invalid.

Ixxxv. *Good Shepherd Manor Foundation, Inc. v. City of Mومence*, 323 F.3d 557, 561-62 (7th Cir. 2003).

Ixxxvi. See *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Bd. of Adjustment*, 284 F.3d 442, 457 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 653 (W.D. Pa. 2003).

Ixxxvii. See *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 459 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002).

Ixxxviii. See *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 460 (3d Cir. 2002); *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002); *Dr.*

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*Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 653 (W.D. Pa. 2003); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 834 (N.D. Ill. 2001). While it is relatively easy to show that an accommodation of a zoning restriction that precludes housing for people with disabilities is "necessary" to afford equal opportunity, it may be more problematic when the zoning restrictions at issue are not absolute. For example, in *Lapid-Laurel*, the plaintiff sought to construct a 95-bed nursing facility where the township objected to the size of the facility for the site and the surrounding neighborhood. The appellate court agreed that the plaintiff had to show that the size of the proposed facility was required to make it financially viable or medically effective in order to meet the "necessary" prong of the test, and concluded that it had failed to do so. 284 F.3d at 461.

lxxxix. See *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462 (3d Cir. 2002); *Smith & Lee Assoc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996); *Judy B. v. Borough of Tioga*, 889 F. Supp. 792 (M.D. Pa. 1995); *United States v. City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1186 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 461 (D.N.J. 1992).

xc. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462 (3d Cir. 2002).

xc. *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785-87 (7th Cir. 2002).

xcii. *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 578-79 (2d Cir. 2003). As discussed below, federal courts generally apply the doctrine of "ripeness" to preclude any FHAA reasonable accommodation claims when the plaintiff had not requested an accommodation from local officials prior to filing suit.

xciii. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 450-

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- 54 (3d Cir. 2002); *cf. Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 1275-76 (10th Cir. 2001) (refusing to consider argument in favor of accommodation when the argument had not been presented to local officials). If the United States files a lawsuit to challenge a refusal to grant a reasonable accommodation, however, it may not be bound by the local administrative record. *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 830 (N.D. Ill. 2001).
- xciv. *See Cohen v. Township of Cheltenham*, 174 F. Supp. 2d 307, 314-16 (E.D. Pa. 2001).
- xcv. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 783-84 (7th Cir. 2002) (collecting cases); *cf. U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002) (burden shifting in reasonable accommodation employment case); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 457 (3d Cir. 2002) (plaintiff bears burden to show accommodation is necessary to afford equal opportunity and then the burden shifts to the defendant to show that the accommodation is unreasonable). *Contra Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603-04 (4th Cir. 1997) (plaintiff bears entire burden of proof on reasonable accommodation claim); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996) (same).
- xcvi. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103-06 (3d Cir. 1996); *see also Akridge v. City of Moultrie*, No. 6:04 CV 31(HL), 2006 WI 292179 at \*9 (M.D. Ga. Feb. 7, 2006) (city may have denied reasonable accommodation by refusing to allow small home for elderly and people with disabilities in a single family residential district).
- xcvii. *United States v. City of Philadelphia*, 838 F. Supp. 223, 228-30 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994).
- xcviii. *Judy B. v. Borough of Tioga*, 889 F. Supp. 792, 798-800 (M.D. Pa. 1995).
- xcix. *Smith & Lee Assoc. v. City of Taylor*, 102 F.3d 781, 794-96 (6th Cir. 1996).
- c. *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), *aff'd mem.*,

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

- ci. *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 435-38 (D.N.J. 1998).
- cii. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785-87 (7th Cir. 2002); *New Hope Fellowship, Inc. v. City of Omaha*, No. B04CV259, 2005 WL 3508407 at \*7-\*8 (D. Neb. Dec. 22, 2005); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 832-42 (N.D. Ill. 2001); *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 955-59 (E.D. Wis. 1998); "*K*" *Care, Inc. v. Town of Lac du Flambeau*, 510 N.W.2d 697, 5 ADD 713, 717-22 (Wis. Ct. App. 1993); *United States v. Village of Marshall*, 787 F. Supp. 872, 878-79 (W.D. Wis. 1991).
- ciii. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 652-55 (W.D. Pa. 2003); *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp.2d 721, 724-25 (E.D. La. 1999), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp.2d 676, 684-86 (E.D. Pa. 1999); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1185-86 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 & n.2 (D.N.J. 1992); *Parish of Jefferson v. Allied Health Care, Inc.*, Civil Action No. 91-1199, 1992 U.S. Dist. LEXIS 9124 at \*15-\*19 (E.D. La. June 10, 1992).
- civ. *Good Shepherd Manor Foundation, Inc. v. City of Mommence*, 323 F.3d 557, 562-64 (7th Cir. 2003); *see also Sanghvi v. City of Claremont*, 328 F.3d 532, 538 (9th Cir), *cert. denied*, 540 U.S. 1075 (2003) (city's requirement that facility accede to annexation to secure sewer hook-up for expansion of facility for people with disabilities was not a denial of a reasonable accommodation since the requirement would not burden the residents but only had economic consequences for the provider).
- cv. *Howard v. City of Beavercreek*, 276 F.3d 802, 806-07 (6th Cir. 2002).
- cvi. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 462-

66 (3d Cir. 2002).

- cvii. *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 604-06 (4th Cir. 1997).
- cviii. *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 152-53 (2d Cir. 1999).
- cix. *Hemisphere Building Co., Inc. v. Village of Richton Park*, 171 F.3d 437, 439-41 (7th Cir. 1999). While the Seventh Circuit indicated that a zoning ordinance that merely increased the cost of housing for everyone need not be waived, *id.* at 440-41, other courts have indicated that an accommodation of zoning laws may be necessary if the financial impact would eliminate the housing opportunity for persons with disabilities (not merely make it more expensive). *E.g.*, *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp.2d 721, 724 (E.D. La. 1999), *aff'd on other grounds*, 234 F.3d 192 (5th Cir. 2000); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 686 (E.D. Pa. 1999); *cf. Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 689-90 (N.D.N.Y. 1999) (while rejecting reasonable accommodation claim, the court indicated that evidence that the program would not be economically viable absent accommodation might have yielded a different outcome).
- cx. *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp. 2d 686, 689-90 (N.D.N.Y. 1999).
- cxii. *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178-79 (5th Cir. 1996).
- cxiii. *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251-52 (8th Cir.), *cert. denied*, 519 U.S. 816 (1996).
- cxiv. *Brandt v. Village of Chebanse*, 82 F.3d 172, 174-75 (7th Cir. 1996).
- cxv. *Erdman v. City of Fort Atkinson*, 84 F.3d 960, 962-64 (7th Cir. 1996).
- cxvi. *Thornton v. City of Allegan*, 863 F. Supp. 504, 510 (W.D. Mich. 1993).
- cxvii. *Hamm v. City of Gahanna*, 109 Fed. Appx. 744, 749-50 (6th Cir.

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2004).

cxvii. *Barry v. Town of Rollinsford*, No. 02-147M, 2003 WL 22290248 at \*7 (D.N.H. Oct. 6, 2003), *app. dismissed*, 106 Fed. Appx. 738 (1st Cir. 2004).

cxviii. 42 U.S.C. § 3613(a)(1)(A).

cxix. See *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 n.2 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332-42 (6th Cir. 2002); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 221-22 (3d Cir. 1998); *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1281-82 (3d Cir. 1993); *Byrom v. Charlotte County*, No. 204CV365FTM29DNF, 2005 WL 2219379 at \*4 (M.D. Fla. Sept. 12, 2005); *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643, 651 (W.D. Pa. 2003); *Community Housing Trust v. Dep't of Consumer and Regulatory Affairs*, 2573 F. Supp. 2d 208, 221 (D.D.C. 2003); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 425 (D.N.J. 1998).

cxx. See *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995).

cxxi. 42 U.S.C. § 3610(a)(1)(A)(i).

cxxii. 42 U.S.C. § 3610(g)(1).

cxxiii. 42 U.S.C. § 3610(b)(1).

cxxiv. 42 U.S.C. § 3610(g)(2).

cxxv. The complainant may choose whether HUD will prosecute the complaint through administrative review or judicial proceedings. 42 U.S.C. § 3612(a).

cxxvi. 42 U.S.C. § 3612.

cxxvii. 24 C.F.R. § 103.400(a)(3).

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cxxviii. 42 U.S.C. § 3613(a)(1).

cxxix. 42 U.S.C. § 3613(a)(2); see also *In re Millcreek Township Zoning Ordinance No. 87-24*, 4 D. & C.4th 449, 461 (Pa. Ct. Com. Pl. 1989).

cxxx. 42 U.S.C. § 3613(b).

cxviii. 42 U.S.C. § 3613(c)(1); see also *Riga v. Alexander*, 208 F.3d 419, (3d Cir. 2000) (indicating that nominal damages are available under FHAA even absent proof of actual injury and that punitive damages are available without proof of egregious or malicious misconduct), *cert. denied*, 531 U.S. 1069 (2001); *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park*, 152 F.3d 217, 222-24 (3d Cir. 1998) (holding that court does not have discretion to decline to award compensatory damages under FHAA; it must award such damages to the extent they are established); *Samaritan Inns, Inc. v. Dist. of Columbia*, 114 F.3d 1227, 1234-38, 1239 (D.C. Cir. 1997) (discussing compensatory damages and holding that punitive damages are available under FHAA and warranted in the circumstances).

cxviii. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The Supreme Court, though, did indicate that punitive damages may be available against municipalities if it can be established that the taxpayers are directly responsible for perpetrating an outrageous violation of civil rights. *Id.* at 267 n.29. The Supreme Court has also held that punitive damages cannot be recovered under the ADA or Section 504 of the Rehabilitation Act. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). The courts have not definitively addressed the question of whether punitive damages are available in actions against municipalities under the FHAA. Compare *Dadian v. Village of Wilmette*, No. 98 C 3731, 1999 WL 299887 at \*3 (N.D. Ill. May 4, 1999) (punitive damages are available against municipal government), with *New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of Asbury Park*, 152 F.3d 217, 224-25 (3d Cir. 1994) (questioning without deciding whether punitive damages can be awarded against municipality).

cxviii. 42 U.S.C. § 3613(c)(2).

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- cxxxiv. 42 U.S.C. § 3607(b)(1).
- cxxxv. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-738 (1995).
- cxxxvi. 42 U.S.C. § 3604(f)(9). Similar "direct threat" provisions are also included in the Americans with Disabilities Act. 42 U.S.C. §§ 12113(b); 12183(b)(3).
- cxxxvii. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995).
- cxxxviii. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995); see also *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 622-23 (D.N.J. 1994).
- cxxxix. *Roe v. Sugar River Mills Associates*, 820 F. Supp. 636, 639 (D.N.H. 1993) (discussing direct threat requirement in landlord-tenant context).
- cxl. 42 U.S.C. § 3613(a)(1)(A); see also *Community Interactions-Bucks County, Inc. v. Township of Bensalem*, 5 ADD 933 (E.D. Pa. 1994).
- cxli. 42 U.S.C. § 3613(a)(1)(B); see also *Comorato v. Fox & Lazo of Pennsylvania, Inc.*, 2 ADD 858 (E.D. Pa. 1993) (discussing equitable tolling of statute of limitations), *aff'd mem.*, 27 F.3d 556 (3d Cir. 1994).
- cxlii. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 102-09 & n.11 (1979); *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp.2d 686, 688 (N.D.N.Y. 1999); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 433 (D.N.J. 1998).
- cxliii. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1982); *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp.2d 686, 688 (N.D.N.Y. 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at \*5 (E.D. Pa. July 30, 1998).
- cxliv. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 451-

- 52 n.5 (3d Cir. 2002) (dicta); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir.), cert. denied, 519 U.S. 816 (1996); *United States v. Village of Palatine*, 37 F.3d 1230, 1233 (7th Cir. 1994); *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp.2d 376, 385-88 (E.D. Pa. 1999); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1260-62 (E.D. Va. 1993); see also *Smith & Lee Associates v. City of Taylor*, 13 F.3d at 929-30 (holding that city could not simply issue a letter granting a reasonable accommodation when the local zoning law did not permit such a procedure and, instead, any reasonable accommodation would require either "spot zoning" or an amendment of the zoning law); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 726, 771-72 (E.D.N.Y. 1999) (holding that case was ripe where enactment of revised zoning law was "tantamount to a final denial" of a special use permit). But see *Advocacy and Resource Center v. Town of Chazy*, 62 F. Supp.2d 686, 689 (N.D.N.Y. 1999) (holding that case was ripe after town issued enforcement notices against residential provider).
- cxlv. *Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 199-200 (5th Cir. 2000).
- cxlvi. See *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 452 n.5 (3d Cir. 2002); *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp. 2d 376, 388-89 (E.D. Pa. 1999). See generally *Psidium v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (in due process "takings" case, the court noted that facial challenges to ordinances or regulations are generally ripe the moment the challenged ordinance or regulation is passed).
- cxlvii. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 452 n.5 (3d Cir. 2002).
- cxlviii. See *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 343-44 (6th Cir. 2002); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 452 n.5 (3d Cir. 2002); *United States v. Village of Palatine*, 37 F.3d 1230, 1233-34 (7th Cir. 1994); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 770 (E.D.N.Y. 1999); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at \*6 (E.D. Pa. July 30, 1998); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 425-28 (D.N.J. 1998); *Oxford House, Inc. v. City of Virginia Beach*, 825 F.

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Supp. 1251, 1261 (E.D. Va. 1994); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

- cxlix. *Bryant Woods Inn Inc. v. Howard County*, 124 F.3d 597, 601-02 (4th Cir. 1997) (holding that FAA claim filed by group home operator who sought to expand size of program was "ripe" after the zoning board denied his request for expansion and that he was not required to pursue an appeal of that decision either under an "exhaustion" doctrine or a "ripeness" requirement); *cf. Community Interactions-Bucks County, Inc. v. Township of Bensalem*, 8 ADD 276, 278-79 (E.D. Pa. 1994) (refusing to dismiss FAA claim where complaint alleged that defendant refused to issue necessary building permit).
- cl. *E.g., Pathways, Inc. v. Dunne*, 329 F.3d 108 (2d Cir. 2003) (holding that *Younger* abstention did not preclude court's consideration of FHAA claims since the state proceedings had concluded); *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1074-75 (6th Cir. 1998) (holding that *Younger* abstention was appropriate where an action to enforce local land use ordinance against rooming house operator was pending in state court); *Cohen v. Township of Cheltenham*, 174 F. Supp.2d 307, 317-19 (E.D. Pa. 2001) (rejecting claims of *Burford*, *Younger*, and *Colorado River* abstention); *Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 430-33 (D.N.J. 1998) (rejecting *Pullman* and *Colorado River* abstention arguments and, more importantly, rejecting *Younger* abstention on the basis that *Younger* does not apply when the proceedings pending are non-coercive (i.e., not enforcement proceedings initiated by the government) but, rather, are "remedial" proceedings initiated by the plaintiff in the federal action); *Remed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272 at \*2-\*4 (E.D. Pa. July 30, 1998) (holding that *Colorado River* abstention was not warranted and that *Younger* abstention was not justified where the federal plaintiff was the party to instigate the state administrative and judicial proceedings).
- cli. *See, e.g., Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 428-30 (D.N.J. 1998)

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(rejecting res judicata argument in FAA case). Discussion of the doctrines of claim and issue preclusion are beyond the scope of this booklet. In considering an FAA claim, however, you must consider the potential impact of these issues when there are or were state proceedings, such as a hearing before a local zoning hearing board or state court.

**Home Improvement Consumer Protection Act, 73 P.S. § 517.1, et seq.**

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**§ 517.1. Short title**

This act shall be known and may be cited as the Home Improvement Consumer Protection Act.

**§ 517.2. Definitions**

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

**"Advertisement."** A statement promoting home improvement services in a newspaper, periodical, pamphlet, circular, billboard, sign, letterhead, business card or other printed materials or in announcements to the public on radio, television or the Internet. The term shall not include the following:

- (1) Sponsorship or recognition of sponsorships of civic, charitable or nonprofit events, teams or purposes.
- (2) Writings or graphics on promotional clothing, pens, pencils, notepads or similar items.

**"Arbitration clause."** A process in which a neutral arbitrator or panel of neutral arbitrators is engaged by the parties to settle a dispute between a contractor and an owner.

**"Bureau."** The Bureau of Consumer Protection in the Office of Attorney General.

**"Certificate."** A certificate of registration as a contractor, issued by the Bureau of Consumer Protection, which contains a registration number assigned by the Bureau of Consumer Protection.

**"Contractor."** Any person who owns and operates a home improvement business or who undertakes, offers to undertake or agrees to perform any home improvement. The term includes a subcontractor or independent contractor who has contracted with a home improvement retailer, regardless of the retailer's net worth, to provide home improvement services to the retailer's customers. The term does not include any of the following:

- (1) A person for whom the total cash value of all of that person's home improvements is less than \$5,000 during the previous taxable year.
- (2) A home improvement retailer having a net worth of more than \$50,000,000 or an employee of that retailer that does not perform home improvements.

**"Home improvement."**

(1) The term includes all of the following done in connection with land or a portion of the land adjacent to a private residence or a building or a portion of the building which is used or designed to be used as a private residence for which the total cash price of all work agreed upon between the contractor and owner is more than \$500:

(i) Repair, replacement, remodeling, demolition, removal, renovation, installation, alteration, conversion, modernization, improvement, rehabilitation or sandblasting.

(ii) Construction, replacement, installation or improvement of driveways, swimming pools, pool houses, porches, garages, roofs, siding, insulation, solar energy

systems, security systems, flooring, patios, fences, gazebos, sheds, cabanas, landscaping of a type that is not excluded under paragraph (2)(vi), painting, doors and windows and waterproofing.

(iii) Without regard to affixation, the installation of central heating, air conditioning, storm windows or awnings.

(2) The term does not include:

(i) The construction of a new home.

(ii) The sale of goods or materials by a seller who neither arranges to nor performs, directly or indirectly, any work or labor in connection with the installation or application of the goods or materials.

(iii) The sale of services furnished for commercial or business use or for resale, if the service takes place somewhere other than at a private residence.

(iv) The sale of appliances, including stoves, refrigerators, freezers, room air conditioners and others which are designed for and are easily removable from the premises without material alteration.

(v) Any work performed without compensation by the owner of the owner's private residence or residential rental property.

(vi) Any work performed by a landscaper certified by the Department of Agriculture under the act of December 16, 1992 (P.L. 1228, No. 162)<sup>1</sup>, known as the Plant Pest Act, except to the extent that the work involves any of the following at a private residence:

(A) The construction, replacement, installation or improvement of buildings, driveways, swimming pools, porches, garages, roofs, siding, insulation, solar energy systems, security systems, flooring, patios, nondecorative fences, doors, lighting systems, concrete walkways and windows.

(B) The placement of retaining walls, fountains or drainage systems.

(vii) Emergency work pursuant to section 7 of the act of December 17, 1968 (P.L. 1224, No. 387)<sup>2</sup>, known as the Unfair Trade Practices and Consumer Protection Law.

(viii) The conversion of existing commercial structures into residential or noncommercial structures.

**"Home improvement contract."** An agreement between a contractor, subcontractor or salesperson and an owner for the performance of a home improvement which includes all agreements for labor, services and materials to be furnished and performed under the contract.

**"Home improvement retailer."** A person, whether or not the person is registered under this act, who sells materials for use in home improvement contracts.

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<sup>1</sup> 3 P.S. § 258.1, *et seq.*

<sup>2</sup> 73 P.S. § 201-7.

**"Owner."**

(1) The term includes any of the following:

(i) An owner of a private residence, including any person authorized by an owner to act on the owner's behalf to order, contract for or purchase a home improvement.

(ii) A person entitled to the performance of the work of a contractor pursuant to a home improvement contract.

(2) An owner of a private residence shall not be required to reside in the residence to be deemed an owner under this act.

(3) A person who owns three or more private residences in this Commonwealth shall not be deemed an owner except with respect to the person's primary residence or the part of the building which houses the primary residence of the owner and those private residences the person uses for personal recreational purposes.

**"Person."** An individual, partnership, limited partnership, limited liability company, joint venture or corporation.

**"Private residence."** Any of the following:

(1) A single family dwelling.

(2) A multifamily dwelling consisting of not more than two units.

(3) A single unit located within any multifamily dwelling, including condominiums and cooperative units.

**"Special order material."** Any material, product or equipment that is not a stock item and must be specially ordered from the factory or distributor and which is produced or processed for the contractor for a specific home improvement contract. Special order materials are not returnable by the contractor for a refund or credit and have no usefulness for other home improvement contracts because they are specially ordered for a specific home improvement contract.

**"Specifications."** The plans, detailed drawings, lists of materials, stated allowances or other methods customarily used in the home improvement industry as a whole to describe with particularity the work, workmanship, materials and quality of materials for each home improvement.

**"Time and materials."** A construction practice where the contractor and owner agree that the contractor will perform the home improvement and the owner will pay the contractor under the home improvement contract based on the actual cost of labor at a specified hourly rate and the actual costs of materials and use of equipment, plus an agreed upon percentage of the total actual costs or a fixed amount, over and above the actual costs, to cover the contractor's fee and overhead costs reasonably incurred in the performance of the home improvement.

**§ 517.3. Registration of contractors**

**(a) General rule.**--No person shall hold himself out as a contractor, nor shall a person perform any home improvement without first registering with the bureau, as provided for in this act.

**(b) Public access to registration information.**--The bureau shall maintain a toll-free telephone number from which a caller can obtain information as to whether a contractor is registered with the bureau pursuant to this act, as well as information that may be obtained on the bureau's Internet website.

**(c) Confidentiality of personal information.**--The bureau shall create a policy for the disclosure of personal information to the public. The bureau may not disclose to the public a contractor's Social Security number, driver's license number or any confidential information prohibited by law from being disclosed, provided that a contractor's home address and home telephone number shall be disclosed only if it is also used as the contractor's business address and business telephone number.

**(d) Nongrant or renewal of license.**--The Department of Banking shall not grant or renew a license to any person registered, or required to be registered, as a home improvement contractor pursuant to any of the following:

(1) The former act of December 12, 1980 (P.L. 1179, No. 219)<sup>3</sup>, known as the Secondary Mortgage Loan Act.

(2) The act of December 22, 1989 (P.L. 687, No. 90)<sup>4</sup>, known as the Mortgage Bankers and Brokers and Consumer Equity Protection Act.

#### **§ 517.4. Procedures for registration as a contractor**

##### **(a) Application.--**

(1) A person shall apply to the bureau in writing or electronically via a secure Internet connection, if permitted by the bureau, on a form provided by the bureau. The application shall include the following information:

(i) For an individual applicant, all of the following:

(A) Name.

(B) Date of birth.

(C) Home address and home telephone number.

(D) Driver's license number, a copy of an identification card issued by the state in which the individual resides or other form of identification as permitted by the bureau.

(E) Business name, address and telephone number.

(F) Federal employer identification number, if applicable.

(G) Social Security number.

(H) All prior business names and addresses of home improvement businesses operated by the individual.

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<sup>3</sup> 7 P.S. § 6601, *et seq.*

<sup>4</sup> 63 P.S. § 456.101, *et seq.*

(ii) For a general partnership applicant, all of the following:

(A) Name of each partner.

(B) Date of birth of each partner.

(C) Home address and home telephone number of each partner.

(D) Driver's license number or a copy of an identification card issued by the state in which the partner resides, of each partner.

(E) Partnership name, address and telephone number.

(F) Federal employer identification number, if applicable.

(G) Social Security number of each partner.

(H) All prior business names and addresses of home improvement businesses operated by the applicant and each partner.

(iii) For a corporation, limited liability company or limited partnership, all of the following:

(A) Name of each officer, manager and general partner.

(B) Date of birth of each officer, manager and general partner.

(C) Home address and home telephone number of each officer, manager and general partner.

(D) Driver's license number or a copy of an identification card issued by the state in which the individual resides, of each officer, manager and general partner.

(E) Entity's name, address and telephone number.

(F) Federal employer identification number, if applicable.

(G) Social Security number of each officer, manager and general partner.

(H) Name of each director or each individual holding greater than a 5% equity interest in the entity.

(I) All prior business names and addresses of home improvement businesses operated by each officer, manager and general partner.

(iv) For an out-of-State corporation, limited liability or limited partnership, the name and address of the entity's resident agent or registered office provider within this Commonwealth and any registration number or license number issued to the entity by its home state or political subdivision of such other state, if applicable.

(v) For a joint venture applicant, the name, address and telephone number of the joint venture, as well as the name, address and telephone number of each party to the joint venture. When the parties to a joint venture include business entities, the information required from such entities pursuant to paragraph (2) and subsection (b) shall also be provided.

(vi) A complete description of the nature of the contracting business of the applicant.

(vii) A statement whether:

(A) The individual or individuals making application, even if doing so as part of a business entity application, has ever been convicted of a criminal offense related to a home improvement transaction, fraud, theft, a crime of deception or a crime involving fraudulent business practices, as well as a statement whether the applicant has ever filed a petition in bankruptcy or, within the last ten years, received a final civil judgment entered against the applicant or businesses in which the applicant held an interest that was related to a home improvement transaction.

(B) The applicant's certificate or a similar certificate or license issued by any other state or political subdivision thereof has ever been revoked or suspended pursuant to an order issued by a court of competent jurisdiction and, if so, the current status of the certificate or similar certificate or license. The statement required by this clause shall include the same information with respect to any other business in which the person making application has or has ever had an interest.

(viii) Whether within the last ten years the applicant has ever been suspended or debarred from participating in any Federal, State, local or not-for-profit program through which public funding or other assistance is provided to owners for home improvements.

(ix) Proof of liability insurance covering personal injury in an amount not less than \$50,000 and insurance covering property damage caused by the work of a home improvement contractor in an amount not less than \$50,000. For the purpose of this subparagraph, proof of insurance may include information attested to by an applicant that the applicant is self-insured and the bureau shall develop forms for this purpose and make them available to applicants. The bureau may determine the sufficiency of the self-insurance and the manner in which it is maintained in compliance with this act.

(2) Information requested in paragraph (1)(i) through (v) shall be for a ten-year period, prior to the time of registration. The applicant shall provide information prior to the last ten years or, as further clarification of the information provided, if the bureau requests such information.

**(b) Reporting of multiple registrations or licensures.**--Any registered contractor in this Commonwealth who is registered or licensed as a home improvement contractor in any other state, or political subdivision thereof, shall report this information to the bureau on the initial registration and biennial registration application. Any disciplinary action taken in such other jurisdiction shall be reported to the bureau on the initial registration application or, if such action occurred subsequent to submission of an initial application, on the biennial registration application or within 90 days of final disposition, whichever is sooner. Multiple registrations or licensures shall be noted by the bureau on the contractor's registration, and such state, or political subdivision thereof, shall be notified by the bureau of any disciplinary actions taken against such contractor in this Commonwealth.

**(c) Reporting of changes in registration information.**--Any contractor required to register under this act shall update the information required to be included in the contractor's application for registration within 30 days after any change in the required information. No fee shall be required for updating the information in an active registration.

### **§ 517.5. Application fees**

**(a) Amount.--**Each application for a certificate for a home improvement contractor or renewal of that certificate shall be accompanied by a fee of \$50. After completion of the application and payment of the fee, the bureau shall issue the home improvement contractor a registration certificate identifying the name of the individual contractor, name and address of the business and a registration number. Renewals shall be on a biennial basis.

### **(b) Home Improvement Account.--**

(1) A restricted revenue account known as the Home Improvement Account is established in the General Fund. All fees and penalties collected under this act after the effective date of this subsection shall be deposited into the Home Improvement Account, which account shall be interest bearing.

(2) The funds in the Home Improvement Account and any interest earned on the funds may be appropriated to the Attorney General for administering and enforcing the provisions of this act and to protect consumers with respect to home improvements through consumer education and other means.

### **§ 517.6. Proof of registration**

A contractor shall include its registration number in all advertisements distributed within this Commonwealth and on all contracts, estimates and proposals with owners in this Commonwealth. This section shall apply to all advertisements, contracts, estimates and proposals created by a contractor after the effective date of this act.

### **§ 517.7. Home improvement contracts**

**(a) Requirements.--**No home improvement contract shall be valid or enforceable against an owner unless it:

(1) Is in writing and legible and contains the home improvement contractor registration number of the performing contractor.

(2) Is signed by all of the following:

(i) The owner, his agent or other contracted party.

(ii) The contractor or a salesperson on behalf of a contractor.

(3) Contains the entire agreement between the owner and the contractor, including attached copies of all required notices.

(4) Contains the date of the transaction.

(5) Contains the name, address and telephone number of the contractor. For the purposes of this paragraph, a post office box number alone shall not be considered an address.

(6) Contains the approximate starting date and completion date.

(7) Includes a description of the work to be performed, the materials to be used and a set of specifications that cannot be changed without a written change order signed by the owner and the contractor.

(8) Includes the total sales price due under the contract or includes a time and materials provision wherein contractor and owner agree in writing to the performance of the home improvement by the contractor and payment for the home improvement by the owner, based on time and materials. If the contract includes a time and materials provision:

(i) The contractor shall provide an initial cost estimate in writing to the owner before any performance of the home improvement commences.

(ii) The contract shall state:

(A) The dollar value of the initial cost estimate for the services to be performed under the time and materials provision.

(B) That the cost of the services to be performed under the time and materials provision may not exceed 10% above the dollar value indicated in the initial cost estimate.

(C) The total potential cost of the services to be performed under the time and materials provision, including the initial cost estimate and the 10% referenced in clause (B), expressed in actual dollars.

(D) A statement that the cost of the services to be performed under the time and materials provision shall not be increased over the initial cost estimate plus a 10% increase without a written change order signed by the owner and contractor.

(9) Includes the amount of any down payment plus any amount advanced for the purchase of special order materials. The amount of the down payment and the cost of the special order materials must be listed separately.

(10) Includes the names, addresses and telephone numbers of all subcontractors on the project known at the date of signing the contract. For the purposes of this paragraph, a post office box number alone shall not be considered an address.

(11) Except as provided in section 12<sup>5</sup>, agrees to maintain liability insurance covering personal injury in an amount not less than \$50,000 and insurance covering property damage caused by the work of a home improvement contractor in an amount not less than \$50,000 and identifies the current amount of insurance coverage maintained at the time of signing the contract.

(12) Includes the toll-free telephone number under section 3(b)<sup>6</sup>.

(13) Includes a notice of the right of rescission under subsection (b).

**(b) Right of rescission.**--An individual signing a home improvement contract, except as provided in the emergency provisions of section 7 of the act of December 17, 1968 (P.L. 1224, No. 387)<sup>7</sup>, known as the Unfair Trade Practices and Consumer Protection Law, shall be permitted to rescind the contract without penalty regardless of where the contract was signed, within three business days of the date of signing.

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<sup>5</sup> 73 P.S. § 517.12.

<sup>6</sup> 73 P.S. § 517.3.

<sup>7</sup> 73 P.S. § 201-7.

**(c) Copy to be provided.**--A contractor or salesperson shall provide and deliver to the owner, without charge, a completed copy of the home improvement contract at the time the contract is executed which shall contain all required notices.

**(d) Arbitration clause.**--Nothing in this act shall preclude the court from setting aside an arbitration clause on any basis permitted under Pennsylvania law. If the contract contains an arbitration clause, it shall meet the following requirements or be deemed void by the court upon motion of either party, filed prior to the commencement of arbitration:

(1) The text of the clause must be in capital letters.

(2) The text shall be printed in 12-point boldface type and the arbitration clause must appear on a separate page from the rest of the contract.

(3) The clause shall contain a separate line for each of the parties to indicate their assent to be bound thereby.

(4) The clause shall not be effective unless both parties have assented as evidenced by signature and date, which shall be the date on which the contract was executed.

(5) The clause shall state clearly whether the decision of the arbitration is binding on the parties or may be appealed to the court of common pleas.

(6) The clause shall state whether the facts of the dispute, related documents and the decision are confidential.

**(e) Voidable clauses.**--If a home improvement contract contains any of the following clauses, the home improvement contract shall be voidable by the owner:

(1) A hold harmless clause.

(2) A waiver of Federal, State or local health, life, safety or building code requirements.

(3) A confession of judgment clause.

(4) A waiver of any right to a jury trial in any action brought by or against the owner.

(5) (Reserved).

(6) An assignment of or order for payment of wages or other compensation for services.

(7) A provision by which the owner agrees not to assert any claim or defense arising out of the contract.

(8) A provision that the contractor shall be awarded attorney fees and costs.

(9) A clause by which the owner relieves the contractor from liability for acts committed by the contractor or the contractor's agents in the collection of any payments or in the repossession of any goods.

(10) A waiver of any rights provided under this act.

(11) A provision providing for the automatic or recurring renewal of any provisions of the agreement, unless:

(i) the contract establishes a procedure by which the owner can choose not to renew the provision or provisions, thereby avoiding any new fees or charges, by providing written notice to the contractor via first class mail postmarked no later than three business days prior to any renewal;

(ii) such procedure is clearly and conspicuously disclosed in the agreement; and

(iii) the contract includes a provision requiring the contractor to notify the owner of any automatic or recurring renewal, and the owner's option to cancel such renewal, by mail, not earlier than 20 days and not later than ten days prior to the date of any such renewal.

**(f) Home improvement retailer contracts.**--A home improvement retailer having a net worth of more than \$50,000,000 or an employee of that retailer that does not perform home improvements shall comply with the provisions of this subsection. No home improvement contract issued by a home improvement retailer having a net worth of more than \$50,000,000 or an employee of that retailer shall be valid or enforceable against an owner unless the contract:

(1) Is in writing and legible and contains all of the following:

(i) The name, address and telephone number of the retailer.

(ii) The name of the person signing the contract on behalf of the retailer and the person's position with the retailer or the person's authority to sign the contract.

(iii) The signature of the owner, the owner's agent or other contracted party.

(2) Complies with subsections (a)(3), (4), (6), (7), (8) and (9), (b), (c), (d) and (e).

**(g) Contractor's recovery right.**--Nothing in this section shall preclude a contractor who has complied with subsection (a) from the recovery of payment for work performed based on the reasonable value of services which were requested by the owner if a court determines that it would be inequitable to deny such recovery.

#### **§ 517.8. Home improvement fraud**

**(a) Offense defined.**--A person commits the offense of home improvement fraud if, with intent to defraud or injure anyone or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:

(1) makes a false or misleading statement to induce, encourage or solicit a person to enter into any written or oral agreement for home improvement services or provision of home improvement materials or to justify an increase in the previously agreed upon price;

(2) receives any advance payment for performing home improvement services or providing home improvement materials and fails to perform or provide such services or materials when specified in the contract taking into account any force majeure or unforeseen labor strike that would extend the time frame or unless extended by agreement with the owner and fails to return the payment received for such services or materials which were not provided by that date;

(3) while soliciting a person to enter into an agreement for home improvement services or materials, misrepresents or conceals the contractor's or salesperson's real name, the name of the contractor's business, the contractor's business address or any other identifying information;

(4) damages a person's property with the intent to induce, encourage or solicit that person to enter into a written or oral agreement for performing home improvement services or providing home improvement materials;

(5) misrepresents himself or another as an employee or agent of the Federal, Commonwealth or municipal government, any other governmental unit or any public utility with the intent to cause a person to enter into any agreement for performing home improvement services or providing home improvement materials;

(6) misrepresents an item as a special order material or to misrepresent the cost of the special order material;

(7) alters a home improvement agreement, mortgage, promissory note or other document incident to performing or selling a home improvement without the consent of the consumer; or

(8) directly or indirectly publishes a false or deceptive advertisement in violation of State law governing advertising about home improvement.

**(b) Prosecution.--**Prosecutions under this section shall not bar prosecution or conviction for any other crimes.

**(c) Grading.--**

(1) A violation of subsection (a)(1), (3), (4), (5), (6), (7) or (8) constitutes:

(i) a felony of the third degree if the amount involved exceeds \$2,000; or

(ii) a misdemeanor of the first degree if the amount involved is \$2,000 or less or if the amount involved cannot be satisfactorily ascertained.

(2) A violation of subsection (a)(2) constitutes:

(i) a felony of the third degree if the amount of the payment retained exceeds \$2,000; or

(ii) a misdemeanor of the first degree if the amount of the payment retained is \$2,000 or less or if the amount of the payment cannot be satisfactorily ascertained.

(3) Amounts involved pursuant to one scheme or course of conduct, whether involving one or more victims, may be aggregated in determining the grade of the offense pursuant to subsection (a).

(4) Where a person commits an offense under subsection (a) and the victim is 60 years of age or older, the grading of the offense shall be one grade higher than specified in paragraphs (1), (2) and (3). This paragraph shall not be applicable to persons whose sentence would be enhanced pursuant to paragraph (5).

(5) Notwithstanding any other provision of this section, where a person commits a second or subsequent offense described in subsection (a), the offense will constitute a felony of the second degree regardless of the amount of money involved. For this paragraph to be applicable, the second or subsequent offense must have occurred after the first conviction. Paragraph (4) shall not be applicable to persons whose sentences would be enhanced pursuant to this paragraph.

(6) In addition to any other penalty imposed by this act, the court may revoke or suspend the certificate. At the time of sentencing, the court shall state the reasons for such revocation or suspension. A person whose registration has been revoked or suspended may petition the court of original jurisdiction for reinstatement after a period of five years from the date of revocation or suspension, or as specified in the court's order. The Administrative Office of Pennsylvania Courts shall report to the bureau any suspension or revocation of a certificate ordered by a court.

**(d) Jurisdiction.--**

(1) The district attorneys of the several counties shall have the authority to investigate and to institute criminal proceedings for any violation of this section.

(2) In addition to the authority conferred upon the Attorney General by the act of October 15, 1980 (P.L. 950, No. 164)<sup>8</sup>, known as the Commonwealth Attorneys Act, the Attorney General shall have the authority to investigate and institute criminal proceedings for any violation of this section or any series of such violations involving more than one county of this Commonwealth or involving any county of this Commonwealth and another state. No person charged with a violation of this section by the Attorney General shall have standing to challenge the authority of the Attorney General to investigate or prosecute the case, and, if any such challenge is made, the challenge shall be dismissed and no relief shall be available in the courts of this Commonwealth to the person making the challenge.

**§ 517.9. Prohibited acts**

No person shall:

(1) Fail to register as required by this act.

(2) Fail to refund the amount paid for a home improvement within ten days of either the acceptance and execution of a return receipt for certified mail containing a written request for a refund or the refusal to accept the certified mail sent to the contractor's last known address if all of the following apply:

(i) No substantial portion of the contracted work has been performed at the time of the request.

(ii) More than 45 days have elapsed since the starting date specified in the written contract.

(3) Accept a municipal certificate of occupancy or other proof that performance of a home improvement contract is complete or satisfactorily concluded with knowledge that the document or proof is false and the performance is incomplete.

(4) Utter, offer or use a completion certificate or other proof that a home improvement contract is complete or satisfactorily concluded when the person knows or has reason to know that the document or proof is false and is made to accomplish any of the following:

(i) Make or accept an assignment or negotiation of the right to receive payment under a home improvement contract.

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<sup>8</sup> 71 P.S. § 732-101, *et seq.*

(ii) Get or grant credit or a loan on security of the right to receive payment under a home improvement contract.

(5) Abandon or fail to perform, without justification, any home improvement contract or project engaged in or undertaken by a contractor. For the purposes of this paragraph, the term "justification" shall include nonpayment by the owner as required under the contract or any other violation of the contract by the owner.

(6) Deviate from or disregard plans or specifications, in any material respect, without a written change order dated and signed by both the contractor and owner, which contains the accompanying price changes for each deviation.

(7) Prepare, arrange, accept or participate in the financing of a home improvement contract with knowledge that the home improvement contract states a greater monetary obligation than the actual price of the home improvement.

(8) Advertise or offer, by any means, to perform a home improvement if the person does not intend to do any of the following:

(i) Accept a home improvement contract.

(ii) Perform the home improvement.

(iii) Charge for the home improvement at the price advertised or offered.

(9) Demand or receive any payment for a home improvement before the home improvement contract is signed.

(10) (i) Except as provided under subparagraph (ii), for a home improvement contract in which the total price is more than \$5,000, receive a deposit in excess of:

(A) one-third of the home improvement contract price; or

(B) one-third of the home improvement contract price plus the cost of special order materials that will be ordered, as designated in the written contract.

(ii) The provisions of subparagraph (i) shall not apply to a home improvement retailer, regardless of net worth, who does all of the following:

(A) Posts an irrevocable letter of credit payable to the bureau for the use and benefit of every person protected by the provisions of this subparagraph in a form approved by the bureau, in the amount of \$100,000 per store location but not to exceed \$2,000,000 for a home improvement retailer that has multiple stores.

(B) Ensures that its contractors are registered under this act and have proof of liability insurance as defined in section 4(a)(1)(ix)<sup>9</sup>.

(iii) In the event of a dispute with a home improvement retailer or a contractor authorized to do work on behalf of the home improvement retailer, an owner may file with the bureau a complaint against the home improvement retailer and request a draw upon the home improvement retailer's letter of credit. The following shall apply:

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<sup>9</sup> 73 P.S. § 517.4.

(A) Upon receipt of a complaint, the bureau shall notify the home improvement retailer and investigate the complaint.

(B) Upon a determination by the bureau that the home improvement retailer is in default of the contract, the bureau may, after providing notice to the home improvement retailer, draw upon the irrevocable letter of credit to satisfy a consumer's complaint as part of its mediation process or a civil action brought under the act of December 17, 1968 (P.L.1224, No.387)<sup>10</sup>, known as the Unfair Trade Practices and Consumer Protection Law.

(C) A home improvement retailer with two draws on an irrevocable letter of credit within a two-year period issued for the purposes of this subparagraph shall be prohibited from posting an irrevocable letter of credit for purposes of this subparagraph for a period of five years beginning from the date of the second draw and shall be required to comply with subparagraph (i).

(11) While acting as a salesperson, fail to account for or remit to the contractor whom the salesperson represents a payment received in connection with a home improvement.

(12) Subsequent to entering into an agreement for home improvement services or materials, changes the name of the contractor's business, liability insurance information, the contractor's business address or any other identifying information in a fraudulent or deceptive manner likely to cause confusion or misunderstanding without advising the owner in writing within ten days following any such change.

#### **§ 517.10. Unfair Trade Practices and Consumer Protection Law**

A violation of any of the provisions of this act shall be deemed a violation of the act of December 17, 1968 (P.L. 1224, No. 387)<sup>11</sup>, known as the Unfair Trade Practices and Consumer Protection Law. Nothing in this act shall preclude an owner from exercising any right provided under the Unfair Trade Practices and Consumer Protection Law.

#### **§ 517.11. Regulations**

The bureau may adopt rules and regulations necessary to carry out the provisions of this act.

#### **§ 517.12. Preemption of local registration**

Registration under this act shall preclude any requirement of payment of a fee or registration or licensing of any home improvement contractor by any political subdivision. Political subdivisions shall be permitted to require building permits and local enforcement of the building code for that political subdivision, for which a reasonable fee may be charged. This provision does not affect a municipality's responsibilities or authority under the act of November 10, 1999 (P.L. 491, No. 45)<sup>12</sup>, known as the Pennsylvania Construction Code Act, or the requirements under section 302(e) of the act of June 2, 1915 (P.L. 736, No. 338)<sup>13</sup>, known as the Workers' Compensation Act, regarding workers' compensation. This provision does not affect existing licensing standards in effect on the effective date of this act, with respect to electricians and plumbers and other

<sup>10</sup> 73 P.S. § 201-1, *et seq.*

<sup>11</sup> 73 P.S. § 201-1, *et seq.*

<sup>12</sup> 35 P.S. § 7210.101, *et seq.*

<sup>13</sup> 77 P.S. § 462.2.

trades, where licensing is conditioned on requirements of testing or possession of certificates obtained through specific training in electricity or plumbing or other trades. This provision does not affect local regulations or standards for liability insurance adopted by a municipality prior to January 1, 2006, and which are in effect on the effective date of this section.

**§ 517.13. Exemptions**

This act shall not apply to any of the following persons or organizations:

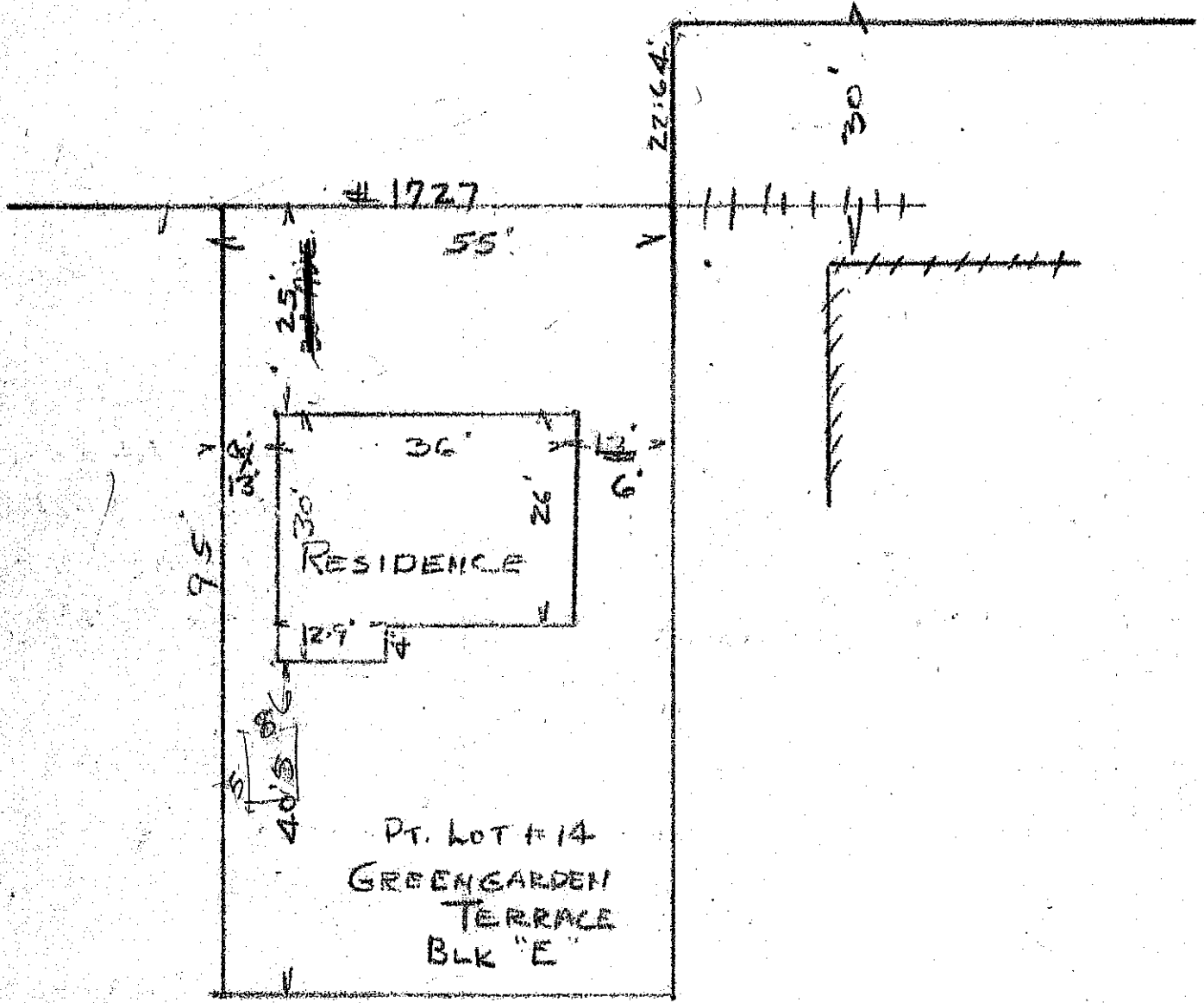
- (1) The Commonwealth, or any of its political subdivisions.
- (2) The Federal Government.

**§ 517.18. Repeal**

All acts and parts of acts are repealed insofar as they are inconsistent with this act.

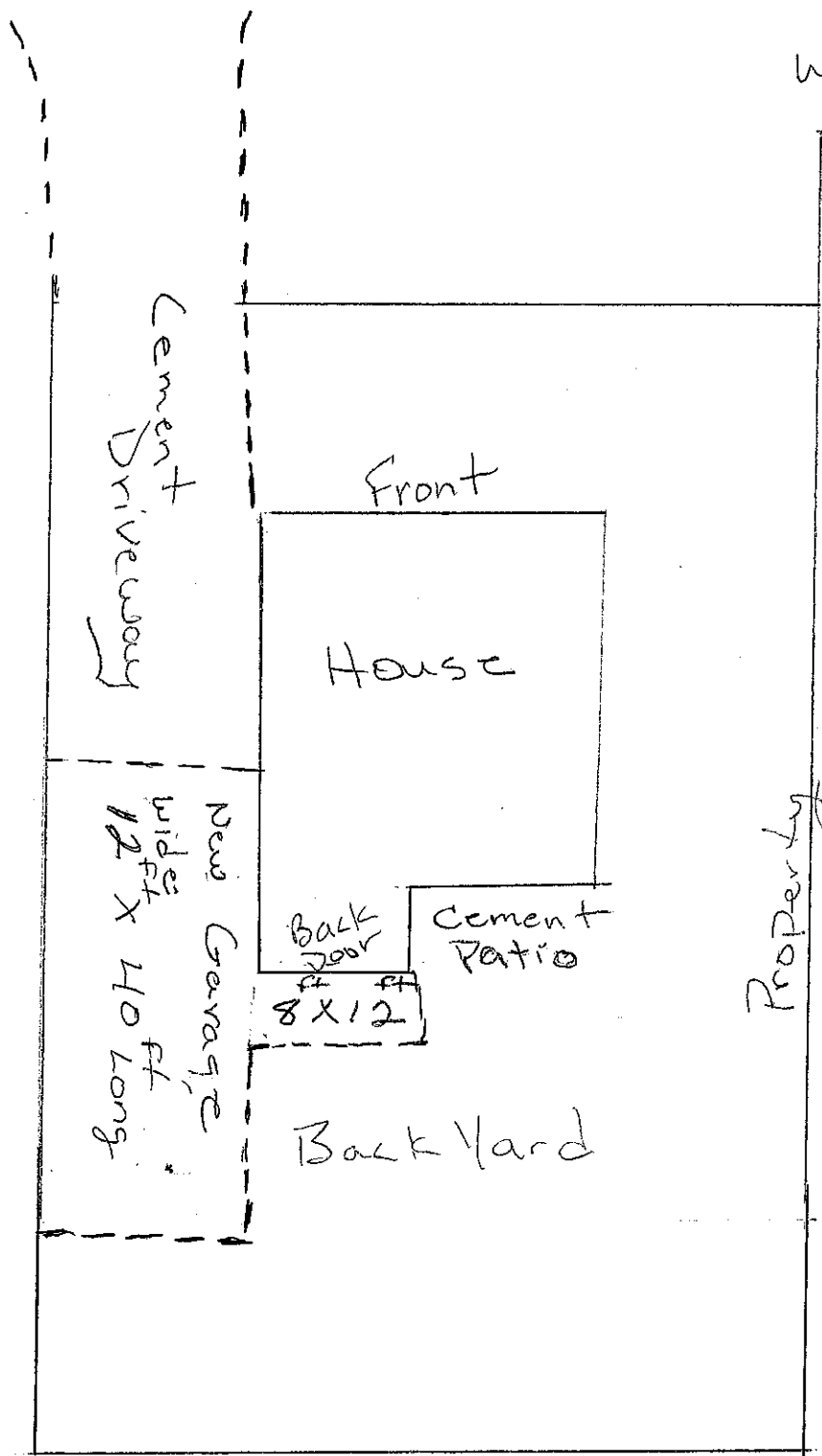


WEST 31ST



Pt. LOT #14  
GREENGARDEN  
TERRALE  
BLK "E"

West 31<sup>st</sup>



Cement Driveway

Front

House

New Garage  
12 ft wide  
40 ft long

Back door  
8 ft x 12 ft

Cement Patio

Back Yard

Property