CIRMA We Protect Connecticut

Fair Housing:

Know the Facts About the Act

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September 2022

Introduction to Fair Housing

The Fair Housing Act ('FHA'), 42 U.S.C. 3601 et seq., also known as Title VIII of the Civil Rights Act of 1968, is a federal law that prohibits discrimination in the purchase, sale, rental, or financing of private and public housing based on race, skin color, sex, nationality or religion. Amendments to the statute in 1988 added disability and family status. The FHA applies to municipalities in that it prohibits municipalities from making decisions or creating regulations that make housing unavailable to persons if they fall into one of the protected classes above.

Because the FHA is a federal statute, federal preemption applies. In other words, the individual States can expand the federal protections but cannot reduce them. In addition to the federal Fair Housing Act, Connecticut has enacted its fair housing statute, codified by CGS 46a-64c, which allows for more protection than the federal Act.

Particularly, it prohibits discrimination in the sale or rental of housing due to race, skin color, religion, national origin, ancestry, sex, marital and familial status, age, disability, lawful source of income, sexual orientation, or gender identity.

In June 2021, PA 21-29 was signed into law by Governor Ned Lamont. This new legislation created substantive changes to the state Zoning Enabling Act (CGS 8-2) to promote the federal FHA's purposes and provide a mechanism to promote compliance with municipal affordable housing plans. The legislation also created several other zoning-related requirements that municipalities must comply with by specific dates as defined in the Act.

Connecticut Public Act Changes

Traditionally, zoning law was largely delegated to individual municipalities. Connecticut's Zoning Enabling Act (CGS 8-2) allows its municipalities to regulate zoning as they see fit. However, significant changes have been brought about due to inequities in housing availability.

Public Act 21-29 was signed into law in June 2021, and this legislation brought about substantive changes to Connecticut's zoning laws. *The key takeaway is the trend toward inclusivity.* Below are the highlights municipalities should be aware of:

- Accessory Dwelling Units (ADUs) are 'an affordable housing option for individuals who want to live closer to family members or caregivers but maintain separate quarters. They are independent housing units created within a single-family home or on its property.'

Any currently existing municipal zoning regulation that conflicts with this mandate and is still in effect as of January 1, 2023, will be considered null and void until the municipality amends it to comply with the new mandate.

There is an 'opt-out 'provision available to municipalities that do not wish to be subject to this statutory regulation. However, an affirmative burden will be placed on any municipality that chooses to 'opt out' of the ADU mandate.

The State Plan of Conservation and Development includes three principles that 'affirmatively further fair housing' in Connecticut. They are:

- Redeveloping and revitalizing regional centers and areas with existing or currently planned physical infrastructure
- Expansion of housing opportunities and design to accommodate a variety of household types and needs
- Concentrate development around transportation

Additionally, Public Act 21-29 includes new requirements for (1) training of municipal land use officials, (2) establishment of land use training guidelines, and (3) training compliance reporting. The applicable statute reads in pertinent part: (1) The zoning commission shall provide how the zoning regulations shall be enforced, except that any person appointed as a zoning enforcement officer on or after January 1, 2023, shall be certified in accordance with the provisions of subdivision (2) of this subsection.

Municipal Land Use Official Training

'On and after January 1, 2023, each member of a municipal planning commission, zoning commission, combined planning and zoning commission, and zoning board of appeals shall complete at least four

hours of training'.

- Those in office *on* January 1, 2023, must complete four hours by January 1, 2024, and every other year after that
- Those taking office *after* January 1, 2023, must complete four hours of training not later than one year after taking office, and every other year after that

Establishment of Municipal Land Use Training Guidelines

Training shall include at least one hour of 'affordable and fair housing policies' education and may also consist of (1) process and procedural matters, including the conduct of effective meetings and public hearings and the Freedom of Information Act, (2) interpretation of site plans, surveys, maps, and architectural conventions, and (3) the impact of zoning on the environment, agriculture and historic resources.

Reporting on Training Compliance

No later than March 1, 2024, and annually after that, the planning commission, zoning commission, combined planning, zoning commission, and zoning board of appeals, as applicable, shall submit a statement to such municipality's legislative body or, in a municipality where the legislative body is a town meeting, its board of selectmen, affirming compliance with the training requirement established under subsection (a) of this section by each member of such commission or board required to complete such training in the calendar year ending the preceding December 31.

- Each board and commission must report to its local authority on the status of its members' compliance with the training requirements by March 1, 2024, and annually thereafter.

CIRMA is pleased to announce a strategic alliance with The Connecticut Association of Zoning Enforcement Officials (CAZEO). CAZEO is a professional membership association that promotes 'comprehensive zoning enforcement policies' within the State of Connecticut. **The State of Connecticut comprises 169 municipalities, and 112 are CAZEO members.*

Types of Claims Under The FHA

There are three types of claims that can occur under the FHA. They are:

1. **Disparate Treatment**

   This occurs when action constituting discrimination is purposeful or intentional, although there is no requirement that the discriminatory act is grounded in animus against the protected group. Statements indicating a preference against a person with a disability constitute an intentional discriminatory act in violation of the Fair Housing Act, as does conduct resulting in the treatment of disabled persons differently than non-disabled persons because of their disability.

2. **Disparate Impact**

   This occurs when an outwardly neutral policy or action has a discriminatory effect on a particular protected individual or group.

3. **Reasonable Accommodation**

   This type of claim is seen most frequently within CIRMA municipalities. It occurs when existing regulations or policies prevent a member of a protected group from accessing housing of their choice, and accommodation on the regulation or policy is necessary for this to occur. Allowing a group of unrelated persons who are in recovery to be treated as a 'family' for zoning purposes so the group can live in a residential zone is an example of reasonable accommodation.

Disabled persons are a protected group under the Fair Housing Act. A person will be considered disabled if he or she has a physical or mental impairment that substantially limits one or more "major life activities," which include seeing, hearing, walking, breathing, performing manual tasks, caring for oneself, and learning, speaking, and working.

When determining whether a requested accommodation is reasonable, ask, *"Does the requested accommodation fundamentally alter a policy or regulation of local government or impose an undue financial or administrative burden on the municipality?"* If it does not, the requested accommodation is deemed "reasonable." The person requesting accommodation must also demonstrate that the requested accommodation is necessary for the person requesting an accommodation to enjoy the benefit or service sought. Under the

FHA, disabled persons are entitled to the same opportunity to receive benefits and services as non-disabled persons.

Examples of Court Decisions in Fair Housing Cases

***The Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission of the Town of Fairfield,* 790 F. Supp. 1197 (1992)**

Here, the District Court held the Town violated the FHA under the theories of intentional discrimination, disparate impact, and reasonable accommodation in relation to their enforcement actions taken to prevent the operation of a group home for individuals diagnosed with AIDs (Acquired Immunodeficiency Syndrome) in a residential zoning district.

***City of Edmond v. Oxford House*, 514 U.S. 725 (1995)**

A zoning ordinance enacted by the City of Edmond limited dwellings in certain areas of residential property to occupancy by a single family only. The ordinance defined 'family' as 'a group of people related by blood, marriage, or adoption, or alternately, any group of five or fewer people who were living together'. The City's action was challenged by Oxford House, a halfway house for persons in recovery, which housed eight people, but was located in a residential zone. Oxford House was cited for violating the zoning regulation and sought a reasonable accommodation on that regulation, asking that the 8 men living together in a supportive atmosphere to be considered a "family" and allowed in the residential zone. The City declined the request. The City's action was upheld by the trial court but reversed on appeal by the U.S. Court of Appeals for the Ninth Circuit, and the matter was accepted by the U.S. Supreme Court for final determination. The Supreme Court sided against the City of Edmond, noting that in the ordinance, "single-family" was defined not only according to the number of individuals in the household but also according to their relationship by blood, marriage, or adoption. There was no claim that there was a building code, health code, or fire code violation that would result if the accommodation on zoning regulations were allowed. Allowing the adult men to live together in a supportive setting as a "family" would not upset the character of the residential zone, nor would it place an administrative burden on the municipality if such occupancy were allowed.

Gilead Community Services v. Town of Cromwell

This suit went to trial in 2021 and resulted in a verdict against the Town in excess of $5M. It is now on appeal at the 2d Circuit Court of Appeals, but there are many points for Connecticut municipalities to examine regardless of the outcome of the appeal.

In early 2015, pursuant to a contract from the State of Connecticut Department of Mental Health and Addiction Services ("DMHAS"), Gilead sought to open and operate a community residence in Middlesex County for six men with disabilities and purchased a single-family house at 5 Reiman Drive in Cromwell, Connecticut. The property was to provide housing for six or fewer men who would receive mental health services from Gilead staff (services paid for by DMHAS). Gilead asserted that the intended arrangement qualified it as a community residence per C.G.S. 8-3e(a)(3), which mandates that such community residences be treated as single-family homes for zoning purposes.

Shortly after Gilead acquired the house, a Facebook group was formed with the purpose of preventing Gilead from operating the house. Gilead also received phone calls from community members stating their opposition to the plan for 5 Reiman Drive. A town forum was held in April 2015 at the Cromwell Town Hall, where the neighborhood groups asked questions and were unhappy with the responses. Subsequently, the Mayor issued a press release requesting that Gilead consider moving to another location, but Gilead moved forward with its plans to establish the house on Reiman Drive. (note that any indication of a preference against a group residing in a particular location because of their disability violates the Fair Housing Act, even in the absence of any prejudice toward that group).

In 2015, the Town submitted a petition to the Department of Public Health (DPH) to deny Gilead a license to operate the subject home because the Town had already met its statutory quota of licensed group home beds under Connecticut law. This law allowed a Town to Petition for denial of additional licenses once the quota was met. The DPH, after much investigation, determined

that no license was required for the subject home because residents would receive psychosocial rehabilitation services at other locations. The Town asked for reconsideration of that decision, and the DPH took the matter under reconsideration, but did not reach a decision by the time Gilead sold its home in August 2015, which rendered the DPH determination moot.

While the matter was subject to DPH reconsideration Gilead and the Town had a dispute over whether the fact that no license was required meant Gilead was not a community residence, which brought it outside the zoning protection of CGS 8-3e. The Town believed the remedy was to have Gilead come into Town hall and seek a reasonable accommodation on zoning regulations, but Gilead thought it had to do nothing at all. The parties agreed to allow two residents to move into the new home while the legal issues were resolved. A cease and desist order issued by the Town was withdrawn before it had any material effect on the process of opening the home.

Gilead allowed two men to move in July 2015 but sold the home in August 2015 while under investigation by DMHAS for mismanagement. Gilead denied the DMHAS investigation played a role in its decision to sell the home and maintained that the decision to sell was in response to the discriminatory conduct of the Town. During the summer of 2015, the Town Mayor was supported by, and was supportive of, on social media, the Facebook group formed to oppose the Gilead home. The Mayor also celebrated before the Town Council when the Gilead decision to move was announced.

Finally, in 2016, Town Assessor informed Gilead that another of its properties in Town was in jeopardy of losing its tax-exempt status unless additional information establishing tax-exempt status was provided. Gilead did not provide additional information and claimed the action of removing tax-exempt status was retaliatory by the Town.

Gilead claimed different types of damages. Gilead claimed the loss of tax-exempt status cost it over $8000 annually. Gilead purchased the Reiman Drive house for $350,000 and sold it for a loss at $280,000 after spending $150,000 to prepare the house for occupancy. Gilead paid insurance, upkeep, and utilities during this time, in addition to property taxes. Gilead's contract with DHMAS was terminated due to the closure, which caused a $900,000 revenue loss annually. All of this negatively affected Gilead's ongoing operations and expansion.

In November 2021, judgment was entered against the Town of Cromwell following a jury trial in the amount of $180,000 in compensatory damages and 5 million dollars in punitive damages. The jury determined the Town discriminated against Gilead's residents, and Gilead's decision to sell its home was motivated, in part, by the discriminatory actions of the Town. The case is on appeal, based on a challenge to the court's instructions to the jury and the allowance of an award of punitive damages against a municipality. For now, all municipalities must proceed as if liability can be found, if discriminatory actions by the municipality played any role in the deprivation of housing to a Plaintiff, and the municipality could have punitive damages awarded against it.

Fair Housing Best Practices for Municipalities

First, appoint a Fair Housing Officer, who will be the first point of contact for anyone seeking a reasonable accommodation on zoning regulations. Failure to have a Fair Housing Officer could jeopardize your municipality's receipt of federal funds.

Requests for reasonable accommodation can be written or oral and do not need to specifically include 'FHA' or 'reasonable accommodation'. However, a municipality must know whether a resident is disabled and how the request will grant the resident a reasonable opportunity to enjoy housing.

Requests can be made at any time- as part of an application for a zoning permit, special permit, variance, or site plan approval; in response to an enforcement action and during a ZBA hearing to consider an appeal of an enforcement action.

- Remember to consult with your town attorney and CIRMA
- Municipalities should have a written procedure for reasonable accommodations—**see the attached sample reasonable accommodation regulation, which is suitable for adoption by your municipality as a text amendment to your zoning regulations.**
- Give the request due consideration when you become aware the applicant is 'disabled'
- Ask: *Would, the requested accommodation alter a fundamental zoning scheme or create an undue financial burden?*

- Ask: *Why is such an accommodation necessary?*
- Be mindful of public opposition and public statements made by public officials
- Before a public hearing, educate municipal leaders/participants on the Fair Housing laws
- Routinely communicate your commitment to complying with Fair Housing laws through public messaging and media outlets

The Benefits of Early, Proactive Engagement with CIRMA

- In **January 2019,** a Plaintiff purchased two single-family homes with the intention to renovate both properties and establish them as community-based housing for six (6) young adults. Each of the six young adults has been diagnosed with anxiety, depression, trauma, and other mental health conditions that require treatment.
- In **March 2019,** a Plaintiff applied for a building permit that sought a "change of use" from a single-family residence to a "group home" and received determinations of zoning compliance for both properties.
- In **April 2019,** a Plaintiff's general contractor obtained building permits for both properties and, relying on the building permits, spent over $200,000 renovating the homes to comply with state group home standards and regulations. Renovations were completed in **May 2019**.
- In **May 2019,** an organization formed in opposition to the development of these group homes and began to appeal to the municipality and its various agents regarding their concerns.
- In **July 2019,** at the municipality's request, their town attorney communicated his legal opinion. He opined the municipality has limited authority to regulate and enforce against group homes. [Remember: even if a proposed group home is not afforded any protections under C.G.S. § 8-3e, federal laws prevent municipalities from taking any action against group homes that (a) are intentionally discriminatory; (b) disparately impact disabled persons; or (c) can be avoided with reasonable accommodation.]
- In **September 2019,** Building Inspector and Fire Marshal conducted inspections of the premises and informed Plaintiff the completed construction satisfied the building code. The ZBA affirmed the issuance of the permits on the basis the opposition group's appeal was untimely pursuant to C.G.S. 8-7.
- In **October 2019,** two separate groups of neighbors filed appeals disputing the municipality's approval of the plaintiffs' building permits for the group homes, which appeals remain pending and which will not impact the resolution of this federal action.
- In **November 2019,** a new administration adopted a position against issuing Certificates of Occupancy for these homes.
- In **February 2020,** the Public Official wrote to the Connecticut Office of Health Strategy (OHS) stating the municipality would not issue the Certificates of Occupancy for the residences while a zoning appeal was pending.
- In **November 2020,** the Town Attorney wrote to Plaintiff that the municipality would not issue Certificates of Occupancy for these homes.
- In **January 2021,** a federal lawsuit was filed by Plaintiff alleging a denial of the Certificates of Occupancy was a direct violation of the FHA and ADA.

Upon receipt of the federal lawsuit, CIRMA assigned outside counsel to defend the municipality. CIRMA defense counsel worked in tandem with the municipality's administration and Town counsel to convey this message—they **must** work with the petitioners in order to provide a reasonable accommodation that will comply with the law. *Certificates of Occupancy* were issued under special conditions, and an amicable resolution was reached between the parties before extensive, costly litigation began.

This fact pattern illustrates early intervention can bring about optimal results and a successful outcome to what could have been a verdict against the Town resulting in the Town being required to pay compensatory and punitive damages.

Real-World Examples

The City of Townsville is faced with a non-profit entity – The Recovery Home Center (RHC) – that wants to develop an abandoned, blighted estate (the Estate) in Townsville into a group home that would serve

at-risk recovering alcoholics and drug addicts in furthering their recovery while reintegrating into society from their previous stay in an in-patient rehabilitation facility.

Under the provisions of the Townsville zoning regulations, the Estate is situated in a zone that allows for multi-family/group homes as a special permitted use. RHC plans to apply for the necessary permits and certificates, and during the process, the City encounters the following problems:

Issue No. 1 - Pre-Application

As word in the community spreads about the RHC plan to convert the Estate into a recovery group home, sentiments opposing the plan spread like wildfire through local citizen-run Facebook groups geared towards discussing local matters. Outspoken leaders of the opposition create an online petition soliciting signatures to raise awareness about the plan; they intend to present the petition at an upcoming city council meeting. The City Council, aware that their concerns relate to an issue more appropriately presented to the Planning and Zoning Commission, responds to the opposition's presenters and informs them as such. After the meeting, one of the leaders approached the Mayor – a known opponent of affordable housing projects in the past – to ask if he would appear on their podcast – *NIMBY Time* to share his personal opinion on the development proposal. The average listener count for *NIMBY Time* is 32 people per episode. Given the political makeup of Townsville, the Mayor believes that speaking on the podcast would only help his chances at re-election that fall because most of the City supports his personal views on the issue. **What should he do?**

ANSWER: Although appearing on the podcast and voicing his personal and political opinions on the issue may help the Mayor's re-election chances, the Mayor should decline the offer. Political ramifications aside, if the Zoning Commission eventually denies any/all of the RHC's permit or certificate applications and the RHC appeals all the way to the Superior Court, the court can and often will assign any discriminatory sentiments communicated to local officials about proposed group home operations as evidence of the enforcement actions taken against the applicant being driven – in some part – by political pressures.

Additionally, it should be acknowledged that while loud, vocal opposition to municipal issues may create an appearance of widespread agreement throughout the community, this is not necessarily the case, and the Mayor taking a decisive stand on a divisive issue can backfire. The City leaders should know the law regarding discriminatory statements or preferences against persons with disabilities and distance themselves from any discriminatory statements or conduct.

If a citizen makes a discriminatory statement—which can be as simple as a comment indicating a preference for or bias against persons with disabilities the City leaders should admonish the citizen to avoid discriminatory statements and assert that the City will not tolerate any form of discrimination based on disability.

Issue No. 2 - Application Filed, Planning and Zoning Commission (PZC) Hearing

As time progresses, the RHC files applications for the necessary building permits for the necessary renovations to the Estate, as well as certificates of zoning compliance and certificates of occupancy. The RHC also files a special permit application, which requires a public hearing. All permits and certificates were applied for in a timely manner at the appropriate juncture. As the public hearing on the special permit approaches, Sarah, the most junior member of the Council and mother of twin toddlers who resides in the neighborhood of the proposed development, wants to speak at the hearing in opposition to the application, based on her concerns as a citizen for the safety of her children and the proximity of the Estate. Sarah, asks her majority leader, Donna, whether she is permitted to speak before the PZC and, more importantly, whether she should. **What guidance should Donna give to Sarah?**

ANSWER: Although Sarah has every right, as a citizen of the Town, to voice her concerns at the public hearing, as discussed in connection with the previous question, the optics of a City Councilor appearing before another municipal board, regardless of the capacity in which intends to speak, to advocate for a particular outcome may look, to members of the public and/or to the PZC itself, like the Council is attempting to strongarm or improperly influence the decisions of the PZC on an issue over which the Council has no authority. This is particularly so in municipalities where the appointments to the PZC are made and approved by the Council, and where Council is dissatisfied with decisions coming from the PZC can replace those appointed PZC members at their discretion.

Issue No. 3 - Reasonable Accommodation Request

During the planning process, it becomes apparent that at least two of the prospective male tenants of the planned group home are wheelchair bound due to sustaining crippling injuries from falls and non-fatal car accidents caused while driving under the influence of drugs and alcohol before their sobriety. The Estate, as it is presently structured, complies with all zoning regulations related to setbacks.

However, as part of its refurbishment and to accommodate these tenants, the RHC seeks approval to install wheelchair ramps at the front and back entrances to the Estate to facilitate their entry and egress. Unfortunately, adding these ramps will cross the setback boundary, bringing the Estate out of technical compliance with the applicable regulations. The Estate has accordingly asked the PZC to waive the setback requirements as a form of reasonable accommodation. **What should the PZC do?**

ANSWER: The PZC should grant the request and waive the setback requirements that would otherwise prohibit the addition of the ramps necessary for enabling access to the Estate for wheelchair-bound tenants. Allowing this would not alter the fundamental zoning scheme in the City and would not place an undue financial burden on the City. Where requests for reasonable accommodations are involved, failure to provide any such necessary and reasonable accommodations may constitute an actionable "failure to accommodate" claim under the ADA, Rehab Act, FHA, and state constitutional/statutory law.

IMPORTANT NOTE: Occasionally, the decision of whether to make reasonable accommodation on zoning regulations winds up before the City's Zoning Board of Appeals (ZBA), which typically considers requests for variance from zoning regulations due to undue hardship. The RHC would not be obligated to satisfy the requirements for obtaining a typical variance – i.e., the RHC would not need to show that its inability to comply with the zoning setback regulations was due to a unique property condition that posed an "undue hardship" on the property owner.

The ZBA is not the most appropriate body to address this issue—if the ZBA approves a variance associated with a housing request, the variance will run with the land so that future occupiers of the property—even if non-disabled, will have the benefit of the variance.

The best practice is to appoint a Fair Housing Officer and follow the procedures in the attached sample regulation. This way, once the person who requires accommodation vacates the property, the existing regulations that are applicable to non-disabled persons will apply.

Issue No. 4 - Tax Liability and Exemptions

It's tax time in Townsville! As the end of the fiscal year approaches, Townsville's City staff works to evaluate tax exemptions for local properties. The new tax assessor, Jerry, comes across the Estate's application for tax exemption based on its status as a non-profit entity. However, Jerry – a stickler for details – finds that the Estate was missing certain documents that should have been included with its application. Jerry is inclined to deny the application for failure to adhere to the requirements for seeking a tax exemption. **What should he do?**

ANSWER: Mills should contact the RHC to inform it about the missing documents and provide an opportunity to cure its application. While the duty is on the nonprofit entity claiming exemption to timely file its application and, after that, to quadrennially file a renewal report, it is prudent to grant leniency to organizations like the RHC to avoid an appearance of discriminatory intent or impact, evidence of which may be damaging in any claims of disability discrimination or failures to accommodate that may arise out of the establishment and operation of such property.

Issue No. 5 - Appeal

Meanwhile, at the Townsville PZC, the Commission grants the special permit to the Estate, authorizing its operation in its designated zone. The Opposition appeals, and the Townsville ZBA denies the appeal, upholding the decision of the PZC 4-1. The Opposition, not to be discouraged, hires a local lawyer and appeals the decision of the ZBA to the Superior Court under Conn. Gen. Stat. § 8-8. Townsville PZC/ZBA members and staff are unsure of what to do upon receiving the appeal. **What should they do?**

ANSWER: Contact CIRMA to provide notice of the claim. Additionally, notify the Town or City Attorney, who will be able to advise municipal boards as to the recommended next steps.

Final Comment

Even the most conscientious public entities can face claims and lawsuits. We know because we work with Connecticut's leading attorneys to defend and represent them. If you identify a potential Fair Housing issue or exposure, always err on the side of caution and contact CIRMA immediately so that we may help you respond appropriately and ultimately mitigate potential losses.

The scenarios provided in this document do not cover all potential Fair Housing legal pitfalls that can exist, are strictly illustrative, and are based on real-world examples. The information in this whitepaper does not constitute legal advice--for decisions regarding the use of the practices suggested by this document, follow the advice of your own legal counsel and CIRMA.

For your convenience, a more in-depth legal discussion and analysis of the Fair Housing Act can be found in the attached *Fundamentals of Public Entity Liability Under Fair Housing Act* (Addendum A). This comprehensive document can be used as a resource for your Town or City Attorney and will guide them to a best-practices plan of action regarding Fair Housing. Additionally, CIRMA members are also encouraged to utilize the attached *Section 56 - Sample Reasonable Accomodation Policy* (Addendum B).

Acknowledgement

This whitepaper was authored in collaboration with Thomas R. Gerarde, Managing Partner, Howd & Ludorf LLC, and Jim Tallberg, Managing Partner, Karsten & Tallberg, LLC.

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Jim Tallberg, Managing Partner, Karsten & Tallberg, LLC, was admitted to the Connecticut Bar in 1996. He is also admitted to the United States District Court for the District of Connecticut, the Southern and Eastern Districts of New York, the Second Circuit Court of Appeals, and the United States Supreme Court. Mr. Tallberg has been board certified as a Civil Trial Advocate by the National Board of Trial Advocacy since 2010. Mr. Tallberg's practice includes the defense of public entities and officials, including law enforcement, educators, professional liability defense, employment practices liability, fair housing liability, and business litigation. He has tried more than thirty cases to verdict or court judgment, including more than twenty federal civil rights cases involving claims of wrongful death, civil rights claims under 42 U.S.C. § 1983 for unreasonable force, police shootings, TASER deployments, false arrest, unlawful search and seizure, First Amendment retaliation, assault, negligence, breach of contract, and CUTPA.

About CIRMA

CIRMA was established as a Connecticut Conference of Municipalities (CCM) service program—Connecticut's association of towns and cities. Today, CIRMA is Connecticut's number-one municipal risk financing and risk management services provider for Connecticut's public entities. A member-owned and governed agency, CIRMA provides high-quality, tailored insurance for municipalities, school districts, and local public agencies. CIRMA operates competitive Workers' Compensation and Liability-Auto-Property pools and provides holistic claims services and risk management solutions exclusively to the Connecticut public sector.

Fair Housing: Know the Facts About the Act.

Fundamentals of Public Entity Liability Under the Fair Housing Act

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The Fair Housing Act and the ADA

Persons with disabilities who have been denied housing often sue under both the Fair Housing Act and the Americans with Disabilities Act. Due to the similarity of the ADA and the Fair Housing Act's protections of individuals with disabilities in housing matters, courts have analyzed the two statutes as one, and this paper does as well. See *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 n. 4 (2d Cir.2003); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 782–83 (7th Cir.2002).

Origin of the Fair Housing Act

The Fair Housing Act (hereinafter the "FHA") bans discrimination in housing based on different characteristics, including race, religion, national origin, or color. The original Statute was passed in 1968. See Pub. L. No. 90-284, 82 Stat. 73 (1968). In 1988, the Fair Housing Amendments Act was passed, which among other things, added familial status and disability to the classes protected by the statute. See Pub. L. No. 100-430, 102 Stat. 1619 (1988).

Intentional Discrimination Under the FHA

The relevant statutes are 42 U.S.C.A. § 3604 (c), § 3604(f), and, § 3617. They all address what constitutes intentional discrimination. There is no requirement of animosity toward a disabled person on the part of the municipal actor.

1. 42 U.S.C. § 3604(c) Claims

Under 42 U.S.C.§ 3604(c) of the Fair Housing Act, it is unlawful

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, **familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.**

42 U.S.C. § 3604(c).

As the Second Circuit has made clear: "Nothing in this language limits the statute's reach to owners or agents or to statements that directly effect a housing transaction. Indeed, this language does not provide any specific exemptions or designate persons covered, but rather . . . **applies on its face to anyone who makes prohibited statements.**" *United States v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005) (internal citations and quotation marks omitted); *see e.g., Babul v. Demty Assocs. Ltd. P'ship*, No. 17-CV-5993, 2018 WL 2121556, at *2 (E.D.N.Y. May 8, 2018) (denying a motion to dismiss by defendants who were board members of a housing owners association, stating that "there [wa]s no credible argument that the board's negative response to the proposed sale could not be at least influential, if not dispositive"); *Wentworth v. Hedson*, 493 F. Supp. 2d 559, 567 (E.D.N.Y. 2007) (denying summary judgment to landlords in a case involving a § 3604(c) claim).

The Second Circuit has rejected as "too narrow" efforts to limit the statute's reach to "expressions that result in the **denial of housing**." *Id.* As a result, 42 U.S.C.§ 3604(c) of the Fair Housing Act also "protect[s] against **[the] psychic injury caused by discriminatory**

statements made in connection with the housing market." *Id.* (internal citations and quotation marks omitted); *Rodriguez,* 788 F.3d at 52 (affirming the same principle).

In determining whether § 3604(c) has been violated, an "ordinary listener test" is applied. Under this standard, "section 3604(c) can be violated by statements targeted at an individual that convey to an ordinary listener that the individual is disabled." *Rodriguez,* 788 F.3d at 52. As further explained by the Second Circuit in *Rodriguez*: "it is not determinative that the individual being addressed is or is not disabled under the [Fair Housing Act]; what matters is whether the ordinary listener would understand the statements as considering her as such and expressing discrimination or a preference against her on that basis." *Id.* (footnote omitted).

In the context of a housing discrimination case on the basis of disability, the Second Circuit has recognized that the "ordinary listener" standard likely "requires a fact intensive, case-by-case inquiry." *Id.* at n.21 (citation omitted). "[F]actfinders may examine [the speaker's] intent, not because a lack of design constitutes an affirmative defense to a [Fair Housing Act] violation, but because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it." *Id.* at 53 (quoting *Soules v. U.S. Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 825 (2d Cir. 1992)). But "the speaker's subjective belief is not determinative." *Id.* at 53. Instead, "[w]hat matters is whether the challenged statements *convey* a prohibited preference or discrimination to the ordinary listener." *Id.* (italics in original).

Significantly, as the Second Circuit has recognized, the application of the ordinary listener standard is "fact intensive" and requires a "case-by-case inquiry." See *Rodriguez,* 788 F.3d at 52-53. Indeed, the Second Circuit there quoted from an earlier ruling in a different case referring to the "factfinder." *Id.* (quoting *Soules v. U.S.* 967 F.2d at 825: "[F]actfinders may examine [the speaker's] intent, not because a lack of design constitutes an affirmative defense to an FHA violation, but because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it.").

2. §3604(f) Claims

Under 42 U.S.C. § 3604(f) of the Fair Housing Act, it is unlawful

(1) 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-- (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of in the provision of services or facilities in connection with such dwelling, because of a handicap of-- (A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person.

42 U.S.C. § 3604(f)(1)-(2).

The phrase "otherwise make unavailable" language in 42 U.S.C. § 3604(f) is a "catchall phrase[]" that "look[s] to consequences, not intent," *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* ("Inclusive Communities Project"), 135 S. Ct. 2507, 2519 (2015), and reaches "a wide variety of discriminatory housing practices." *Mhany Mgmt., Inc. v. Cty. of Nassau,* 819 F.3d 581, 600 (2d Cir. 2016); *see Thurmond v. Bowman,* 211 F. Supp. 3d 554, 564 (W.D.N.Y. 2016) (stating that the "otherwise make available" provision "has been construed to reach every practice which has the effect of making housing more difficult to obtain on prohibited grounds"); *United States v. Youritan Const. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), (stating that the phrase "otherwise make unavailable" "appears to be as broad as Congress could have made it, and all practices which have the effect of denying dwellings on

prohibited grounds are therefore unlawful"), *aff'd in part, remanded in part on other grounds*, 509 F.2d 623 (9th Cir. 1975).

Courts have found that a defendant "otherwise makes [housing] unavailable" under the Fair Housing Act when the defendant engages in a series of actions that imposes burdens on or constitutes harassment of a protected class of residents or intended residents, making it more difficult for the members of the protected class to obtain housing or conveying a sense that the members of the protected class are unwanted. For example, in *Housing Rights Center v. Sterling*, the court denied summary judgment to landlord defendants because

> the [c]ourt here cannot hold as a matter of law that the variety of ways in which [d]efendants catered to Korean tenants, coupled with Defendants' discriminatory statements [against tenants of other racial and ethnic backgrounds], taken as a whole, did not create a hostile environment sufficient to make [plaintiff's] apartment effectively unavailable to him.

404 F. Supp. 2d 1179, 1192 (C.D. Cal. 2004); *see also Corey v. Sec'y, U.S. Dep't of Hous. & Urban Dev. ex rel. Walker*, 719 F.3d 322, 327 (4th Cir. 2013) (stating that "by imposing more burdensome application procedures and generally discouraging the . . . application" of a woman and her brother who lived with autism, the landlord defendant " 'otherwise ma[de] [the property] unavailable' to the [applicants] because of a disability, in violation of § 3604(f)(1)") (citing *Youritan*, 370 F. Supp. at 648); *United States v. Hadlock*, No. CV 08-3074-CL, 2010 WL 331772, at *7 (D. Or. Jan. 27, 2010) (granting plaintiffs' summary judgment motion because, iven evidence that the defendant landlord had "made statements to discourage families from renting no reasonable juror could find in favor of [d]efendant").

In *Youritan Construction Company*, "delaying tactics" and "various forms of discouragement" on the part of resident managers, rental agents, top management, and owners "otherwise made housing unavailable" under § 3604(a) of the FHA. 370 F. Supp at 648 (internal citations omitted). Indeed, the failure of top management and owners "to set forth objective and reviewable procedures for apartment application and rental" amounted to discouragement and delay in violation of § 3604(a). *Id.*; *see also Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.1974) (stating that § 3604 "prohibit[s] all forms of discrimination, sophisticated as well as simpleminded and tactics of delay, hindrance, and special treatment must receive short shrift from the courts").

Significantly, the Fair Housing Act's scope extends beyond private actors and reaches governmental actors, including municipal officials. In *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, two organizations that operated residential substance abuse treatment programs in Massachusetts sued the Town of Framingham in addition to several Town officials and residents for violating 42 U.S.C. § 3604(f)(1) and § 3617. 752 F. Supp. 2d 85, 95 (D. Mass. 2010). In that case, three residences operated by the plaintiffs were at issue. *Id.* at 91.

Plaintiffs there alleged that the Town had effectively made housing unavailable to intended residents based on their disability (substance use) by delaying or blocking various license and zoning applications, passing a new law that subjected the plaintiffs to a new review process with the goal of deterring plaintiffs from operating their residential programs, and otherwise treating the plaintiffs differently from other similarly situated organizations/individuals based on the disabilities of the plaintiffs' clients. Id. at 97-103. The court stated that "[d]iscrimination under the FHA . . . includes delays in issuing permits that are caused in part by discriminatory intent, even if the permits are ultimately granted." Id. at 97.

Under 42 U.S.C. § 3604(f), proof of discrimination can be established "by showing that animus against the protected group 'was a significant factor in the position taken' by the

municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive." *LeBlanc-Sternberg v. Fletcher,* 67 F.3d 412, 425 (2d Cir. 1995) (quoting *United States v. Yonkers Bd. of Educ.,* 837 F.2d 1181, 1217, 1223, 1226 (2d Cir.1987)) (this is the "mixed motive" standard. See discussion on p

age B-10 below as to whether the mixed motive standard should be replaced by the "but for" causation standard). As a result, discriminatory intent may be inferred from the totality of the circumstances, including

> the historical background of the decision . . . ; the specific sequence of events leading up to the challenged decision, . . . ; contemporary statements by members of the decision making body . . . ; . . . and substantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached . . .

Id. at 425 (quoting *Yonkers,* 837 F.2d at 1221 (internal citations and quotation marks omitted)).

Indeed, "a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter." *Innovative Health Sys., Inc. v. City of White Plains,* 931 F. Supp. 222, 243 (S.D.N.Y. 1996) ("[I]f an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter."), *aff'd by* 117 F.3d 37, 49 (2d Cir. 1997); *see also United States v. City of Black Jack,* 508 F.2d 1179, 1185 n.3 (8th Cir.1974) (racist statements by "leaders of the incorporation movement" and fact that "[r]acial criticism was made and cheered at public meetings" could be considered evidence of improper purpose).

3. 42 U.S.C. § 3617 Claims

42 U.S.C. § 3617 provides as follows:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of [the Fair Housing Act].

42 U.S.C. § 3617.

To establish a *prima facie* case under § 3617, Plaintiffs must show (1) that they were "engaged in a protected activity;" (2) "that [Defendants were] aware of this activity;" (3) "that [Defendants] took adverse action against the [P]laintiff;" and (4) that "a causal connection exists between the protected activity and the adverse action." *Joseph's House and Shelter, Inc. v. City of Troy,* 641 F. Supp. 2d 154, 158 (N.D.N.Y. 2009) (quoting RECAP, 294 F.3d at 53-54).

The Second Circuit has permitted a § 3617 claim to proceed where a municipality withdrew plaintiff's funding for another project, after the plaintiff filed a fair housing complaint against the municipality. *See RECAP,* 294 F.3d at 35, 54 ("RECAP suffered an adverse action [under § 3617] in losing funding that had been committed to it . . ."). A variety of housing- related activities also have constituted viable claims under § 3617, including attempted evictions, *Robbins v. Conn. Inst. for the Blind,* No. 3:10-CV-1712 (JBA), 2012 WL 3940133, at *7 (D. Conn. Sept. 10, 201)); manipulation of municipal processes to delay plaintiffs' ability to obtain needed permits, *Middlesex Opportunity Council,* 752 F. Supp. 2d at 85; and discriminatory application of zoning laws, *Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n of Town of Fairfield,* 790 F. Supp. 1197, 1197 (D. Conn. 1992). Additionally, as some courts have held, "[i]t is sufficient

to state that 'interference' under [§ 3617] can encompass a 'pattern of harassment, invidiously motivated.'" *Middlesex Opportunity Council,* 752 F. Supp. 2d at 85, 104 (quoting H*alprin v. Prairie Single Family Homes,* 388 F. 3d 327, 330 (7th Cir. 2004)). Additionally, "[t]he causal connection needed for proof of a retaliation claim can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." *RECAP*, 294 F.3d at 54 (quoting *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001)). The Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship" *Gorman–Bakos v. Cornell Coop. Extension,* 252 F.3d 545, 554 (2d Cir. 2001).

Americans with Disabilities Act and Section 504 of the Rehabilitation Act Claims

The legal analysis under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act is not substantially different from the analysis under the Fair Housing Act. *See Forziano v. Indep. Grp. Home Living Program, Inc.,* 613 F. App'x 15, 18 (2d Cir. 2015) ("Because of similarities in the three statutes, intentional discrimination claims under the ADA, Rehabilitation Act, and FHA are considered in tandem"); *Tsombanidis v. West Haven Fire Dep't,* 352 F.3d 565, 573–74 (2d Cir. 2003)(analyzing plaintiffs' FHA and ADA claims together, and stating that "[t]o establish discrimination under either the FHAA or the ADA, plaintiffs have three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation")); *RECAP,* 294 F.3d at 48 (analyzing disparate treatment theories of discrimination under the FHA, the ADA, and the Rehabilitation Act together).

Disparate Impact Analysis

Disparate impact analysis focuses on facially neutral policies or practices that may have a discriminatory effect. "To establish a prima facie case under this theory, the plaintiff must show: '(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.' " *City of Middletown,* 294 F.3d at 52–53 (quoting *Gamble v. City of Escondido,* 104 F.3d 300, 306 (9th Cir.1997)) (emphasis added). A plaintiff need not show the defendant's action was based on any discriminatory intent. *Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 934–36 (2d Cir.1988). When establishing that a challenged practice has a significantly adverse or disproportionate impact on a protected group, a plaintiff must prove the practice "actually or predictably results in ... discrimination." *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 90 (2d Cir.2000) (quoting *Town of Huntington,* 844 F.2d at 934). A plaintiff has not met its burden if it merely raises an inference of discriminatory impact. *See Gamble,* 104 F.3d at 306. Statistical evidence is also normally used in cases involving fair housing disparate impact claims. For example, in *Town of Huntington,* the district court found a shortage of affordable rental housing for low and middle-income households and that the impact of this shortage was three times greater on blacks than on the overall population. *Town of Huntington,* 844 F.2d at 929. Furthermore, the town had restricted new low-income housing to an area consisting of 52% minority residents while the entire town was 98% white. *Id.* at 937–38. Thus, the Court concluded the town's refusal to amend the ordinance restricting multifamily housing projects to largely minority urban renewal areas disparately impacted minorities. *Id.* at 938. Similarly, in *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir.1977), the court held that plaintiffs had proven discriminatory effect by showing that the defendants' urban renewal efforts had left the area in question an "all-white community" whereas the area had previously been integrated to the extent of having 45% black families. *Id.* at 149. The court concluded that there was no

"doubt that the impact of the governmental defendants' termination of the project was felt primarily by blacks, who make up a substantial proportion of those who would be eligible to reside there." *Id.*

By contrast, in Hack, this Court dismissed plaintiffs' disparate impact claims against a university housing policy that required students to live in co-educational residence halls, which were objectionable to Orthodox Jews on religious grounds. The court noted that "[t]he students do not allege that [the university's] policy has resulted in or predictably will result in under-representation of Orthodox Jews in [university] housing. Therefore, their claim fails." Hack, 237 F.3d at 91. Whether using statistics or some other analytical method, plaintiffs must also utilize the appropriate comparison groups. They must first identify members of a protected group that are affected by the * neutral policy and then identify similarly situated persons who are unaffected by the policy.

Duty to Make Reasonable Accommodation

Under the FHAA and the ADA, a governmental entity engages in a discriminatory practice if it refuses to make a "reasonable accommodation" to "rules, policies, practices or services when such accommodation may be necessary to afford [a handicapped person] equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B); see also 42 U.S.C. § 12131(2) ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies or practices ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."). Thus, these statutes "require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 333 (2d Cir.1995) (quoting H.R.Rep. No. 711, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186 (footnotes omitted)). "Plaintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice." *Smith & Lee Assocs., Inc. v. City of Taylor,* 102 F.3d 781, 795 (6th Cir.1996). A defendant must incur reasonable costs and take modest, affirmative steps to accommodate the handicapped as long as the accommodations sought do not pose an undue hardship or a substantial burden. *Shapiro,* 51 F.3d at 334–35; *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 605 n. 16, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999); *Salute v. Stratford Greens Garden Apartments,* 136 F.3d 293, 300 (2d Cir.1998) (requiring landlord to accept Section 8 housing tenants modified an integral aspect of the landlord's rental policy). To prevail on a reasonable accommodation claim, plaintiffs must first provide the governmental entity an opportunity to accommodate them through the entity's established procedures used to adjust the neutral policy in question. ***579** *Oxford House–C v. City of St. Louis,* 77 F.3d 249, 253 (8th Cir.1996); *see also United States v. Vill. of Palatine,* 37 F.3d 1230, 1234 (7th Cir.1994) (holding that an administrative procedure must be used unless plaintiff can show such an action would be futile). Furthermore, requiring a Plaintiff to utilize facially neutral procedures to request an accommodation is not by itself a failure to reasonably accommodate plaintiffs' handicaps. A governmental entity must know what a plaintiff seeks prior to incurring liability for failing to affirmatively grant a reasonable accommodation. *Tsombanidis, supra.* It may be that once the governmental entity denies such an accommodation, neither the FHAA nor the ADA require a plaintiff to *exhaust* the state or local administrative procedures. *See Bryant Woods Inn, Inc. v. Howard County,* 124 F.3d 597, 601 (4th Cir.1997) (holding that plaintiffs were not required to exhaust county administrative procedures after it received a final decision on its application for a variance to zoning restrictions); *see also* 42 U.S.C. § 3613(a)(2) (permitting private enforcement of the FHA "whether or not a complaint [to the Secretary] has been filed"). But a plaintiff must first use the procedures available to notify the governmental entity that it seeks an exception

or variance from the facially neutral laws when pursuing a reasonable accommodation claim.

Under 42 U.S.C. § 3613(c)(2) a court may award reasonable attorney's fees to the prevailing party in a private enforcement action. We believe the district court correctly analogized this case to *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986), which interpreted similar statutory language employed in the Clean Air Act. Both the FHAA, 42 U.S.C. § 3613(c)(2), and section 304 of the Clean Air Act, 42 U.S.C. § 7604(d), allow a prevailing party to obtain attorney's fees for private enforcement "actions." Both statutes use only the term "action" instead of "action or proceeding." In Delaware Valley, however, the Court held that the Clean Air Act should be interpreted in a manner similar to § 1988. 478 U.S. at 559–61, 106 S.Ct. 3088. Section 1988 permits attorney's fees "for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation." *North Carolina Dep't of Transp. v. Crest Street Cmty. Council, Inc.*, 479 U.S. 6, 15, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986). To obtain the fees, the administrative proceeding must be "useful and of a type ordinarily necessary to secure the final result obtained from the litigation." *Delaware Valley*, 478 U.S. at 561, 106 S.Ct. 3088 (internal quotations omitted). The Court employed the same reasoning for the Clean Air Act, because like § 1988, the Clean Air Act was "enacted to ensure that private citizens have a meaningful opportunity to vindicate their rights." *Id.* at 559. The same can be said for private citizen suits brought pursuant to the FHAA. Thus, an administrative proceeding could be included in the calculation of reasonable attorney's fees if it is "useful and of a type ordinarily necessary to secure the final result obtained from the litigation." *Id.* at 561.

Reasonable Accommodation on Zoning Regulations

In more recent years, a great deal of litigation under the Fair Housing Amendments Act of 1988 has been based on disputes between group homes for disabled persons and local authorities who sought to prevent the - operation of such homes on the basis of zoning or other land-use restrictions. The legislative history of the 1988 amendments makes clear that this law was intended to outlaw land-use practices by local governments that have the effect of discriminating against disabled persons. Thus, the Report of the House Judiciary Committee stated that: the 1988 Act was 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 (disabled] individuals to live in the residence of their choice in the community. In a substantive challenge to a municipality's refusal to change an adverse zoning rule or decision, a complainant must make three showings in order to prevail under the "reasonable accommodation" theory: (1) that the accommodation requested "may be necessary" for the group home to operate; (2) that this accommodation will afford disabled persons "equal opportunity" to use and enjoy the proposed home; and (3) that the accommodation is "reasonable." The "necessary" requirement suggests that a group home is not entitled to an accommodation with respect to a rule that causes mere inconvenience. Thus, for example, a group of physically disabled persons might not be excused from compliance with an ordinance requiring that lawns be mowed regularly, because the residents could hire someone to do this at a modest cost. The use of the phrase "equal opportunity" in implies that the rule must be one with which disabled persons are unable to comply because of their disability. Disabled persons are entitled to such accommodations as will put them on an equal footing with similarly situated persons who are not disabled, but to no more. For example, the Fair Housing Act would probably not excuse a group home provider from paying property taxes on the same basis as other homeowners in the neighborhood. The use of the word "reasonable" to describe the accommodations required by the Fair Housing Act allows for a good deal of flexibility in interpreting this provision, but some things are clear. The issue in a given case is not whether the respondent's ordinance or adverse decision itself is reasonable,

but whether the accommodation sought by the complainant is reasonable. This means that a municipality cannot defend itself on the ground that its ordinance or decision blocking a group home is reasonable; it must show that its decision not to accommodate the home is reasonable. The key judicial precedents dealing with the "reasonable accommodation" provision hold that an accommodation must be made unless it requires the respondent to fundamentally alter the nature of its program or to incur undue financial or administrative burdens. For example, granting an exception concerning the number of unrelated persons who may live together in a home in a single-family neighborhood would not generally impose any significant burden on the municipality. The crucial question thus becomes whether the exception is fundamentally inconsistent with the underlying purposes of the zoning ordinance. What are the underlying purposes of residential zoning? Entire treatises have been written on this subject, and only a brief summary of the principal points is possible here. The essence of zoning is that only certain types of uses are compatible with each other, which means that winning a zoning case under the "reasonable accommodation" theory probably requires persuading the court that the operation of the particular group home involved in this case is compatible with the values traditionally associated with residential neighborhoods. The basic assumption of single-family zoning is that the value of each home in such an area will be maximized by being surrounded by other single-family homes. Proximity to commercial or multi-family uses makes a home less desirable. It would probably be difficult, therefore, for a provider who wanted to build a large nursing-home type facility for the disabled in the middle of a single-family zone to convince the court that such a use was not fundamentally inconsistent with the zoning ordinance. However, the typical group home does not raise such issues, because it generally seeks to locate in a dwelling that has, itself, been used as a single-family home and is therefore physically compatible with the character of the neighborhood. What is more likely to be involved is a question as to what types of persons may live in a single-family district without compromising the values that the zoning ordinance seeks to protect. In a 1974 decision upholding a single-family zoning ordinance that was used to bar a group of college students from living in a single-family zone, the Supreme Court noted that: A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . [Local governments may] lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. This passage endorses the view that groups of unrelated persons may increase the density of population, which will in turn increase traffic. It is important, therefore, in investigating a zoning complaint, to determine how many people will live in the proposed group home and the effect they might have on traffic and other problems associated with higher-density living. The Supreme Court's willingness to allow municipalities to bar groups of college students from single-family zones may have also been based on the belief that such persons are likely to keep irregular hours and live without adequate supervision, with the resulting higher noise levels imposing a hardship on the near-by residents. In a group home case, therefore, it is important to discern whether the particular group involved is likely to need the control normally exercised by parents in conventional families and, if so, whether a plan for such control has been established. Thus, in order to show that a group home is entitled to an exception from numerical limits on unrelated persons, it may be necessary to demonstrate that the particular group home is, or would be, more like a family than a group of college students. In many cases, this will be possible.- First, the number of residents in the typical group home, while greater than the number of unrelated persons permitted by the ordinance, is usually well within the normal range for a conventional family. Second, the group home's impact on traffic will ordinarily be less than that of a conventional family, since group home residents often do not drive cars. Finally, the essence of the operation of a typical group home is to provide a structured environment for its residents, who are subject to restraints on their behavior analogous to those exercised by

parents upon their children.

In summary, here are the elements of a reasonable accommodation claim under the FHA or ADA:

- **(1) that the plaintiff ... had a handicap within the meaning of § 3602(h);**
- **(2) that the defendant knew or reasonably should have been expected to know of the handicap;**
- **(3) that the accommodation was likely necessary to afford the handicapped person an equal opportunity to use and enjoy the dwelling;**
- **4) that the accommodation requested was reasonable;**
- **(5) that the defendant refused to make the requested accommodation."** ***Olsen v. Stark Homes, Inc.*****, 759 F.3d 140, 152 (2d Cir. 2014).**

The "But For" Causation Standard Versus "Mixed Motive" Causation Standard

Courts in the 2d Circuit have utilized a mixed motion standard for causation in Fair Housing cases. Plaintiffs are not required to prove that disability was the only reason for the Town's behavior. Rather, they are only required to show that disability was one motivating factor for the conduct. This means that in order for the Town to be found liable, disability need only have played some role in the Town's behavior. However, the U. S. Supreme Court's decision in COMCAST CORPORATION, Petitioner V. NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, Et Al., 140 S.Ct. 1009 (2020) may have sparked a change, such that the higher bar of "but for" causation must be proved before a plaintiff can succeed in a Fair Housing Act suit. In Comcast, the Court noted that "but for" causation is the default standard in all civil rights statutes. Because there is no language in either the FHA or ADA that removes application of the default standard, it follows that the proper standard for a FHA or ADA housing related claim is "but for" causation rather than mixed motive.

In Comcast, an African-American-owned media firm, Entertainment Studios Network ("ESN"), operated multiple television networks and had, for years, sought to have Comcast carry its channels. Comcast refused, offering a "lack of demand for ESN's programming, bandwidth constraints, and its preference for news and sports programming that ESN didn't offer" as explanation for its choice. ESN, believing the explanations proffered were merely a pretext for racism, sued Comcast, alleging that it systematically disfavored "100% African American-owned media companies." ESN did not contest that the reasons offered by Comcast were legitimate business reasons for Comcast to not want to carry ESN channels. ESN however contended that those reasons, while technically legitimate, were merely pretextual.

The trial court dismissed ESN's Complaint, holding that they had failed to adequately allege that "but for racial animus, Comcast would have contracted with ESN." On appeal, the Ninth Circuit reversed, holding that but-for causation was not the appropriate standard, and that a Sec. 1981 complaint need only plead facts showing "that race played 'some role' in the defendant's decision-making process." Finally, the case reached the Supreme Court where Justice Gorsuch authored the unanimous opinion of the Court.

Justice Gorsuch began:

> It is "textbook tort law" that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation. University of Tex. Southwestern Medical Center v. Nassar, 570 U. S. 338, 347 (2013) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984)). Under this standard, a plaintiff must demonstrate that, but for the defendant's

> unlawful conduct, its alleged injury would not have occurred. This ancient and simple "but for" common law causation test, we have held, supplies the "default" or "background" rule against which Congress is normally presumed to have legislated when creating its own new causes of action. 570 U. S., at 346–347 (citing Los Angeles Dept. of Water and Power v. Manhart, 435 U. S. 702, 711 (1978)). That includes when it comes to federal antidiscrimination laws like §1981. See 570 U. S., at 346–347 (Title VII retaliation); Gross v. FBL Financial Services, Inc., 557 U. S. 167, 176– 177 (2009) (Age Discrimination in Employment Act of 1967).

Comcast Corp. v. National Ass'n of African-American-Owned Media, 140 S. Ct. 1009 (2020). As stated above, "we generally presume that Congress legislated against the backdrop of the common law." Nassar, 570 U. S., at 347. Even before Nassar, the Civil Rights Act of 1866 put clearly onto paper that presumption: "in all cases where [the laws of the United States] are not adapted to the object [of carrying the statute into effect] the common law . . . shall . . . govern said courts in the trial and disposition of such cause." §3, 14 Stat. 27. Under a "but for" causation standard, a Plaintiff will have to prove that the denial of housing would not have occurred "but for" the conduct of the Public Entity that is prohibited by the Fair Housing Act.

Possibility of Respondeat Superior Liability

Many Fair Housing Act Plaintiffs argue that the Public Entity should have liability for discriminatory conduct of its officials acting within the scope of their duty, under the doctrine of respondeat superior. The entities oppose this notion by pointing to the rule applicable to civil rights cases brought pursuant to 42 U.S.C. 1983, that there is no respondeat superior liability. The Supreme Court caselaw is clear that a public entity will have 1983 liability only for its policies and customs that violate federal laws. Monell v. Dept. of Social Services of the City of New York, et al, 436 U.S. 658 (1978). A public entity cannot be held vicariously liable for the acts of individual employees. Id. Furthermore, although Plaintiffs point to Meyer v. Holley, 537 U.S. 280 (2003), where the Supreme Court held that *traditional* rules of agency and vicarious liability apply with respect to claims brought pursuant to the Fair Housing Act, it bears emphasis that the "traditional" rule with respect to civil rights lawsuits brought against municipalities, as established by the Supreme Court in Monell, is that there can be no claims of vicarious liability against a municipality. Monell v. Dept. of Social Services of the City of New York, et al, 436 U.S. 658 (1978). The question remains open and up to a future Superme

Court decision, but there is no question that a strong argument exists in favor of there being no respondeat superior liability.

Possibility of Punitive Damages

In a 42 U.S.C. § 1983 suit, local governments are immune from punitive damages. See, e.g., City of Newport v. Fact Concerts, 453 U.S. 247 (1981). "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar conduct… it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort." Id. at 266-67. "The reasoning of City of Newport seems largely hinged upon the fact that the traditional purposes of punitive damages (punishment and deterrence) would not be served by imposing punitive damages upon local governments, because taxpayers would foot the bill, governments would likely have to increase taxes or reduce public services, and such an award would place the local government's financial integrity in serious risk." Martin A. Schwartz, 32nd Annual Section 1983 Civil Rights Litigation, at 552 (Practicing Law Inst. Vol. 3. 2015) (citing Revilla v. Glanz, 8 F.Supp. 3d 1336, 1342-43 (N.D. Okla. 2014)). See also Chestnut v. City of Lowell, 305 F.3d 18,

21-22 (1st Cir. 2002) (vacating award of punitive damages against City, remanding and giving plaintiff option of having new trial on issue of actual damages against City).

Likewise, in the context of the Fair Housing Act, numerous courts have held that local governments are immune from punitive damages. See, e.g., Ross v. Port Chester Housing Authority, No. 17-CV-4770(NSR), 2019 WL 4738941, at n.17 (S.D.N.Y. Sept. 27, 2019) ("As a matter of law, Plaintiff's claim for punitive damages also fails because governmental entities are immune from punitive damages.") (citing City of Newport v. Fact Concerts, 453 U.S. 247 (1981)); New Jersey Coalition of Rooming and Boarding House Owners v. Mayor and Council of City of Asbury Park, 152 F.3d 217, 225 (3d Cir. 1998) (opining in *dicta* in Fair Housing Act case that "it is not clear that punitive damages can ever be awarded against a municipal defendant"); Jennings v. Housing Authority of Baltimore City, 2014 WL 346641, at *9 (D. Md. 2014) (holding that local governments are not liable for punitive damages under the Fair Housing Act); Brooker v. Altoona Housing Authority, 2013 WL 2896814, at *27 (W.D. Pa. 2013) (holding that punitive damages cannot be recovered against municipalities under the Fair Housing Act); Kennedy v. City of Zanesville, OH, 505 F. Supp. 2d 456, 476 (S.D. Ohio 2007) (holding, in a case based on the Fair Housing Act as well as other civil rights statutes, that punitive damages are not available against the county and city defendants); Developmental Services of Nebraska v. City of Lincoln, 504 F. Supp. 2d 726, 737-38 n.20 (D. Neb. 2007) (holding in a Fair Housing Act case that punitive damages are not available against a municipal defendant) (citing Inland Mediation Bd. V. City of Pomona, 158 F. Supp. 2d 1120, 1158 (C.D. Cal. 2001)). A 2d Circuit decision making punitive damages unavailable in a suit against a municipality would be helpful, but for now, the decisions from other parts of the country, combined with the fact that the Supreme Court has clearly established that punitive damages are not available as to a municipality in a 1983 case should be an effective shield against punitive damages claims.

SECTION 56 – SAMPLE REASONABLE ACCOMMODATION POLICY

56.1 PURPOSE. It is the policy of the Town of _____, pursuant to the Fair Housing Amendments Act of 1988 ("Fair Housing Act" or "FHA"), and the Americans with Disabilities Act, to provide to people with disabilities reasonable accommodation in rules, policies, practices, and procedures, including reasonable accommodations to zoning regulations that may be necessary to ensure equal housing opportunities. The purpose of these provisions is to provide a process for making requests for reasonable accommodation to land use and zoning decisions, regulations and procedures regulating the siting, funding, development and use of housing for people with disabilities. In these regulations, "use of housing" includes, but is not limited to, housing-related supports or services and the use and enjoyment of the property.

Any and all officials, employees, agents, boards, or commissions of the Town of _____ involved in the application, review, consideration, and/or enforcement of the terms and conditions of the reasonable accommodation policy contained herein shall be guided by, and shall adhere to, the criteria set forth in Section 56.2 (b) below and the requirements of the Fair Housing Act, which take precedence over conflicting state and local laws.

Nothing in these Regulations shall require persons with disabilities or operators of homes for persons with disabilities acting or operating in accordance with applicable zoning or land use laws or practices to seek a reasonable accommodation under these Regulations.

56.1 PROCEDURE.

a. Requests for reasonable accommodation shall be made to the _____ Zoning Enforcement Officer who shall issue a written decision within thirty (30) days of the date of the request and may grant the reasonable accommodation request with or without modification or deny the request. Such requests may be made on a form provided by the Zoning Enforcement Officer.

b. The Zoning Enforcement Officer shall consider narrowly defined criteria when deciding whether a requested accommodation is reasonable,, consistent with the FHA, such as: (i) is the housing, which is the subject of the request for reasonable accommodation, to be used by an individual or group of individuals protected under the FHA; (ii) is the request for accommodation necessary to make specific housing available to an individual or group of individuals protected under the FHA; (iii) whether the requested accommodation does not pose an undue hardship or a substantial burden on the municipality; and (iv) whether the requested accommodation requires a fundamental alteration of the Town's zoning scheme.

c. If necessary to reach a decision on the request for reasonable accommodation, the Zoning Enforcement Officer may request further information from the applicant consistent with the FHA, tailored to the particular factors in Section 56.2(b) above, and specifying in detail what information is required. The Zoning Enforcement Officer will not inquire into the nature or severity of a person's disability or require confidential medical records or information. However, the Zoning Enforcement Officer may request reliable disability-related information that (1) is necessary to

verify that the person meets the Fair Housing Act and/or Americans with Disability Act's definition of "disability", (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Depending on the individual's circumstances, information verifying that the person meets the FHA's and/or ADA's definition of disability can usually be provided by the individual but also may come from a doctor or medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability. Once the Zoning Enforcement Officer has established that the applicant meets the definition of a person with a disability, such official shall seek only the information necessary to evaluate if the request is needed because of a disability.

d. The written decision of the Zoning Enforcement Officer on the request for reasonable accommodation shall explain in detail the basis of the decision, including the designated findings on the criteria set forth in Section 56.2(b) above.

e. All written decisions shall give notice of the right to appeal and to request reasonable accommodation in the appeals process as set forth in Section 56.2(f) below.

f. Appeals of the decision regarding a request for accommodation shall be conducted in accordance with the following procedures:

   (i) Within thirty (30) days of the date of the written decision, the applicant may appeal an adverse decision to the _____ Fair Housing Enforcement Officer in writing and may utilize the Appeal of Decision on Fair Housing Accommodation Request form ("Appeal Form"), which shall be provided by the Zoning Enforcement Officer.

   (ii) An applicant may request reasonable accommodation to the procedure by which an appeal will be processed. If an applicant needs assistance in filing an appeal, the Town shall provide the assistance that is necessary to ensure that the appeal process is accessible to the applicant, including by transcribing a verbal request for an appeal into a written request.

   (iii) An applicant shall state the grounds for the appeal on the Appeal Form or in such other appeal document used by the applicant.

   (iv) When an appeal is filed with the _____ Fair Housing Enforcement Officer, such Officer shall issue a written decision on such appeal within 30 days of the filing of the appeal.

   (v) In reaching a decision on the appeal, the Fair Housing Enforcement Officer shall determine whether the decision was consistent with the FHA, and the applicable criteria in evaluating a reasonable accommodation request as set forth in Section 56.2(b) above. The Fair Housing Enforcement Officer shall consider: (i) the applicant's initial reasonable accommodation request; (ii) the written decision at issue; (iii) the applicant's written appeal; and (iv) the provisions in this Regulation to determine whether the decision was consistent with the FHA and the requirements of this Regulation. The Fair Housing Enforcement Officer's decision shall include the basis for their determination.

   (vi) The decision on the appeal shall be issued to the applicant in writing.

   (vii) If a written decision on the appeal is not rendered within thirty (30) days

from the date the appeal was filed, as required in Section 56.2 (f) (iv) above, the accommodation request shall be deemed granted.

G. The person or entity requesting an accommodation may file an action at any time in court to challenge the Town's denial of a reasonable accommodation under the FHA, ADA, or any other applicable federal, state or local law. Such persons or entities shall not, solely by virtue of having requested an accommodation under this Regulation, be barred, estopped or otherwise limited in bringing an action in court against the Town to challenge the denial of a reasonable accommodation.