Planning and Zoning for Group Homes: Local Government Obligations and Liability Under the Fair Housing Amendments Act

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ACROSS THE DIVERSE LANDSCAPE OF LOCAL LAND USE MATTERS, few regulatory issues and approval processes elicit as much emotion and opposition as planning and zoning decisions relating to housing for persons with disabilities. While such facilities have proven invaluably beneficial in the care and treatment of one of the most underserved populations in the United States—those with disabilities—community discrimination against people with disabilities has limited, and in some cases has wiped out, the willingness of local governments to approve such housing. As advances in the medical, sociological, and psychological fields have encouraged movement away from the early-to-mid twentieth century approach of large-scale institutionalization of persons with physical and cognitive disabilities and mental illnesses, and as civil rights organizations have exposed the mistreatment of people with disabilities that has pervaded much of history, pressure has increased on non-profit organizations and local communities to provide housing for people with disabilities in smaller congregational settings located in predominantly residential areas generally occupied by persons without disabilities. Consequently, local governments are increasingly called upon to decide the fate of applications by social service organizations

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This article is adapted from excerpts of BRIAN J. CONNOLLY & DWIGHT H. MERRIAM, GROUP HOMES: STRATEGIES FOR EFFECTIVE AND DEFENSIBLE PLANNING AND REGULATION (Am. Bar Ass'n 2014)*, and is being reproduced with the consent of ABA Publishing.*

and other treatment facility operators to locate and operate housing facilities for people with disabilities in local jurisdictions.

Discrimination against persons with disabilities has been pervasive and perpetual throughout history, and continues with regrettably little abatement today.[1] Particularly in the arena of housing, this population has experienced a degree of isolation and segregation that far exceeds the more widely-known and highly-publicized forms of housing discrimination such as racial or religious discrimination.[2] Before the rise of the modern welfare state, persons with disabilities lived primarily with family members.[3] However, such arrangements often failed to provide the treatment and support necessary for persons with disabilities to share in the experience of productive lives in the community or to enjoy a high quality of life.[4] Furthermore, from ancient times through the mid-twentieth century, the principal method of treatment recommended by the medical and psychological communities for persons with mental disabilities was confinement and isolation, treatment methods that have been wholly rejected in modern times.[5]

Historically, persons with disabilities have been disenfranchised of their civil and political rights, suffered verbal and physical abuse, and subjected to forced sterilizations.[6] In the United States, for much of the twentieth century, people with disabilities were typically relegated to large, publicly operated institutions many of which were poorly funded and negligently operated.[7] Residents were often abused and lived in unsanitary and inhumane conditions.[8] These facilities offered little to no treatment or support to those seeking to lead fulfilling lives.

While medical and social science has evolved with respect to the proper treatment and the best forms of housing for persons with disabilities, discrimination against this population continues to persist

1. *See* Christina Kubiak, *Current Issues in Public Policy*: *Everyone Deserves a Decent Place to Live: Why the Disabled are Systematically Denied Fair Housing Despite Federal Legislation*, 5 RUTGERS J.L. & PUB. POL'Y 561, 570 (2008).

2. *See* Henry Korman, *Clash of the Integrationists: The Mismatch of Civil Rights Imperatives in Supportive Housing for People with Disabilities*, 26 ST. LOUIS U. PUB. L. REV. 3, 4 (2007) ("[B]y definition they were segregated and isolated from community life.").

3. *See* James T. Hogan, *Community Housing Rights for the Mentally Retarded*, 1987 DET. C. L. REV. 869, 874 (1987).

4. *See generally id.*

5. *See generally id.*

6. *See, e.g.*, Kim Severson, *Thousands Sterilized, A State Weighs Restitution*, N.Y. TIMES, Dec. 10, 2011, at A1.

7. *See* Hogan, *supra* note 3, at 875, 877.

8. *See id.* at 875.

throughout the United States and the world.[9] In the United States, while independent living arrangements and group living facilities have in large part replaced the institutions of the past,[10] they have also given rise to new, or at least modified, forms of discrimination. Societal-structural discrimination and poor knowledge about the proper means of treatment were often behind earlier institutionalizations of persons with disabilities,[11] whereas persistent fears and a palpable antipathy toward people with disabilities are a more current, common feature of debates in neighborhoods and localities when housing facilities for this population are under consideration. Whether justified by concerns about maintenance of community character, preservation of property values, or concern for personal and property protection, these arguments effectively deny persons with disabilities fair and equal access to housing and give voice to bias, prejudice, stigma, and discrimination. More often than not, the result of these battles is drawn-out litigation that imposes high costs on local governments and the taxpaying public. Furthermore, a broad national failure to ensure that persons with disabilities have adequate housing has been a principal driver of social problems such as homelessness, criminality, and emergency hospitalization, all of which impose high costs on government agencies and society as a whole.[12]

The modern trend in housing for people with disabilities, embraced by both the medical and scientific community as well as the civil rights community, has concentrated on midsize to small group homes and individualized living arrangements located among residential neighborhoods.[13] These living arrangements provide persons with disabilities with the most "normalized" living environment, allowing for interaction with those without disabilities, dramatically improved treatment outcomes, and a level of dignity which was previously unheard of in institutional settings. Unfortunately, due to widespread fear of the

9. *See, e.g.*, Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 508-09 (1994).

10. *See* Michael Allen, *Just Like Where You and I Live: Integrated Housing Options for People With Mental Illnesses*, BAZELON CENTER FOR MENTAL HEALTH L. (Mar. 10, 2015), http://www.bazelon.org/LinkClick.aspx?fileticket=4sZjOa313oI%3D&tabid=245.

11. *See* Hogan, *supra* note 3, at 870 ("Throughout history, the mentally retarded population has been segregated and forgotten by the community.").

12. *See generally* Gerrard, *supra* note 9, at 513 (stating that homeless shelters, group homes, jails, and other agencies are funded through taxes).

13. *See generally* Daniel R. Mandelker, *Housing Quotas for People With Disabilities: Legislating Exclusion*, 43 URB. LAW. 1 (2011) (discussing various types of group housing available to individuals with disabilities).

unknown and misunderstood or outright bias, group homes and independent living facilities have faced a great uphill battle and persistent community opposition when locating in residential areas. In a 1998 study, group homes for people with disabilities outranked many industrial uses, including landfills and other waste disposal sites, on a list of the most unwanted land uses in local communities.[14]

Community opposition to group homes has its roots in many, varied reactions to people with disabilities, but can often be traced back to lack of information or misinformation, fear of negative community impacts, shortcomings in local procedures that preclude full public participation in the decision-making process, outright prejudice and bias toward people with disabilities, and conflicting interests and development goals.[15] Furthermore, general community antipathy toward the homeless has a disproportionate impact on people with disabilities. Ironically, the failure of government to provide housing facilities for the homeless and people with disabilities has left more people with disabilities on the streets, where they are more prone to criminal activity such as violence or drug addiction.[16] Neighborhood opposition to a proposed group home can delay the construction and operation of a needed community resource, and can derail the establishment of a group home altogether. Given the significant amount of misinformation about group homes in many communities, as well as the discrimination and community opposition that group homes often generate, planners and group home operators must leverage what they can accomplish politically and take the initiative to educate the community about new group homes and the benefits they have for everyone.

While the political and social challenge of providing housing for people with disabilities is complicated by the dire need for such housing facilities and all too common, yet quite extreme levels of community opposition, there is an additional layer of complexity in housing for people with disabilities arising out of the legal obligations applicable to local governments which pertain to housing discrimination. As a result of the Federal Fair Housing Amendments Act (referred to in this

14. *See* Lois M. Takahashi & Sharon Lord Gaber, *Controversial Facility Siting in the Urban Environment: Resident and Planner Perceptions in the United States*, 30 ENV'T & BEHAV. 184, 192, 194 (1998)*; see also* Mandelker, *supra* note 13.

15. S*ee* Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. OF AFFORDABLE HOUS. & COMMUNITY DEV. L. 78, 90-91 (2002)

16. *See* Alicia Hancock Apfel, *Cast Adrift: Homeless Mentally Ill, Alcoholic and Drug Addicted*, 44 CATH. U. L. REV. 551, 553-54 (1995).

article as the FHAA or the Act),[17] the principal federal law dealing with matters of housing discrimination against people with disabilities, and other federal and state antidiscrimination laws (including the Americans With Disabilities Act (ADA),[18] the Rehabilitation Act,[19] and state law equivalents), local governments are obligated to ensure that people with disabilities can use and acquire housing on an equal basis with nondisabled persons. These laws require equal treatment under the terms of zoning codes and other regulations, as well as equal treatment in approval processes for the location of housing for people with disabilities. While the FHAA's protections for people with disabilities are less than three decades old, they have already benefitted and empowered those who are unfairly treated as a result of local government regulation and action. Proven time and again in litigation over approvals and denials of housing facilities for people with disabilities, the consequences of a local government's failure to comply with the FHAA and other laws can be quite severe.

The twenty-fifth anniversary of the passage of the FHAA occurred in 2013. Although the Fair Housing Act (FHA) has existed since 1968, protection for people with disabilities was added in 1988. In the 1980s, the FHAA was passed, and the medical, psychological, and sociological fields were in the process of recognizing that smaller, more intimate housing arrangements dispersed throughout the community were the most appropriate living arrangements for persons with disabilities. These developments triggered unforeseen levels of community conflict, and ultimately, much litigation surrounding local government regulations, particularly zoning. Longstanding social fears and biases directed against persons with disabilities have come to the fore as local governments seek to carry out their obligations under the law and housing developments for persons with disabilities make efforts to locate in established residential neighborhoods. And in some cases, local governments and their officials have been the driving force behind community fears and biases. Although litigation is seldom the best way to resolve conflicts, one of the positive outcomes of litigation over community-based housing for persons with disabilities and the FHAA has been a significant evolution and, ultimately, clarification of the law relating to land use regulations and housing for this population. With a quarter-century of legal

17. 42 U.S.C. §§ 3601-3619, 3631 (2012).
18. 42 U.S.C. §§ 12101-12213 (2012).
19. 29 U.S.C. §§ 791-794 (2012).

developments in the area of fair housing as a guide, local governments and lawyers can gain a much more informed understanding of the meaning and requirements of the FHAA.

The next part of this article provides a basic overview of the provisions of the FHAA. Following that, the article reviews the three ways in which local governments—through zoning and building regulations, and through quasi-judicial approval processes—may be held to have violated the FHAA. The article concludes with a discussion of one particular area of fair housing law, the concept of disparate impact, which is presently in flux, and offers some observations of the potential outcomes of the current division over disparate impact for housing for people with disabilities.

I. Understanding the FHAA

The relatively short history of the FHAA has meant that the law pertaining to people with disabilities and housing discrimination is still in an evolutionary stage. The meager legislative history of the FHAA has left courts with a difficult task in interpreting and applying the law. Moreover, the legal issues that have arisen under the FHAA are distinct from those that arose under the original FHA. For example, under the FHAA, there has been much litigation over the definition of "handicap" and the phrase "reasonable accommodation." The zoning issues that are litigated tend to deal with denials of special use permits, facially neutral zoning provisions that have discriminatory impacts on persons with disabilities, and reasonable accommodations for people with disabilities.[20] These issues were generally unfamiliar to courts that have had to deal with different problems under the pre-1988 FHA, presenting new challenges in the past twenty-five years.

A. *Who is Protected Under the FHAA?*

The FHAA grants protections to persons based on many types of disabilities, and extends beyond those with disabilities as long as a person is associated with a person with a disability. Determining who is protected under the FHAA requires looking at the actual persons who receive the law's protections as well as the types of housing units that receive protection. The protection of individuals under the FHAA

20. Robert L. Schonfeld & Seth P. Stein, *Fighting Municipal "Tag-Team": The Federal Fair Housing Amendments Act and Its Use in Obtaining Access to Housing for Persons With Disabilities*, 21 FORDHAM URB. L.J. 299, 300 (1994).

extends to persons with a "handicap,"[21] as defined in the statute, and anyone associated with a person who has a handicap. The protection for housing units extends only to "dwellings," so there are some transitional housing facilities that do not receive protection under the FHAA, as further discussed. This section discusses these determinations in detail.

Section 3604(f)(1) of the FHAA prohibits a party from discriminating "in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."[22] The handicap may be of the buyer or renter of the property him- or herself, or it may be a handicap of "a person residing in or intending to reside in that dwelling after it is so sold, rented or made available."[23] The handicap may also be of "any person associated with that buyer or renter."[24] Courts have recognized that a broad class of persons with handicaps is protected by the FHAA under the latter provision.[25] The term "handicap" is defined by a test with three alternatives set out in 42 U.S.C. § 3602(h):

> " 'Handicap' means, with respect to a person—(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in [Section 102 of the Controlled Substances Act, 21 U.S.C. § 802 (2012)])."

The definition of handicap contained in the FHAA is almost identical to that contained in the Rehabilitation Act of 1973,[26] and this definition has been similarly incorporated into the ADA.[27] For a person to obtain the protections of the FHAA, he or she must be able to demonstrate one of the three elements described in § 3602(h).[28]

The three tests outlined in § 3602(h) are further explained in the regulations promulgated by the Department of Justice to implement

21. This article sometimes uses the term "handicap" in order to be consistent with the terms used in the FHAA, however, the authors wish to note that the term "handicap" is disfavored among disability rights advocates, and the term "disability" is preferred.
22. 42 U.S.C. § 3604(f)(1).
23. 42 U.S.C. § 3604(f)(1)(B).
24. 42 U.S.C. § 3604(f)(1)(C).
25. 42 U.S.C. § 3604(f)(1).
26. *See* 29 U.S.C. § 705(20)(A) (2012).
27. *See* 42 U.S.C. § 12102(1).
28. 42 U.S.C. § 3602(h); *see, e.g.,* Matthew M. Gorman et al., *Fair Housing for Sober Living: How the Fair Housing Act Addresses Recovery Homes for Drug and Alcohol Addiction*, 42 URB. LAW. 607, 609 (2010) (explaining the status of alcohol or drug addiction as a disability under the FHA).

the FHAA and other federal laws protecting people with disabilities. The ADA similarly provides additional detail in understanding the meaning of the three parts of the test.[29] For the purposes of the first alternative test, "major life activities" are defined in the regulations as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[30] The regulations explicitly require that a person's disability in this area is defined and determined based on a comparison to the majority of the population.[31] The intent of the second alternative test is to eliminate discrimination on the basis of a past impairment,[32] and thus protects people with a history of a disability or who have "been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."[33] Finally, the third alternative test protects persons based upon whether others perceive them as having an impairment as described in the first alternative test.[34] In many cases, the third alternative provides protection for homeless persons who may not have an actual disability, but who are "treated adversely as a result of stigmatizing perceptions held by others."[35]

The definition of disability contained in § 3602(h) "covers people with developmental disabilities, mental illnesses, physical disabilities, contagious diseases like tuberculosis or HIV and drug or alcohol addictions as long as the individuals are not currently using any illegal substance."[36] The legislative history of the FHAA refers to some of the disability conditions that were contemplated by Congress when the Act was passed, including persons using wheelchairs, persons who are deaf, persons with visual impairments, persons with cognitive impairment, and persons with AIDS or HIV.[37] Additionally, courts have been willing to consider all of these as conditions justifying

29. 42 U.S.C. § 12102.
30. 28 C.F.R. § 35.104(2) (2015).
31. *See* 28 C.F.R. § 41.31(b)(2) (2015); Apfel, *supra* note 16, at 572.
32. *See* Apfel, *supra* note 16, at 572-73.
33. 28 C.F.R. § 41.31(b)(3).
34. *See* 24 C.F.R. § 100.201 (2015).
35. Apfel, *supra* note 16, at 573.
36. Daniel Lauber, *A Real LULU: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988,* 29 J. Marshall L. Rev. 369, 374 (1996).
37. H.R. REP. NO. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2173-74. While the legislative history of the FHAA only explicitly mentions persons with AIDS, the Supreme Court has held in the context of the Americans With Disabilities Act that HIV also constitutes a protected disability, as it follows a "predictable . . . and unalterable course." Bragdon v. Abbott, 524 U.S. 624, 633 (1998).

application of the FHAA in lawsuits against municipalities.[38] While an individual's personal physical or cognitive characteristics may be dispositive as to whether the individual's condition is covered by § 3602(h), courts have found that it is sometimes necessary to look at a particular facility's criteria to determine whether its residents fall under the protections of the FHAA.[39]

Although current users of drugs or alcohol are expressly excluded from coverage under the FHAA, courts have uniformly held that recovering substance abusers are protected by the Act's provisions.[40] Furthermore, even recovering substance abusers who live in so-called "three-quarter houses"—facilities for persons further along in recovery that help return former substance abusers to general society—are considered handicapped under the provisions of the Act.[41] Federal regulations pertaining to the disability protection laws identify three conditions which qualify a person as not being a current user of drugs or alcohol: (1) the person "[h]as successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;" (2) the person "[i]s participating in a supervised rehabilitation program;" or (3) the person "[i]s erroneously regarded as engaging in such use."[42]

Although the FHAA's coverage extends across a broad range of disabilities, not every condition that may draw housing discrimination is covered by the Act's protections. For example, the Act does not cover certain types of communal housing arrangements in cases where the residents of these facilities are not handicapped under the FHAA. Domestic violence shelters, shelters for the homeless population, and halfway houses for citizens returning from imprisonment fall outside of the protections of the FHAA because the definition of handicap in § 3602(h) does not apply to abuse victims without a physical or

38. *See, e.g.*, Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n, 790 F. Supp. 1197, 1209-10 (D. Conn. 1992); Ass'n of Relatives & Friends of AIDS Patients (*A.F.A.P.S.*) v. Regulations & Permits Admin., 740 F. Supp. 95 (D. P.R. 1990); Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989).

39. McKivitz v. Twp. of Stowe, 769 F. Supp. 2d 803, 822 (W.D. Pa. 2010).

40. *See, e.g.*, United States v. S. Mgmt. Corp., 955 F.2d 914, 920-22 (4th Cir. 1992) (finding that explicit exception for current drug and alcohol abusers evidenced congressional intent to include persons in drug and alcohol rehabilitation within the scope of the FHAA's protected classes); St. Paul Sober Living, LLC v. Bd. of Cnty. Comm'rs of Garfield Cnty., 896 F. Supp. 2d 982 (D. Colo. 2012); Jeffrey O. v. City of Boca Raton, 511 F. Supp. 2d 1339 (S.D. Fla. 2007); Oxford House v. Twp. of Cherry Hill, 799 F. Supp. 450, 459 (D.N.J. 1992).

41. *McKivitz*, 769 F. Supp. 2d at 821-22.

42. 28 C.F.R. § 35.131(a)(2)(i)-(iii).

mental handicap, homelessness, or past incarceration. Commentators have noted that the combination of Supreme Court decisions condoning restrictive definitions of "family" in residential zones and the limitation of the Act's protections to persons with disabilities have left housing for the nonhandicapped exposed to the sometimes discriminatory whim of local zoning authorities.[43] Group housing for the nonhandicapped is often subject to the same discrimination as group housing for the handicapped.[44]

It is also unclear whether the § 3602(h) definition of handicap extends to some forms of childhood emotional disturbance or juvenile criminal behavior.[45] A Washington state court appeared to suggest that abused or neglected children are not handicapped as that term is defined in the state's Housing Policy Act.[46] The court suggested, however, that if the plaintiff could show that childhood abuse had caused a physical or mental condition that fell within the definition of handicapped, the children would be protected under the state law.[47] Authors have predicted that litigation over the handicapped status of group home residents will grow, particularly as it pertains to the "handicapped" status of child offenders.[48] The Department of Justice and the Department of Housing and Urban Development have noted that, regardless of the disability status of children, discrimination against housing facilities for children may violate the provisions of the FHA prohibiting discrimination against persons on the basis of familial status.[49]

It is also not always clear whether elderly persons living in assisted living facilities or other elder care facilities qualify as "handicapped" for the purposes of the Act.[50] Where a developer of an elder care

43. *See* Michael J. Davis & Karen L. Gaus, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post*-Edmonds *Era*, 46 U. KAN. L. REV. 777 (1998).

44. *See* Dwight H. Merriam & Robert J. Sitkowski, *The Seven Nun Conundrum: Seeking Divine Guidance in the Definition of "Family*," LAND USE L. & ZONING DIG. 3 (1999).

45. Davis & Gaus, *supra* note 43, at 806.

46. The Washington statute used a definition of "handicap" that cross-referenced 42 U.S.C. § 3602(h) (1994). *See* Sunderland Family Treatment Serv. v. City of Pasco, 903 P.2d 986, 990-91 (Wash. 1995).

47. *Id.* at 991.

48. Davis & Gaus, *supra* note 43, at 807.

49. THE UNITED STATES DEPARTMENT OF JUSTICE & THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JOINT STATEMENT: GROUP HOMES, LOCAL LAND USE, AND THE FAIR HOUSING ACT (1999), *available at* http://www.justice.gov/crt/about/hce/final8_1.php [hereinafter JOINT STATEMENT] (stating also that homes for children may be required to employ reasonable requirements for adult supervision).

50. *See* Davis & Gaus, *supra* note 43, at 808.

facility can demonstrate that the residents have mental or physical handicaps, such facilities are covered by the act,[51] but where the developer cannot demonstrate such handicap, the facilities generally are not covered.[52] As long as some residents of an assisted living facility suffer from some form of disability, the facility will receive the protections of the Act.[53] Some authors have suggested that discrimination against group living facilities for the nondisabled could be prohibited through the application of rational basis scrutiny under the Equal Protection Clause, where the discrimination lacks a legitimate governmental purpose or rational relationship between the purpose and the means chosen to achieve the purpose.[54]

B. *What Types of Housing are Protected Under the FHAA?*

While the FHAA's protections are applicable to certain types of persons with disabilities, the FHAA's coverage extends to a broad segment of housing units. The protections of the FHAA extend only to those facilities that can properly be considered a "dwelling" under the Act. Section 3602(b) of the FHAA contains the following definition of "dwelling:"

> "[A]ny building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof."[55]

While most facilities for people with disabilities are covered under the FHAA, certain facilities lack the Act's protections if they are not intended as residential facilities. Transitional living facilities, where the residents are only present for a short time period, are not generally considered dwellings under the FHAA.[56] However, courts have been willing to give the FHAA a generous reading to afford protection

51. *See, e.g.*, Quad Enters. Co. v. Town of Southold, 369 F. App'x 202 (2d Cir. 2010); Montana Fair Hous., Inc. v. City of Bozeman, 845 F. Supp. 2d 832 (D. Mont. 2012); Bryant Woods Inn, Inc. v. Howard Cnty., Md., 911 F. Supp. 918 (D. Md. 1996).

52. *See* Budnick v. Town of Carefree, 518 F.3d 1109 (9th Cir. 2008).

53. *See generally* Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144 (2d Cir. 1999).

54. *See* Davis & Gaus, *supra* note 43, at 812.

55. 42 U.S.C. § 3602(b).

56. *See* Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096 (3d Cir. 1996); *McKivitz*, 769 F. Supp. 2d 803.

for short-term rehabilitation facilities or nursing homes.[57] Generally speaking, where the residents consider the facility their home, and where the facility functions as a place to which they can and do return on a regular basis, the facility gets the protections of the FHAA.[58] On the other hand, because the Act's protections extend to "buyers" and "renters," at least one court has suggested that it is doubtful that facilities such as homeless shelters, where individuals pay nothing to reside in the facility, are protected by the Act.[59] Note, however, that persons with disabilities utilizing the services offered by shelters for the homeless are protected under the ADA's provisions relating to public accommodations.[60] Although the Act exempts landlords of buildings with fewer than four units, this exemption does not apply when a local government is the defendant. A local government may not raise that exemption as a defense to an act which is either discriminatory or which does not reasonably accommodate persons with disabilities.[61]

Three judicial approaches are used to determine if a particular facility is covered by the protections of the FHAA.[62] In some jurisdictions, any residence housing persons with a particular category of disability—for example, a residence for Alzheimer's patients—is automatically protected under the FHAA, as are any residents of that facility.[63] In other jurisdictions, a person must be denied housing on the basis of his or her disability status in order to receive the FHAA's protections, and thus the protection of housing units is dependent on the individual characteristics of its residents.[64] The third approach depends upon expert testimony showing that a person or class of persons has a disability because of serious limitations in their ability to perform important life activities; thus, those persons and residences which house such persons or class of persons are protected under the FHAA.[65] While the differences between these judicial determinations are subtle, they must be

57. *See Hovsons*, 89 F.3d 1106; *McKivitz*, 769 F. Supp. 2d 803; Conn. Hosp. v. City of New London, 129 F. Supp. 2d 123, 132 (D. Conn. 2001); *Baxter*, 720 F. Supp. 720.
58. *Conn. Hosp.*, 129 F. Supp. 2d at 134-35.
59. *See* Johnson v. Dixon, 786 F. Supp. 1, 4 (D.D.C. 1991). Some commentators are critical of this approach because of its effect of preventing homeless disabled persons from seeking shelter and taking initial steps toward a treatment process. *See* Apfel, *supra* note 16, at 595.
60. 42 U.S.C. § 12132.
61. *See McKivitz*, 769 F. Supp. 2d at 815-16.
62. *See* Schonfeld & Stein, *supra* note 20, at 307.
63. *Id.* at 307-08.
64. *Id.* at 310.
65. *Id.* at 310-11.

considered in determining the disability status of residents and housing facilities for the purposes of the FHAA.

C. *Who Must Comply with the FHAA?*

The FHAA's requirements and prohibitions apply to a broad range of parties in a housing transaction. The Act prohibits discrimination based on the protected classes as it pertains to all dwellings, with limited carve-outs for single-family houses owned by landlords with fewer than four rental properties, and for dwelling units in buildings containing four or fewer total units so long as the landlord occupies one of the units in the building.[66] Landlords of any other form of rental dwelling are required to comply with the Act. Furthermore, real estate agents, lenders, and governments are all required to comply with the Act. Another form of private discrimination covered by the FHAA is the use of private restrictive deed covenants to exclude group homes for people with disabilities.[67] These private covenants are considered null and void, and unenforceable under the Act.

Congress assumed that the FHA would apply to local zoning laws and would limit the ability of local jurisdictions to engage in discriminatory zoning against the FHA's protected classes.[68] The legislative history of the FHAA contains explicit language evidencing congressional intent to include local zoning laws in the Act's coverage. Furthermore, the Federal Departments of Justice and Housing and Urban Development interpret the FHAA to apply to local government regulatory and approval actions.[69]

The Supreme Court has not heard a case questioning the Act's application to local zoning. However, the Court implied the FHAA's application to local zoning when it struck down an Edmonds, Washington zoning ordinance in *City of Edmonds v. Oxford House, Inc.*[70] The city had a zoning provision restricting the number of unrelated persons that could occupy a group home, while allowing any number of related persons to live in any other dwelling unit. The Court held that under the FHAA the city failed to make a reasonable accommodation for persons with disabilities. All of the federal appeals courts that have

66. 42 U.S.C. § 3603(b).
67. Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities,* 43 AM. U. L. REV. 925, 959 (1994).
68. H.R. REP. NO. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.
69. JOINT STATEMENT, *supra* note 49.
70. 514 U.S. 725, 728 (1995).

addressed the question have expressly held that the Act applies to local zoning.[71]

D. *What Does the FHAA Require and Prohibit?*

With respect to persons with disabilities, the FHAA contains requirements and prohibitions aimed at achieving the Act's broad goals of eliminating housing discrimination. First, § 3604(f)(1) makes it unlawful

> "[t]o 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."[72]

Examples of making unavailable or denying a dwelling unit based on handicap include overt acts of discrimination, such as a landlord refusing to rent to a person with a disability. In many FHAA contexts, however, the language "make unavailable" has been read much more broadly. For example, post-housing acquisition harassment or other discrimination has been found by courts to amount to constructive eviction making a dwelling unit effectively unavailable to a member of a class protected by the FHAA.[73] Section 3604(f)(1)'s prohibition on making dwelling units unavailable to those with disabilities has also been found to reach discriminatory land use regulations which have the effect of denying housing to persons with disabilities.[74]

Second, § 3604(f)(2) makes it unlawful

> "[t]o 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 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."[75]

71. *See, e.g.,* Hemisphere Bldg. Co. v. Vill. of Richton Park, 171 F.3d 437, 438 (7th Cir. 1999); Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285, 289 (6th Cir. 1996); Bangerter v. Orem City Corp., 46 F.3d 1491, 1498 (10th Cir. 1995).

72. 42 U.S.C. § 3604(f)(1).

73. Bloch v. Frischholz, 587 F.3d 771, 776 (7th Cir. 2009).

74. *See, e.g.,* Southend Neighborhood Imp. Ass'n v. St. Clair County, 743 F.2d 1207, 1209 (7th Cir. 1984) ("For example, although Section 3604(a) applies principally to the sale or rental of dwellings, courts have construed the phrase "otherwise make unavailable or deny" in subsection (a) to encompass mortgage "redlining," insurance redlining, racial steering, exclusionary zoning decisions, and other actions by individuals or governmental units which directly affect the availability of housing to minorities."). The same broad reading given the identical language in § 3604(a) and which applies to the other classes protected under the Fair Housing Act also applies to the language of § 3604(f)(1).

75. 42 U.S.C. § 3604(f)(2).

Section 3604(f)(2) thus reaches conduct beyond simple acquisition or disposition of property by requiring that any of the privileges or services attendant to a dwelling be delivered in a nondiscriminatory fashion. While § 3604(f)(2) is not frequently invoked in claims against local *zoning* authorities, this section of the Act may be employed against local governments when questions of discrimination arise in the delivery of public services such as water, sewer, utilities, or other services.[76] As with zoning actions, delivery of government services may not be conducted in a discriminatory manner, and any questions about service delivery are reviewed with the same level of scrutiny as discriminatory zoning ordinances or actions.

Section 3604(f)(3) goes on to provide a broad definition of "discrimination" which includes, among other things, "a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises,"[77] and "a refusal 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."[78] In the case of rental facilities, a landlord may reasonably require a modification adapted for a resident with a disability to be restored to its original condition upon the termination of the person's tenure in the unit. The "reasonable accommodation" provision contained in § 3604(f)(3)(B) is at the center of much of the FHAA litigation involving local zoning authorities and is discussed at length herein.

The FHAA also prohibits making or publishing any statement or advertisement that indicates a preference, limitation, or discrimination based on handicap;[79] representing to a person that, because of the person's handicap, a dwelling unit is unavailable for inspection, sale or rental;[80] and inducing "any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood" of a person with a disability or group home.[81] These restrictions apply particularly to real estate agents who might either suggest to a

76. *See, e.g.*, Community Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170 (3d Cir. 2005); Hayden Lake Recreational Water & Sewer Dist. v. Haydenview Cottage, LLC, 835 F. Supp. 2d 965 (D. Idaho 2011).
77. 42 U.S.C. § 3604(f)(3)(A).
78. 42 U.S.C. § 3604(f)(3)(B).
79. 42 U.S.C. § 3604(c).
80. 42 U.S.C. § 3604(d).
81. 42 U.S.C. § 3604(e).

person or group with a disability that a housing unit is unavailable because of the person's disability, and to real estate agents who might attempt to "blockbust" a neighborhood—that is, to encourage property owners to sell their homes at discounted prices—by stirring up neighborhood anxieties related to the entry of a group living facility or persons with disabilities into the neighborhood. Private restrictive covenants that either expressly or effectively prohibit persons with disabilities and group homes from locating in particular neighborhoods are also unenforceable under the Act.[82]

The FHAA also requires that multifamily housing developments be constructed so as to be accessible for persons with physical disabilities, including a requirement that site plan designs provide an accessible route into the building, as well as accessible routes throughout the building itself.[83] While authority for review and approval of multifamily buildings covered by the Act lies with state and local governments, an approval of a multifamily development by a unit of state or local government is not dispositive in the event that a party brings an enforcement action against the developer for failure to provide an accessible property.[84] Furthermore, the Act does not limit the ability of state or local governments to require developers to construct housing units that have greater accessibility than is required.[85]

E. *Construction of the FHAA*

Relying on the sweeping goals of the FHA and FHAA, courts have generally construed the language of the Act very broadly. The first United States Supreme Court case to deal with interpretation of the FHA, *Trafficante v. Metropolitan Life Insurance Co.*,[86] affirmed that the courts would take a broad view when interpreting the provisions of the Act. Justice William Douglas wrote for the *Trafficante* majority: "The language of the Act is broad and inclusive."[87] The majority opinion went on to say, "[w]e can give vitality to [the act] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by . . . discrimination in the management of those facilities within the coverage of the statute."[88] This broad reading of

82. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 11.5(3)(c) (2004).
83. 42 U.S.C. § 3604(f)(3)(C).
84. 42 U.S.C. § 3604(f)(6)(B).
85. 42 U.S.C. § 3604(f)(8).
86. 409 U.S. 205 (1972).
87. *Id.* at 209.
88. *Id*. at 212.

the statute has been further applied in housing cases dealing with discrimination by local governments against people with disabilities.[89] In 2015, the Supreme Court applied this rule of broad construction of the Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project (ICP III),* which is discussed in greater detail below.[90]

The rule of broad construction of the FHAA applies to many aspects of the Act's coverage. Examples of the FHAA's broad construction are found in the generous judicial standing granted to persons with disabilities,[91] as well as to a wide variety of individuals associated with them injured by discrimination.[92] The definition of disability has also been construed broadly to reach persons with many types of disabilities and in a number of different housing situations.[93] Furthermore, the Act has been read to permit a plaintiff to bring suit *before* discrimination actually occurs if discrimination is simply *likely* to occur.[94] This generous reading of the Act prevents the antidiscrimination goals of the Act from being undermined, and thus such broad construction has survived throughout the history of the FHA and the 1988 amendments.

Construction of Title VIII is also guided by the judicial construction of other portions of the Civil Rights Act. A number of courts, including the United States Supreme Court, have found that Title VII, addressing employment discrimination, serves as a useful guide to congressional intent in the FHAA.[95] Title VII's role in guiding Title VIII construction was evident in the Supreme Court's decision in *Inclusive Communities,* upholding the use of disparate impact as a basis for FHAA claims.[96] Interpretation of the FHAA is also based on sections of the Rehabilitation Act and the ADA, both of which are discussed in greater detail below. In fact, some portions of the FHAA cross-reference these other federal acts to achieve definitional consistency between them.

The *Inclusive Communities* and *Trafficante* Courts also recognized the importance of federal administrative regulations in interpreting the FHAA. As the *Trafficante* Court noted, such regulations interpreting

89. *See, e.g.*, Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th Cir. 2008); Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp., 455 F.3d 154, 156 (3d Cir. 2006).
90. 135 S. Ct. 2507, 2521 (2015).
91. *Trafficante,* 409 U.S. at 209.
92. *See Trafficante,* 409 U.S. at 205, 212.
93. *See* Kanter, *supra* note 67, at 946.
94. *Trafficante*, 409 U.S. at 206 n.1.
95. *ICP III,* 135 S. Ct. at 2518-19. *Trafficante*, 409 U.S. at 209; *see also* SCHWEMM, *supra* note 82, § 7.2(3) n.27.
96. *ICP III,* 135 S. Ct. at 2518.

the Act are "entitled to great weight."[97] This fact remains true today and is strengthened by the Court's deference to administrative rulemaking and interpretation of federal laws under the *Chevron* doctrine.[98] Despite the usefulness of the United States Department of Housing and Urban Development (HUD) regulations in interpreting some general sections of the FHAA, the HUD regulations do not address discriminatory local land use regulations. HUD chose not to address discriminatory local land use regulations because the agency lacks authority to enforce the FHAA against local zoning authorities.[99]

II. Local Government Liability Under the FHAA

Generally speaking, courts review local zoning decisions deferentially. Where a local legislative body is making a legislative decision—that is, enacting a zoning ordinance with broad coverage over the jurisdiction in question—the decision by the local body is generally upheld unless it was arbitrary or capricious, or without some basic rationale.[100] However, when cases are brought under the FHAA, courts are far less deferential in their review of local zoning decisions. This difference results in an inherent conflict between the authority of state and local governments to regulate land use—a power that the Constitution has reserved to the states—and federal authority to enforce the FHAA. Some commentators have criticized the FHAA's broad reach, in essence arguing that the Act's provisions overriding local zoning are an unconstitutional expansion of federal authority,[101] but these arguments have generally fallen flat.

The lack of judicial deference to local legislative bodies in the fair housing arena is evident in the burden shifting approach adopted by a number of courts reviewing FHAA claims against local zoning authorities. The plaintiff in a FHAA case has the initial burden of establishing a prima facie case of housing discrimination under the statute.

97. *Trafficante*, 409 U.S. at 210.

98. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The *Chevron* doctrine generally stands for the notion that a court will not disrupt an agency's interpretation of a statute unless that interpretation is unreasonable. *Id.* at 843-44.

99. *See* SCHWEMM, *supra* note 82, § 11.5(3)(c) n.287. The United States Department of Housing and Urban Development (HUD) regulations pertaining to the FHAA are codified at 24 C.F.R. §§ 100-04, 115 (2015).

100. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

101. *See generally,* Brian E. Davis, Comment, *The State Giveth and the Court Taketh Away: Preserving the Municipality's Ability to Zone for Group Homes Under the Fair Housing Amendments Act of 1988,* 59 U. PITT. L. REV. 193 (1997) (stating that courts' broad interpretations of the term "handicapped" under FHAA are not the same as the definition under state and local laws).

Such a prima facie case may be based on a theory of discriminatory intent or disparate impact, or the plaintiff may show that the local zoning accommodation requested by the person with a disability or his representative is reasonable under the requirements of § 3604(f)(3).[102] Once the plaintiff has made out a case of discrimination against a person with a disability or a group, the burden then shifts to the local government to demonstrate a legitimate, bona fide governmental interest and to show that no alternative would serve that interest with less discriminatory effect.[103] Most courts have explicitly rejected a "compelling interest" test—which would require that the government demonstrate important regulatory interests and narrowly tailored regulations to further that interest—to overcome a claim that the governmental action had a discriminatory effect or that the government had violated the law in failing to offer a reasonable accommodation.[104] However, the burden placed on local government defendants remains high under the FHAA analysis. Once the government has shown a legitimate, bona fide governmental interest and no less discriminatory alternative, the burden shifts back to the plaintiff to establish that the governmental interest provided by the defendant is a pretext for discrimination.[105]

Zoning ordinances can run afoul of the FHAA in a number of ways. A common tactic is for the local zoning authority to exclude group homes by classifying them as boarding houses, medical facilities, schools, or commercial businesses, which typically enables their exclusion from residential areas and limits them to commercial or industrial zones.[106] Other ways in which zoning ordinances may violate fair housing laws include having restrictive definitions of "family" that exclude groups of persons unrelated by blood, marriage, or adoption from residing in single- or multi-family residential zones.[107] Definitions of "group home" or equivalent facilities in the community may also have references to the disabilities of particular residents that facially discriminate on the basis of that disability.[108]

102. *See, e.g.*, Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993).

103. *See, e.g.,* Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977); *Town of Babylon*, 819 F. Supp. at 1182.

104. *See, e.g.*, *Rizzo*, 564 F.2d at 148.

105. *See, e.g.,* Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997).

106. Kanter, *supra* note 67, at 963.

107. *See* Patricia E. Salkin & John M. Armentano, *The Fair Housing Act, Zoning, and Affordable Housing*, 25 URB. LAW. 893, 894 (1993).

108. *Id.*

Three legal theories are available to a plaintiff in a FHAA action involving group homes and local zoning regulations, and thus there are generally three broad ways that local governments can be held liable for FHAA violations. The plaintiff may allege that (1) the local government engaged in intentional discrimination against persons with disabilities, (2) the zoning regulation in question had a disparate impact—or discriminatory *effect*—on persons with disabilities, or (3) the local government failed to make a reasonable accommodation for a person or group based on a disability.[109]

A. *Intentional Discrimination*

The claim of intentional discrimination is often broken down into two separate but closely related claims: facial discrimination and discriminatory intent. If the ordinance or action by the local government discriminates against people with disabilities on its face—for example, if the zoning ordinance clearly states that group homes for persons with disabilities are permitted only in industrial or commercial zoning districts—it is reviewed as a facially discriminatory law. Then again, if the ordinance or action is outwardly neutral but motivated by a discriminatory animus, it is reviewed as a discriminatory intent issue. These two types of claims are discussed herein.

A plaintiff challenging a facially discriminatory local zoning code is highly likely to prevail in a FHAA challenge. As the Ninth Circuit aptly noted, "[a] facially discriminatory policy is one which on its face applies less favorably to a protected group."[110] A simple example of a facially discriminatory code that would likely violate the Act would include a law that requires special—and more restrictive—procedures, such as special use or conditional use permits for group homes for persons with cognitive or physical disabilities. This rule would be facially discriminatory because the zoning ordinance specifically mentions people with disabilities and presumably subjects persons with disabilities to less favorable treatment than persons without disabilities.

With facially discriminatory laws, the federal appellate courts apply a uniform standard that places the burden of showing the local ordinance's validity squarely on the local government. Although the plaintiff must first make out a prima facie case of facial discrimination by demonstrating that the protected group in question has been subjected to an explicitly discriminatory treatment,[111] it is up to the government to demonstrate that the challenged provision's less favorable application

109. *See e.g.*, *Gamble*, 104 F.3d at 304-05.
110. Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1048 (9th Cir. 2007).
111. *Bangerter*, 46 F.3d 1491, 1501.

to the protected class is permissible under Title VIII because the discrimination is objectively legitimate.[112] Most of the federal appellate courts have found that a facially discriminatory code is objectively legitimate if the restriction in question *benefits* the protected class, or if the restriction responds to legitimate safety concerns raised by the affected individuals, so long as those safety concerns are not based on stereotypes.[113] Only one federal circuit court, the Eighth Circuit, follows a "rational basis"-like test under the FHAA,[114] requiring that the government simply demonstrate that the regulation in question is rationally related to the furtherance of a legitimate governmental interest. Once the government entity has successfully articulated a legitimate reason for its facially discriminatory policy, the plaintiff has the opportunity to show that the local government intentionally discriminated on a prohibited ground—disability, for example—or that the reason offered by the government for the discrimination is a mere pretext for improper discrimination.[115]

A local regulation that discriminates against people with disabilities on its face and serves no legitimate governmental purpose violates the FHAA.[116] There are several types of facial discrimination that may be found to serve no legitimate purpose. Spacing or dispersal requirements for group homes—a common feature of local ordinances and some state statutes, which are typically justified by findings that group home residents in the community benefit when group homes are dispersed among different neighborhoods—have often been struck down by courts. For example, in Upper Southampton Township, Pennsylvania, a 1000-foot spacing requirement for group homes was found facially discriminatory where group homes would be excluded from operating in many parts of the community due to the spacing requirement, and the spacing requirement effectively capped the number of people with disabilities who could live in the community.[117] A Michigan state statute imposing a dispersal requirement was also struck down on the grounds that it discriminated against persons with

112. *See, e.g.*, Larkin v. Mich. Dep't of Social Servs., 89 F.3d 285, 290 (6th Cir. 1996).

113. *See Cmty. House*, 490 F.3d at 1050*; see also Larkin*, 89 F.3d at 290; *Bangerter*, 46 F.3d at 1503-04.

114. *See* Oxford House-C v. City of St. Louis, 77 F.3d 249, 252 (8th Cir. 1996).

115. Reg'l Econ. Cmty. Action Program v. City of Middletown (*Cmty, Action Program*), 294 F.3d 35, 44-45 (2d Cir. 2002).

116. Horizon House Devel. Servs., Inc. v. Twp. of Upper Southampton, 804 F. Supp. 683, 693 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

117. *Id.* at 693-94.

disabilities.[118] Local governments in spacing cases have frequently offered the justification that the spacing requirement encourages persons with disabilities to become integrated into the community.[119] Courts, however, routinely find that this justification is barred by the FHAA.[120] The FHAA does not require or allow integrating measures that would effectively have a discriminatory impact on members of a protected class.[121] Numerous other cases have found similarly.[122]

While some courts have found spacing requirements to violate the FHAA, other courts have found such requirements properly justified and acceptable. A Minnesota statute and Saint Paul city ordinance, both of which required a quarter mile distance between group homes unless the city granted a special use permit, were upheld against a challenge from a mental illness treatment center operator.[123] The reviewing court found that the state had proffered a legitimate interest in the facially disparate treatment of group homes because the dispersal requirement furthered the state's interest in deinstitutionalization of persons with disabilities and encouraged the location of residential living centers among the broader community.[124] Moreover, the court found that the FHAA did not preempt states from creating licensing standards for group homes for persons with cognitive impairments.[125] Some other courts that have found dispersal requirements in zoning ordinances facially discriminatory have insinuated a willingness to accept those requirements, as long as the local government is willing to make a reasonable accommodation by variance or special use permit, when requested.[126] Despite the disfavor that spacing requirements have found with many judges, a number of states still impose these requirements by statute.[127] Local zoning authorities should therefore be cognizant

118. *Larkin*, 89 F.3d at 292.
119. *See, e.g., Horizon* 804 F. Supp. 693-94.
120. *See Horizon*, 804 F. Supp. at 695.
121. *Id.* at 697; *see also* United States v. Starrett City Assocs., 840 F.2d 1096, 1100-01 (2d Cir. 1988).
122. *See, e.g.*, United States v. Dist. of Columbia (*U.S. v. D.C.*), 538 F. Supp. 2d 211 (D.D.C. 2008); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002); *Larkin*, 89 F.3d 285; United States v. City of Chicago Heights, 161 F. Supp. 2d 819 (N.D. Ill. 2001); Oconomowoc Residential Programs v. City of Greenfield, 23 F. Supp. 2d 941 (E.D. Wis. 1998); *see also* Mandelker, *supra* note 13, at 929-31.
123. *See* Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 93-94 (8th Cir. 1991).
124. *See id.* at 94.
125. *Id.*
126. *See Oconomowoc*, 300 F.3d at 782-85.
127. *See, e.g.*, MINN. STAT. § 245A.11 (2015); WIS. STAT. § 62.23 (2015).

of the positions of the various federal circuits on dispersal requirements, and should understand the implications of different types of spacing requirements. Spacing requirements—and the pros and cons of clustering or dispersal—are often one of the most problematic local code requirements from an FHAA perspective.[128]

Other examples of facial discrimination can be found in special or conditional use permit requirements. In one instance, a City of Stow, Ohio zoning code provision was found facially discriminatory against persons with disabilities and violative of the FHAA where the zoning code required a special use permit for "boarding houses" in a single-family district.[129] The city code further imposed special safety requirements on buildings where persons with disabilities would be housed, regardless of the type of disability that the residents would have.[130] The reviewing court suggested that if the city's safety requirements had been tailored to the building occupants' specific disabilities, the facially disparate provision would have been upheld, as it would serve a bona fide governmental purpose.[131] In another case, a court struck down a Suffolk County, New York law that required proposed group homes to provide notice and obtain approval from neighboring property owners before local zoning approvals could be granted.[132] That same law also imposed strict caps on the number of persons who could occupy a group home and imposed special management requirements for group home operators.[133] Generally speaking, however, special use permit or conditional use permit requirements for group homes will stand against challenges, so long as those permit requirements review the actual land use impacts of group homes, and not their occupants. Special permit requirements should also be applied fairly and may not operate as a subterfuge for universal rejection of group homes or discriminatory actions by local officials.[134]

128. BRIAN J. CONNOLLY & DWIGHT H. MERRIAM, GROUP HOMES: STRATEGIES FOR EFFECTIVE AND DEFENSIBLE PLANNING & REGULATION 174-75 (2014).

129. Marbrunak v. City of Stow, 974 F.2d 43, 45-47 (6th Cir. 1992).

130. *Id.* at 46-47.

131. *Id.* at 47.

132. Human Res. Research & Mgmt. Grp., Inc. v. Cnty. of Suffolk, 687 F. Supp. 2d 237, 267 (E.D.N.Y. 2010).

133. *See id.* at 251.

134. *See* Budnick v. Town of Carefree, 518 F.3d 1109, 1117 (9th Cir. 2008); Tsombanidis v. W. Haven Fire Dept., 352 F.3d 565, 575 (2d Cir. 2003); United States v. Vill. of Palatine, Ill., 37 F.3d 1230, 1234 (7th Cir. 1994); Thornton v. City of Allegan, 863 F. Supp. 504, 510 (W.D. Mich. 1993); *cf.* Oak Ridge Care Ctr., Inc. v. Racine Cnty, Wis., 896 F. Supp. 867 (E.D. Wis. 1995) (finding that special use permit requirement imposing stringent procedural requirements on the disabled violated the FHAA); *see also* CONNOLLY & MERRIAM, *supra* note 128, at 163-71.

Even when a local law or action is not facially discriminatory, a plaintiff may still be able to demonstrate discriminatory intent. While facial discrimination deals with codes that by their language (*i.e.* on their face) create disparate treatment for persons with disabilities, discriminatory intent is concerned with codes or actions that appear to be facially neutral but are passed with an improper legislative motive to discriminate against people with disabilities.

In analyzing claims of discriminatory intent, courts rely on the burden-shifting approach established by the United States Supreme Court in *McDonnell-Douglas Corp. v. Green*.[135] The *McDonnell-Douglas* test was first articulated in the context of a Title VII employment discrimination case, but the test has been applied in Title VIII fair housing matters as well.[136] The *McDonnell-Douglas* test imposes the initial burden of proving a prima facie case of discrimination on the plaintiff, but places the burden of demonstrating the legitimacy of the action on the government actor. A plaintiff's prima facie showing of discrimination does not necessarily guarantee that the local government's action is invalid.[137] Some of the federal appellate courts have articulated a four-part standard for a plaintiff to make out a prima facie case of discriminatory treatment in a land use decision.[138] Under the four-part standard, the plaintiff must prove that (1) he or she is a member of a protected class; (2) he or she was required to apply for and did apply for a particular local approval, and was qualified to receive it; (3) the approval was wrongfully required or denied despite the plaintiff's qualification; and (4) the local government required and then approved the same permit or approval for a similarly situated party during a period relatively near the time it denied plaintiff's request.[139] Conversely, courts will also generally allow a plaintiff to make an initial, basic showing of direct or circumstantial evidence demonstrating that the defendant's policy was made because of an invidious motivation.[140] There is no requirement that the plaintiff demonstrate that the local government acted with malice to show intentional discrimination. It is sufficient for a plaintiff to demonstrate

135. 411 U.S. 792, 802-03 (1973).
136. *See Cmty. House*, 490 F.3d at 1049; *Bangerter*, 46 F.3d at 1500-01.
137. Sanghvi v. City of Claremont, 328 F.3d 532, 537 (9th Cir. 2003).
138. *Gamble*, 104 F.3d at 305.
139. *Id.*
140. Pacific Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1158 (9th Cir. 2013); Rise, Inc. v. Malheur Cnty, No. 2:10-CV-00686-SU, 2012 WL 1085501 (D. Or. Feb. 13, 2012), *report and recommendation adopted,* No. 2:10-CV-00686-SU, 2012 WL 1079808 (D. Or. Mar. 30, 2012).

that the local government considered residents' disabilities as part of its decision-making.[141]

Once the plaintiff makes out a prima facie case of discrimination, the burden shifts to the local government to show a legitimate, bona fide public purpose for its action. If the defendant makes such a successful showing, the plaintiff is then given the opportunity to show that the neutral policy is actually an improper pretext resulting from a discriminatory motivation.[142] To make out a case of intentional discrimination, it is not necessary that the plaintiff show that the discriminatory motive was the government's *only* motive. The plaintiff must simply show that the disability of the residents or prospective residents was *one* factor behind the local government's decision.[143] The disabilities of group home residents need not even be the *sole* or *greatest* motivating factor behind the government's action in order for a plaintiff to succeed on a discriminatory intent claim; as long as the government considered the disabilities of residents, an intentional discrimination claim may succeed.[144] Note that the FHAA standard differs from that under Section 504 of the Rehabilitation Act, which provides a remedy only where the disability was the sole reason for the discrimination.[145]

The judicial test for improper pretext or invidious discriminatory purpose on the part of a local government is the same test that is used to find discriminatory purpose in Fourteenth Amendment Equal Protection Clause challenges. That test was articulated by the United States Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (*Arlington Heights I*).[146] Courts apply five—or sometimes six (depending on how the reviewing court formulates the test)—factors in determining whether there was an invidious discriminatory purpose. First, courts want to know whether the regulation in question has an actual discriminatory impact on people with disabilities versus those without disabilities.[147] For example, if "the law bears more heavily on one [group] than another," this fact will weigh against the local government.[148] However, unless the

141. *Wind Gap*, 421 F.3d at 177.
142. *See, e.g.,* Turner v. City of Englewood, 195 Fed. App'x. 346, 354-56 (6th Cir. 2006).
143. *Wind Gap*, 421 F.3d at 177.
144. Apfel, *supra* note 16, at 558.
145. 29 U.S.C. § 794.
146. 429 U.S. 252 (1977).
147. *See id.* at 266.
148. United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1221 (2d Cir. 1987) (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

decision was made entirely on the basis of disability with a clear record of discrimination, the discriminatory impact of the decision is not typically dispositive.[149] Second, the court will consider the historical background of the decision being challenged to determine whether "it reveals a series of official actions taken for invidious purposes."[150] If the local government undertakes actions clearly designed to obstruct the development of a group home, intent to discriminate will be evident.[151] Third, the court will look at the sequence of events leading up to the enactment of the attacked provision to determine what types of actions were taken that might reveal discriminatory intent.[152] For example, if a group home is proposed at a specific site and the local government undertakes a rezoning action restricting the ability of the group home to locate at the site, this will be taken as evidence of discriminatory intent.[153] Fourth, courts are mindful of departures from normal procedural sequences in the approval or disapproval of a group home.[154]

Finally, courts will seek to determine whether there were departures from normal substantive criteria in making decisions regarding group homes, such as whether the locality relied on an abnormal set of interests or factors in arriving at the decision.[155] In reviewing this final factor, courts will frequently compare the factors relied upon by the local government in the group home approval with factors relied upon in other land use approvals.[156] Judicial review of the fourth and fifth factors relies heavily on the records of the challenged decision, such as statements by decision makers, meeting minutes, and other documentation by the decision-making body.[157] Numerous judicial decisions have found an intent to discriminate against people with disabilities and other protected classes. In denying a rehabilitation center's application for a special use permit, New London, Connecticut violated the ADA because the zoning commission's underlying motivation was found to be discriminatory.[158] The city offered a variety of reasons

149. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 141 (3d Cir. 1977).
150. *Arlington Heights I*, 429 U.S. at 267.
151. *See Rizzo*, 564 F.2d at 143.
152. *See id.*
153. *See Yonkers Bd. of Educ.*, 837 F.2d at 1221.
154. *Arlington Heights I,* 429 U.S. at 267.
155. *See id*.
156. *Yonkers Bd. of Educ.*, 837 F.2d at 1222.
157. Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 635 (6th Cir. 2001); *Rizzo*, 564 F.2d at 144.
158. First Step, Inc. v. City of New London, 247 F. Supp. 2d 135, 154 (D. Conn. 2003).

for denying the permit, such as increased parking demand, increased traffic, concerns about the center's impact on pedestrian safety, and the center's failure to prepare a public safety plan.[159] The court found, however, that the rehabilitation center rebutted the city's rationale by showing that the traffic and parking impacts would be minimal and that the center was not required by the zoning code to prepare a public safety plan. Thus, the plaintiffs successfully showed that the city's permit denial was based on illicit pretext.[160] Generally speaking, courts will look for evidence of community animosity—discriminatory or prejudicial statements or actions by community members—to determine whether the group home and its residents have been subject to intentional discrimination. Opposition by the local citizenry is not a sufficient reason to deny approval of a group home.[161]

Still, courts have found no discriminatory intent in other situations where a local government action adversely impacted group homes. This outcome generally follows local government decisions made with proper procedural standards. Reliance on a local comprehensive plan for guidance in decision making is often indicative of a deliberate effort to fairly apply the local government's zoning code. In one case, Englewood, Ohio's decision to downzone a property from a multifamily to a single-family zone, disallowing the operation of a particular group home, complied with the ADA[162] because the down-zoning was supported by evidence of problematic management of the home, which in turn was causing a hazard to public safety.[163] The decision was also consistent with the local master plan.[164] Nor did Taylor, Michigan run afoul of the FHAA by denying the rezoning application of an adult foster care home operator who sought to have the zoning designation changed to allow a twelve resident group home, as opposed to the six resident group home permitted by state statute in the city's single-family zoning district.[165] The court found little

159. *Id.* at 151-54.

160. *Id.* at 154.

161. *Yonkers Bd. of Educ.*, 837 F.2d at 1223-26 (citing numerous Supreme Court and circuit court opinions for support)*; see also* Apfel, *supra* note 16, at 557-58.

162. Courts apply the same discriminatory intent analysis under the ADA as the FHAA. *See* CONNOLLY & MERRIAM, *supra* note 126, at 79 n.59.

163. *See* Turner v. City of Englewood, 195 Fed. App'x 346, 354-56 (6th Cir. 2006).

164. *See id*. The *Turner* court also noted that the downzoning decision was not motivated by any discrimination against the disabled, but was rather a response the group home operator's mismanagement of the property. *Id.* at 356.

165. *See generally* Smith & Lee Assocs., Inc. v. City of Taylor, Mich., 102 F.3d 781 (6th Cir. 1996) (holding that intentional discrimination against those who were elderly and disabled did not occur).

evidence of discriminatory animus by zoning authorities, and the city properly relied on its master plan in considering a rezoning application that would have otherwise amounted to spot zoning.[166] Furthermore, the United States Supreme Court held in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation* that where the local government submitted the approval of a low-income housing development to a voter referendum upon a petition by the city's voters, discriminatory intent did not exist because the city had properly followed the referendum process for provided for by state law and the city charter.[167]

Moreover, courts are unwilling to find discriminatory intent solely on the basis of discriminatory comments or animus on the part of community members. Only if the local government acted upon such comments or animus can a plaintiff succeed on a discriminatory intent claim.[168] Generally speaking, localities that follow their comprehensive plans and abide by standard procedures in their decision making are subject to much less scrutiny and are more likely to win when challenged on discriminatory intent grounds.

B. *Disparate Impact*

Disparate impact, also referred to as *discriminatory effect*, refers to a law that on its face is neutral, but in practice has an outsized impact on a particular group.[169] Laws that have a disparate impact are not always invalidated. The United States Supreme Court expressly held in *Washington v. Davis* that disparate impact analysis is *not* available when a party brings a constitutional claim under the Equal Protection Clause of the Fourteenth Amendment.[170]

The use of disparate impact in Title VIII claims has been the source of significant controversy. The Supreme Court recently resolved the controversy in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* (*ICP III*),[171] holding that disparate impact analysis is permissible in FHAA claims. We provide a more substantial analysis of *Inclusive Communities Project* below,

166. *See id.* at 794.
167. *See* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 195 (2003).
168. *See, e.g., McKinney Found.*, 790 F. Supp. at 1212; *A.F.A.P.S.*, 740 F. Supp. at 104; *see also* Apfel, *supra* note 16, at 558.
169. *Bangerter*, 46 F.3d at 1501; Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982); Bryant Woods Inn, Inc. v. Howard Cnty, Md., 911 F. Supp. 918, 939 (D. Md. 1996).
170. *See* Washington v. Davis, 426 U.S. 229, 239-46 (1976).
171. 135 S. Ct. 2507 (2015).

and discuss the likely effect on people with disabilities. For purposes of this part, however, we address the approaches to disparate impact analysis to date under the FHAA.

Where disparate impact is alleged, a plaintiff makes out a prima facie case of discrimination by showing "the occurrence of certain outwardly neutral practices, and a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."[172] There is no requirement that the plaintiff make a showing of discriminatory intent.[173] There are plaintiffs who have successfully made out cases of discriminatory intent but failed on associated claims of disparate impact because they failed to show either a neutral practice[174] or, where the plaintiff was unable to show that a person without disabilities was treated differently than a person with a disability, failed to show that a practice had a disproportionate impact.[175] In making such a prima facie case, the plaintiff must establish causation—that is, to show that the neutral rule or policy in question actually causes the effect that is at issue.[176] The courts had been divided on whether an isolated local government decision is sufficient to support a claim of disparate impact,[177] however, *ICP III* suggests that isolated decisions are insufficient to establish a prima facie case of disparate impact.[178]

In analyzing disparate impact under Title VIII, the federal courts of appeals developed a variety of tests to determine whether a zoning action has a disparate impact on a protected group. The seminal disparate impact test comes from the Seventh Circuit Court of Appeals' decision in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (*Arlington Heights II*).[179] The *Arlington Heights II* test relies on four factors to determine whether a regulation has a disparate impact.

172. Quad Enters. Co. v. Town of Southold, 369 F. App'x 202, 206 (2d Cir. 2010); *Gamble*, 104 F.3d at 306 (internal numbering omitted).

173. *See Huntington Branch, N.A.A.C.P.*, 844 F.2d at 934-36.

174. *See Bryant Woods Inn*, 911 F. Supp. at 939 (noting that an "isolated decision" is not an outwardly neutral practice sufficient for disparate impact analysis).

175. *Cmty. Action Program*, 294 F.3d at 53; Pathways Psychosocial v. Town of Leonardtown, MD, 133 F. Supp. 2d 772, 788 (D. Md. 2001).

176. 135 S. Ct. at 2523.

177. *Compare Cmty. Action Program*, 294 F.3d at 53, *U.S. v. D.C.*, 538 F. Supp. 2d 211, 220 (D.D.C. 2008), *and Thornton*, 863 F. Supp. at 509, *with* Sharpvisions, Inc. v. Borough of Plum, 475 F. Supp. 2d 514, 525 (W.D. Pa. 2007); *McKinney Found.*, 790 F. Supp. at 1218.

178. *ICP III,* 135 S. Ct. at 2523-24.

179. 558 F.2d 1283, 1290 (7th Cir. 1977).

The first factor is the strength of the plaintiff's showing of discriminatory effect.[180] This factor focuses both on whether the facially neutral rule has a greater negative impact on the protected class than other groups, and the actual effect that the rule has on the protected class.[181] At the same time, however, simply showing an undersupply of housing for persons with disabilities compared to the number of persons with disabilities in the local population is not sufficient to establish disparate impact.[182] For a plaintiff making out a case of disparate impact, it is helpful—and some courts have required—that the plaintiff provide some statistical support demonstrating the impact under the first prong of *Arlington Heights II.*[183] The second factor looks to whether there is any evidence of discriminatory intent, even if such evidence is not sufficient to show discriminatory intent under the *Arlington Heights I* test.[184] The *Arlington Heights II* court found that this factor was the least important of the four,[185] and other circuit courts have chosen not to adopt this factor when reviewing disparate impact claims.[186] In the disability context especially, this factor has been determined to be of relatively little importance.[187] The third factor reviews the defendant's asserted interest in taking the action complained of. [188] The fourth and final factor is whether the plaintiff seeks to compel the defendant governmental entity to affirmatively provide housing for the protected group in question, or whether the plaintiff is simply seeking to remove barriers to housing for the protected group.[189] On this prong of the test, courts respond more favorably to a plaintiff who is seeking to remove a barrier as opposed to seeking to compel the locality to provide housing.[190] Versions of the *Arlington Heights II* test have been adopted by at least four of the federal circuit courts in one form or another.[191]

180. *Id.*
181. *See id.*
182. *See, e.g.*, *Quad Enters. Co.*, 369 Fed. App'x at 206; *Budnick*, 518 F.3d at 1119.
183. *See, e.g.*, *Gamble*, 104 F.3d at 306. Despite the fact that quantitative data supporting claims of disparate impact is not necessary, courts place a great weight on such data. The Supreme Court in *ICP III* noted the importance of facts and statistical evidence in disparate impact cases. *ICP III*, 135 S. Ct. at 2523.
184. *Arlington Heights II*, 558 F.2d at 1292.
185. *Id.*
186. *See, e.g.,* Arthur v. City of Toledo, Ohio, 782 F.2d 565, 575 (6th Cir. 1986).
187. *See* Baxter v. City of Belleville, Ill., 720 F. Supp. 720, 732 (S.D. Ill. 1989).
188. *Arlington Heights II*, 558 F.2d at 1293.
189. *Id.*
190. *See id.*; Potomac Grp. Home Corp. v. Montgomery Cnty., Md. 823 F. Supp. 1285, 1296 (D. Md. 1993); Cason v. Rochester Hous. Auth., 748 F. Supp. 1002, 1008 (W.D.N.Y. 1990).
191. *See* Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1231 (10th Cir. 2007); *Arthur*, 782 F.2d at 575; *Town of Clarkton*, 682 F.2d at 1065 (Fourth Circuit). The Second

Two circuit courts used an alternative test for disparate impact first developed by the Third Circuit in *Resident Advisory Board v. Rizzo*, typically referred to as the "burden-shifting approach." Under this treatment, a plaintiff in a Title VIII action must make a prima facie case of discriminatory effect, and the burden then shifts to the defendant to justify its action as supporting a legitimate, bona fide governmental interest that would not be served in any less discriminatory manner than the regulation or action that was adopted.[192] The Eighth Circuit has also adopted this approach.[193]

Of the three types of FHAA claims, the disparate impact claim is the most difficult for a plaintiff to win.[194] In part, the difficulty stems from the fact that courts require plaintiff to demonstrate a causal connection between the rule or policy at issue and the discriminatory effect complained of.[195] Successful disparate impact claims have, however, succeeded in a few situations. First, when persons with disabilities are subjected to unique procedures that are not required of any other group seeking to enter the community, there is a colorable claim of disparate impact.[196] Second, disparate impact claims may sometimes help support facial discrimination claims if the party challenging the action can demonstrate that a dispersal requirement or family definition regulation negatively impacts the ability of persons with disabilities to locate in the community.[197] Third, in some limited situations, courts have allowed a disparate impact claim to go forward if the plaintiff can demonstrate that general discriminatory animus on the part of the population or local officials deters persons with disabilities from entering the community.[198] Fourth and finally, if the government fails to identify *any* rationale for its decision to require group homes or persons with disabilities to undergo more stringent procedures or regulations, the disparate impact claim will typically succeed.[199]

Circuit takes a hybrid approach, looking to whether the government entity in question has demonstrated a legitimate, bona fide governmental interest and whether there was no less discriminatory alternative to the course of action taken, while also requiring review of the second and fourth factors of the *Arlington Heights II* test. *See Huntington Branch, N.A.A.C.P.*, 844 F.2d at 936.

192. *Rizzo*, 564 F.2d at 149.

193. *See* Gallagher v. Magner, 619 F.3d 823, 833-34 (8th Cir. 2010).

194. *See McKinney Found.*, 790 F. Supp. at 1216-17.

195. *ICP III,* 135 S. Ct. at 2523-24.

196. *Id.* at 1219-20*; see also Sharpvisions*, 475 F. Supp. 2d at 525-26. However, this problem could also be one of facial discrimination; the dividing line between discriminatory intent and disparate impact is not always entirely clear.

197. *See Town of Babylon*, 819 F. Supp. 1179; Horizon House Dev. Servs., Inc. v. Twp. of Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992).

198. *See Baxter*, 720 F. Supp. at 730.

199. *See A.F.A.P.S.*, 740 F. Supp. at 107.

Conversely, however, there are several situations that will *not* constitute disparate impact in an FHAA case. In many instances, courts are unwilling to accept a disparate impact claim where the plaintiff cannot identify a facially neutral policy, and instead relies on isolated, quasi-judicial actions—such as a single special or conditional use permit or variance denial—to demonstrate disparate impact.[200] Where a plaintiff cannot demonstrate any situation where the locality granted an approval to a non-disabled party, but denied a comparable approval to a party with a disability, the disparate impact claim will typically fail,[201] as will claims where the plaintiff fails to provide quantitative or qualitative support for claims that the law disproportionately impacts people with disabilities.[202] Nor is a demonstration of need for group homes sufficient alone to make out a disparate impact claim.[203] For example, in West Haven, Connecticut, a substance abuse rehabilitation center that would have housed seven recovering drug and alcohol abusers was issued a citation because the local safety code prohibited more than three unrelated persons from living together unless the center received approval as a boarding or lodging house.[204] The rehabilitation center would require significant structural changes to meet state and local safety codes for boarding and lodging houses.[205] In that case, the West Haven code was found not to impose any significant adverse impact on recovering substance abusers because the plaintiffs had failed to show any unmet demand for homes for recovering substance abusers, nor did they show that group homes were more impacted than other uses.[206] Finally, even where a plaintiff could show that a facially neutral law had been misapplied so as to have a disproportionately negative impact on people with disabilities, the law itself was upheld and the locality's corrective action was found sufficient to reject a disparate impact claim.[207]

Disparate impact is the most difficult of the three types of Title VIII claims on which a plaintiff can succeed in the disability context.[208]

200. *See Pathways Psychosocial*, 133 F. Supp. 2d at 788-89; *Bryant Woods Inn*, 911 F. Supp. at 939-40.

201. *Quad Enters. Co.*, 369 F. App'x at 206; *Budnick*, 518 F.3d 1118-19; *Cmty. Action Program*, 294 F.3d at 52-53; *Thornton*, 863 F. Supp. at 509.

202. *See, e.g.*, Frazier v. City of Grand Ledge, Mich., 135 F. Supp. 2d 845 (W.D. Mich. 2001); *cf.* Oak Ridge Care Ctr., Inc. v. Racine Cnty, Wis., 896 F. Supp. 867 (E.D. Wis. 1995). In *ICP III,* the Supreme Court stated in dicta that a plaintiff must establish "facts . . . or produce statistical evidence" at the pleading stage to bring a disparate impact claim. 135 S. Ct. at 2324.

203. *See Gamble*, 104 F.3d 300.

204. *See* Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565 (2d Cir. 2003).

205. *Id*. at 565.

206. *See id.* at 576-77.

207. *See U.S. v. D.C.*, 538 F. Supp. 2d 211.

208. *See McKinney Found.*, 790 F. Supp. at 1216-18.

The evidentiary showings required to demonstrate disparate impact are often difficult for plaintiffs to achieve.[209] A plaintiff seeking a disparate impact claim should establish a clear record of the impact of zoning regulations, backed up by quantitative data in addition to qualitative accounts of the regulation's effect.

C. *Reasonable Accommodation*

Both the FHAA and ADA require local zoning authorities to make reasonable accommodations for persons with disabilities. The FHAA requires zoning authorities "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a] person [with disabilities] equal opportunity to use and enjoy a dwelling. . . ."[210] Per one federal appeals court, the " '[r]easonable accommodation' provision prohibits the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that to those who are not disabled."[211] The reasonable accommodation prong of the Act has been described as ensuring that "the only qualification for admittance to housing should be the financial ability [of the tenant] to pay rent."[212]

Under the statute, there are three issues inherent in reasonable accommodation analysis: (1) the reasonableness of the accommodation requested, (2) the necessity of the accommodation to afford persons with disabilities the opportunity to use the dwelling, and (3) whether the person with a disability has been given the opportunity to enjoy the dwelling on an equal basis as nondisabled persons.[213] Reasonable accommodation has proven to be complicated: it does not require any form of affirmative action for people with disabilities or guarantee equal treatment, but it does require that individuals receive equal opportunity with respect to their specific disabilities.[214] More than any other part of the Act, the reasonable accommodation provision has generated the greatest amount of fair housing litigation, giving courts the difficult task of determining what zoning actions are and are not

209. *See Pathways Psychosocial*, 133 F. Supp. 2d 772 at 788-89.
210. 42 U.S.C. § 3604(f)(3)(B).
211. Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996).
212. Kanter, *supra* note 67, at 952.
213. *See, e.g.*, *Oconomowoc*, 300 F.3d at 784; Howard v. City of Beavercreek, 276 F.3d 802, 806 (6th Cir. 2002); Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 457 (3d Cir. 2002); Bryant Woods Inn, Inc. v. Howard Cnty, Md., 124 F.3d 597, 603 (4th Cir. 1997); *Smith & Lee Assoc.*, 102 F.3d at 794.
214. Kanter, *supra* note 67, at 956.

permissible under the FHAA.[215] While local governments are required to grant a reasonable accommodation, the reasonable accommodation analysis is unavailable in situations where the zoning ordinance is found to be facially discriminatory or where disparate treatment has occurred.[216]

As a threshold matter, parties in reasonable accommodation claims often battle over whether the person with a disability or that person's representative sufficiently requested a reasonable accommodation, or whether such a request is even required. Typically, to bring a reasonable accommodation claim, a plaintiff must have actually requested a reasonable accommodation.[217] Many local governments codify reasonable accommodations in local zoning codes by providing an administrative process by which the requirements of the code may be adjusted to provide a reasonable accommodation for persons with disabilities.[218] In cases where the party desiring accommodation does not formally request a reasonable accommodation, to prevail on a reasonable accommodation claim, that party is required to demonstrate that the persons for whom it is seeking accommodation have a disability, and that the local zoning authorities should have been aware of the disability.[219] In cases where a plaintiff is seeking to construct a facility and discloses to the local government that the prospective residents have one or more disabilities, the government is deemed to have sufficient notice of the disability.[220] Where it is not clear from the developer's disclosures that the facility will be used to house persons with disabilities, the local government may have a colorable argument that it lacked notice as to the disabilities of the prospective residents.

A plaintiff making a reasonable accommodation claim must first show that the desired accommodation is reasonable. Although courts have devised several formulations to find whether an accommodation is reasonable, they generally rely on whether an accommodation is both *efficacious* and *proportional* to its implementation cost.[221] For

215. *See, e.g.,* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995); Marriott Senior Living Servs. v. Springfield Twp., 78 F. Supp. 2d 376, 384-86 (E.D. Pa. 1999).

216. Bay Area Addiction Research & Treatment v. City of Antioch, 179 F.3d 725, 733 (9th Cir. 1999).

217. *See, e.g.*, *Marriott,* 78 F. Supp. 2d at 385-86.

218. *See, e.g.*, DENVER, COLO., ZONING CODE § 12.4.5.3(B)(2) (2014).

219. Sacred Heart Rehab. Ctr. v. Richmond Twp., No. 08-12110, 2010 WL 3942847, at *3 (W.D. Mich. Oct. 6, 2010)

220. *Id*.

221. *See, e.g.*, *Vande Zande*, 44 F.3d at 543.

example, if the cost of the accommodation far exceeds the benefit received from the accommodation, the accommodation is probably not reasonable.[222] An accommodation may also be unreasonable if it imposes "undue financial or administrative burdens or requires a fundamental alteration in the nature" of the regulation or program.[223] One court clarified that, if waiving zoning requirements were "so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change," a requested accommodation would be unreasonable.[224] An example of such an unreasonable request would be the addition of residential units for persons with disabilities in commercial zone districts where residences are otherwise not permitted.[225] For instance, where a group home's requested accommodation—such as an alteration to a building footprint or curb cut—is not out of line with the physical character of a neighborhood, the request is reasonable.[226] Although legitimate public safety concerns may be taken into account when considering the siting of group homes, a local government cannot rely on anecdotal testimony by neighbors opposing a group home as sufficient evidence of the unreasonableness of the accommodation requested.[227] Denying a group home's application based on public safety concerns "cannot be based on blanket stereotypes about disabled persons rather than particularized concerns about individual residents" who may pose safety concerns.[228]

The second consideration in a reasonable accommodation is the necessity of the accommodation for giving persons with disabilities an equal opportunity to obtain and enjoy housing. When courts consider the necessity of the accommodation, the plaintiff is generally required to demonstrate "that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability."[229] Therefore, a plaintiff must demonstrate that

222. *Id.*

223. Erdman v. City of Fort Atkinson, 84 F.3d 960, 962 (7th Cir. 1996). In the context of the ADA, the Supreme Court has said, "[t]he reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the States' services and programs." Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 603 (1999) (quoting 28 C.F.R. § 35.130(b)(7) (1998)).

224. Dadian v. Vill. of Wilmette, 269 F.3d 831, 888 (7th Cir. 2001).

225. Cinnamon Hills Youth Crisis Ctr., Inc. v. St. George City, 685 F.3d 917, 923-24 (10th Cir. 2012).

226. *Id.*

227. *Bangerter*, 46 F.3d at 1503.

228. *Oconomowoc*, 300 F.3d at 786.

229. *Dadian*, 269 F.3d at 838 (quoting Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995)). In cases of larger group homes where the requested accommodation is

without the accommodation, he or she will be denied equal opportunity to live in the neighborhood.[230]

The third part of the reasonable accommodation analysis is determining what constitutes equality of opportunity under § 3604(f)(3)(B). Generally speaking, equal opportunity for persons with disabilities or groups means the opportunity for those people or groups to live in a residential neighborhood.[231] Although an FHAA violation may occur automatically because of the impact arising from a facial reading of the statute, zoning laws can violate the equal opportunity prong when applied in a manner affording persons with disabilities less opportunity to live in certain neighborhoods than people without disabilities.[232] The equal opportunity prong requires zoning ordinances to grant persons with disabilities equal—but not greater—opportunity to occupy a dwelling as compared to persons without disabilities.[233]

Related to the reasonable accommodation question is whether the term "dwelling" as used in the FHAA refers to any dwelling in a general residential area or whether it refers to the particular dwelling in which a person with a disability wishes to reside.[234] Courts applying a broad reading of the FHAA have found that a plaintiff should be entitled to reasonable accommodation in a dwelling chosen by the person with a disability, reasoning that this result is more consistent with the original vision of the Act.[235] Other courts have taken a less strict approach, finding that the FHAA's reasonable accommodation provision is satisfied when a person with a disability has the ability to find a dwelling in a residential area in the general vicinity.[236]

In a reasonable accommodation claim, the plaintiff must demonstrate that the accommodation it seeks is reasonable on its face.[237] At a

a height or bulk variance, some courts have required a plaintiff to make one of two showings: that the requested accommodation is necessary to a group home's financial viability, or that the requested accommodation is necessary for the medical benefit of the residents. *See Lapid-Laurel*, 284 F.3d at 461.

230. *Oconomowoc*, 300 F.3d at 784.

231. *See Lapid-Laurel,* 284 F.3d at 460.

232. *See Smith & Lee Assoc.*, 102 F.3d at 795.

233. *See Bryant Woods Inn*, 124 F.3d at 604.

234. *See McKivitz*, 769 F. Supp. 2d at 825.

235. *See, e.g.*, United States v. City of Chicago Heights, 161 F. Supp. 2d 819, 841 (N.D. Ill. 2001); Conn. Hosp. v. City of New London, 129 F. Supp. 2d 123, 130 (D. Conn. 2001); *Town of Babylon*, 819 F. Supp. at 1185 n.10; *Bryant Woods Inn*, 911 F. Supp. at 946.

236. *See, e.g.*, *Lapid-Laurel*, 284 F.3d at 460; *McKivitz*, 769 F. Supp. 2d at 825-26.

237. *Oconomowoc*, 300 F.3d at 783 (citing U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401-02 (2002)).

minimum, the plaintiff carries the initial burden of demonstrating that group homes are not permitted in a particular district and that the defendant locality failed to make a reasonable accommodation in its zoning laws to allow the successful operation of the group home.[238] A group home operator or its residents in a reasonable accommodation claim must first seek the reasonable accommodation through the local government's established procedures before going to court,[239] although the plaintiff is not necessarily required to *exhaust* its administrative remedies.[240] Furthermore, to make a reasonable accommodation claim, a plaintiff must demonstrate that the action complained of was a neutrally applicable rule for which the local government failed to make a reasonable exception for the group home.[241] The federal appellate courts are divided on which party bears the burden of showing the reasonableness or unreasonableness of the accommodation request. At least six circuits place the burden on the local government to demonstrate that the plaintiff's request is unreasonable or that the request would impose an undue hardship in some circumstances.[242] Two circuits place the burden on the plaintiff, as a person with a disability, to demonstrate affirmatively that the accommodation requested is reasonable.[243] In determining whether an accommodation is reasonable, courts then generally balance the competing interests of the parties.[244]

There are numerous examples of zoning regulations that have violated the reasonable accommodation requirement of § 3604(f)(3)(B). Restrictive definitions of "family" pertaining to single-family and multi-family zoning districts often run afoul of the reasonable accommodation provision. In one example, in another case involving the City of West Haven, Connecticut, the city denied a group home's variance request to allow seven men in drug and alcohol recovery live in a single-family home where the code's definition of "family" allowed no more than three unrelated persons to occupy a single-family house.[245] The city's denial was found to violate the reasonable accommodation provision of the FHAA because the plaintiffs had shown that the particular group home residents needed to live in a single-family neighborhood to ensure their recovery

238. *See Tsombanidis*, 352 F.3d at 578.
239. *Id.*
240. *See Bryant Woods Inn*, 124 F.3d at 601.
241. *Cmty. Action Program*, 294 F.3d at 53.
242. *See Oconomowoc*, 300 F.3d at 783 (explaining that, in the Fifth and Fourth Circuits, plaintiffs have the burden).
243. *See id.*
244. *See, e.g.*, *Vill. of Palatine*, 37 F.3d at 1234.
245. *Tsombanidis,* 352 F.3d 565.

and the city had not demonstrated that the requested accommodation would upset the character of the neighborhood.[246]

Variance procedures or requirements are also prone to create controversy in the reasonable accommodation analysis. Courts have held that the right to appeal to a zoning board of appeals for a variance does not in itself constitute a reasonable accommodation.[247] However, local zoning ordinance variance requirements may violate the reasonable accommodation provision of the Act if they are particularly onerous.[248] Delays in approving a request for a reasonable accommodation may violate the reasonable accommodation requirement.[249] Local governments should note also that an initial denial of a reasonable accommodation may itself constitute a failure to provide a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings.[250] Where a variance procedure is available and offers a group home a nonfutile opportunity to vary the usual zoning requirements of the local government, it will not typically constitute a violation of the Act.[251] However, courts have found that some variance requirements themselves are *per se* unreasonable, because the procedures are lengthy and local fees are a significant expense.[252] Some plaintiffs have unsuccessfully argued that a locality's variance requirement amounts to a violation of the reasonable accommodation requirement because it would force the group home and its residents to undergo a public hearing and thus be subject to increased scrutiny by the community.[253]

In addition to variance requirements, some communities impose special use permit or conditional use permit requirements on group homes wishing to locate in particular zoning districts. Special approval requirements may be acceptable when the approval is automatic and does not require significant scrutiny by planning or zoning authorities; special approval requirements that single out persons with disabilities and create a presumption against group homes are rarely tolerated.[254] These discretionary site-specific approaches may

246. *See id*. at 580.
247. *Oconomowoc*, 300 F.3d at 785.
248. Salkin & Armentano, *supra* note 105, at 895.
249. *See* United States v. City of Jackson, 318 F. Supp. 2d 395, 417 (S.D. Miss. 2004).
250. *See id.*
251. *See Oxford House-C*, 77 F.3d at 253. *See also Vill. of Palatine*, 37 F.3d 1230-34.
252. *Horizon House Dev. Servs.*, 804 F. Supp. at 700.
253. *Vill. of Palatine*, 37 F.3d at 1233-34.
254. Lauber, *supra* note 36, at 400-01*; see also* CONNOLLY & MERRIAM, *supra* note 126, at 155-87 (discussing regulatory strategies).

be good in terms of making better decisions on the location of group homes, but they also stigmatize the residents by making them apply, appear, and argue for what everyone else has as a matter of right. A middle ground may be, as suggested above, highly-detailed, definitive, and essentially self-executing site-specific regulations that could be applied administratively without a public hearing.

D. *Local Governments' Obligation to Affirmatively Further Fair Housing*

While the FHAA acts as a limitation on local governments' authority to regulate land use and make quasi-judicial determinations, local governments receiving federal funding—such as Community Development Block Grant (CDBG) funds—have stepped-up obligations to ensure that housing is available for protected classes. The Housing and Community Development Act of 1974 made federal funds available to local governments through HUD.[255] The Act conditions the receipt of such funds on the local government's agreement that "the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. §§ 2000a-2000h] and the Fair Housing Act [42 U.S.C. §§ 3601-3619], and the grantee will affirmatively further fair housing."[256] By extension, the FHAA contains the express requirement that the Secretary of HUD administer the FHAA so as to further the FHAA's policy of fair housing.[257] HUD regulations further establish that federal funds must be used in accordance with the policy goals of the ADA.[258] This statutory provision has been read to require HUD, and by extension, the recipients of HUD's funds, to utilize its programs to limit segregation and discrimination.[259]

This requirement came to the fore in Westchester County, New York in 2006, when a plaintiff brought a False Claims Act case against Westchester County seeking to penalize the county government for its alleged failure to conduct a proper "analysis of impediments" analyzing racial barriers to fair housing as a prerequisite to the county's receipt of federal funds.[260] While the focus of the *Westchester County*

255. 42 U.S.C. §§ 5301-5321 (2012).
256. 42 U.S.C. § 5304(b)(2).
257. 42 U.S.C. § 3608(e)(5).
258. 24 C.F.R. § 570.614 (2015).
259. U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cty., 495 F. Supp. 2d 375, 385 (S.D.N.Y. 2007).
260. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (Jul. 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). For a thorough analysis of the *Westchester Cnty.* litigation, see Matthew J. Termine, Note, *Promoting*

litigation has been the county's failure to properly analyze racial barriers to fair housing within the county, the result of the litigation has been an upgraded obligation for local governments receiving HUD funds to conduct thorough analyses of barriers to fair housing—including disability—as a prerequisite to receipt of federal funds, as well as an enhanced substantive obligation for local governments to ensure that they comply with the conditions of federal funding.[261] As of this writing, HUD has issued a final rule that will ensure greater availability of fair housing data to HUD funding recipients while imposing more stringent requirements on grantees relating to their obligations under HUD funding programs.[262]

As the federal government and federal courts continue to refine the obligations of HUD funding recipients in the fair housing area, local governments receiving HUD funds should take care to ensure that they fully understand the changing landscape of fair housing requirements relating to their receipt of funds.

E. *Other Local Actions That May Draw Scrutiny*

While the most frequently challenged local government actions in fair housing cases involve zoning decisions, other local actions may have a discriminatory intent or effect on persons with disabilities in the community. Building codes, fire codes, and other safety codes may facially discriminate against people with disabilities, may have a disparate impact, or may be applied in a manner that does not afford reasonable accommodation to such persons.[263] In any local government action, a procedural rule that is neutral on its face, but which is applied in a discriminatory manner may violate one or more of the laws protecting people with disabilities.[264] In at least one case, a municipality was found to have acted in bad faith when the local government attempted to use its power of eminent domain to condemn a property that was being considered for development of a residential rehabilitation

Residential Integration Through the Fair Housing Act: Are Qui Tam *Actions a Viable Method of Enforcing "Affirmatively Furthering Fair Housing" Violations?*, 79 FORDHAM L. REV. 1367 (2011). To review the ongoing settlement of the litigation, see Westchester Housing Monitor, http://www.westchesterhousingmonitor.org/ (last visited Apr. 12, 2015).

261. *See* Affirmatively Furthering Fair Housing, *supra* note 260.

262. *Id*.

263. *See Tsombanidis*, 352 F.3d at 575*; see also* JOINT STATEMENT, *supra* note 49.

264. *See Potomac Group Home*, 823 F. Supp. at 1297.

facility.[265] In another case, important as an illustration even though the claim ultimately failed, a local sewer authority's determination that a for-profit group home was a commercial use for the purposes of sewer billing was challenged.[266] Furthermore, when a local government fails to act on a proposal for a group living facility, its indefinite delay could amount to a denial under any of the laws targeting housing discrimination, and could lead to an order requiring the local government to allow the proposed facility to be constructed.[267]

There are many ways in which a local government can violate the FHAA. While acting with discriminatory intent toward people with disabilities and enacting ordinances that specifically deny equal treatment to such people are the most obvious violations, others exist, too. If an ordinance provision has a disparate impact or discriminatory effect on people with disabilities, it may also violate the FHAA or other federal laws designed to provide equal housing opportunity.[268] Moreover, if a local government fails to accommodate a person with a disability—so long as the request is reasonable—the FHAA will block the local government's action.[269] Planners and government lawyers must be careful in navigating the difficult terrain of federal and state law. The safe way ahead is not always clear.

III. Changes Afoot: The Future of Disparate Impact Analysis

As noted above, disparate impact analysis has been the subject of recent controversies that could lead to changes in judicial interpretations of the FHAA. The theory of disparate impact allows a plaintiff to claim an FHAA violation as a result of a facially neutral policy that has a discriminatory effect on one of the protected classes, such as people with disabilities.[270] For example, a policy that has disparate impact on people with disabilities might include a zoning code definition of "family" prohibiting more than three unrelated persons from living together in a single housing unit. If this policy were applied in a way that prohibits congregate living facilities for people with

265. *See* Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 673 A.2d 856, 861 (N.J. Super. Ct. Law Div. 1995).

266. *Wind Gap*, 421 F.3d at 171.

267. *See* United States v. Town of Garner, N.C., 720 F. Supp. 2d 721, 729 (E.D.N.C. 2010).

268. *Potomac Group Home,* 823 F. Supp. at 1295.

269. *Tsombanidis*, 352 F.3d at 578.

270. *Bangerter*, 46 F.3d at 1501; *Bryant Woods Inn, Inc.* 911 F. Supp. at 939*; see Town of Clarkton*, 682 F.2d at 1065.

disabilities from locating in the community, the policy would have a disparate impact on a protected class.

During the congressional committee negotiations leading to the 1988 FHA amendments, some lawmakers introduced an amendment to explicitly require a showing of discriminatory intent and thus prohibit disparate impact analysis, but the amendment failed.[271] The Supreme Court previously approved the use of disparate impact analysis under the Rehabilitation Act,[272] and all of the federal circuit courts of appeals that have dealt with the issue have found disparate impact actionable under the FHAA.[273] As the Third Circuit Court of Appeals noted, "[a]lthough the legislative history of Title VIII is somewhat sketchy, the stated congressional purpose demands a generous construction of Title VIII. The Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination."[274]

The Supreme Court granted certiorari on the specific question of whether disparate impact analysis is available under Title VIII in both 2012 and 2013, but both cases were dismissed upon the parties' reaching an out-of-court settlement.[275] None of these Supreme Court cases addressing disparate impact related to housing for people with disabilities. In 2012, the Supreme Court granted certiorari in the case of *Magner v. Gallagher*.[276] *Magner* pertained to a Saint Paul, Minnesota property maintenance enforcement program that specifically targeted rental properties.[277] The city issued citations and notices of violations against rental property owners, resulting in reduced availability of rental properties for lower-income residents, who were disproportionately members of racial minorities.[278] Several rental

271. Douglas E. Miller, Note, *The Fair Housing Act, Oxford House, and the Limits of Local Control Over the Regulation of Group Homes for Recovering Addicts*, 36 WM. & MARY L. REV. 1467, 1481 (1995).

272. *See* Alexander v. Choate, 469 U.S. 287, 299 (1985).

273. *See, e.g., Gallagher*, 619 F.3d at 833-34 (Eighth Circuit); *Huntington Branch, N.A.A.C.P.*, 844 F.2d at 926 (Second Circuit); *Arthur*, 782 F.2d at 574-75 (Sixth Circuit); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); *Town of Clarkton*, 682 F.2d at 1065 (Fourth Circuit); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978); Metro. Housing Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290-92 (7th Cir. 1977); *Rizzo*, 564 F.2d at 147 (Third Circuit)*; see also* Kanter, *supra* note 67, at 980-81 (noting that ten of eleven federal appeals courts have approved of the use of disparate impact analysis under the Fair Housing Act).

274. *Rizzo*, 564 F.2d at 147 (footnote omitted).

275. *See infra* notes 278 and 280 and accompanying text.

276. *Gallagher*, 619 F.3d at 823.

277. *See id.* at 829.

278. *Id.* at 829-30.

property owners brought suit, claiming violations of the FHA under a theory of disparate impact (among other theories).[279] The Eighth Circuit Court of Appeals reversed the trial court's grant of summary judgment to the city on the disparate impact claim, and a subsequent petition for writ of certiorari was granted by the Supreme Court.[280] The case was dismissed in February 2012 upon the parties' reaching an out-of-court settlement.[281] The dismissal of the case was viewed as a victory for the United States government (which uses disparate impact under the FHA as leverage in fair lending issues, among other matters) and civil rights organizations, because the facts of *Magner* were not particularly sympathetic to the pro-disparate impact coalition.[282]

Again, in 2013, a disparate impact case was brought before the Supreme Court. In *Township of Mount Holly, New Jersey v. Mount Holly Gardens Citizens in Action, Inc.*, the Court was asked to review the Third Circuit Court of Appeals' reversal of a summary judgment order finding no disparate impact in a condemnation and redevelopment project.[283] Mount Holly, New Jersey had determined that a particular section of the township, known locally as the Mount Holly Gardens neighborhood, was in need of redevelopment and sought to purchase or condemn properties in the neighborhood to pursue the redevelopment.[284] The neighborhood was disproportionately occupied by African American residents, and a citizens group filed suit against the township on a claim of disparate impact under the FHA.[285] The Supreme Court granted a petition for writ of certiorari following the Third Circuit's decision.[286] Like before, the case was settled out of court at the urging of the United States and civil rights groups, largely out of fear that the Supreme Court's conservative majority would disfavor disparate impact analysis.[287]

279. *Id.* at 833 (including theories of disparate treatment, discriminatory retaliation, Equal Protection, and Due Process).

280. *See id.* at 845.

281. Magner v. Gallagher, 132 S.Ct. 1306 (2012).

282. *See, e.g.*, Lyle Denniston, *Fair Housing Case Dismissed*, SCOTUSBLOG (Feb. 10, 2012, 2:27 PM), http://www.scotusblog.com/2012/02/fair-housing-case-dismissed/.

283. Twp. of Mt. Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc., 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (U.S. Jun. 17, 2013) (No. 11-1507).

284. *Mt. Holly*, 658 F.3d at 379.

285. *Id.* at 380.

286. *Mt. Holly*, 658 F.3d 375, *cert. granted*, 133 S. Ct. 2824 (U.S. Jun. 17, 2013) (No. 11-1507).

287. David O'Reilly, *Mount Holly Gardens Discrimination Dispute Settled*, PHILA. INQUIRER (Nov. 15, 2013), http://articles.philly.com/2013-11-15/news/44078231_1_township-residents-olga-pomar-south-jersey-legal-services.

In October 2014, the Supreme Court again granted certiorari on the same question—whether a theory of disparate impact is sufficient to state a claim under the FHA—in the case of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (*ICP III*).[288] The Court heard oral arguments in the case on January 21, 2015[289] and issued its opinion on June 25, 2015.

In *Inclusive Communities* the Supreme Court reviewed the program applied by the State of Texas's Department of Housing and Community Affairs (TDHCA) for the distribution of Low Income Housing Tax Credits (LIHTCs). Through the LIHTC program, the Federal Internal Revenue Code provides tax credits to real estate developers who build "qualified" low-income housing.[290] The number and amount of tax credits available through the LIHTC is limited on a state-by-state basis.[291] The LIHTC portion of the Internal Revenue Code delegates to states the task of allocating LIHTCs among development projects in a particular state, through what the statute calls a "qualified allocation program."[292] In Texas, TDHCA is the agency that is responsible for allocating LIHTCs.[293] The Internal Revenue Code places certain limitations on the allocation of LIHTCs (including a requirement that the tax credits be granted to projects in low-income areas),[294] and the Texas allocation formula establishes an eleven-factor point system to assist TDHCA in distributing tax credits.[295] The Texas point system includes factors such as the proposed development's financial feasibility; the development's tenant income levels; the size, rental rates, and building quality of the units; and support for the development from the local government jurisdiction and community organizations.[296] In addition to applying the eleven-factor allocation analysis, TDHCA analyzes supplemental "below-the-line" factors, but these below-the-line factors are applied subordinately to the statutory

288. 747 F.3d 275, 276-77 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 939 (U.S. Jan. 9, 2015) (No. 13-1371).

289. *See* Transcript of Oral Argument, *ICP III*, 135 S. Ct. 939 (2015) (No. 13-1371), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1371_g4ek.pdf.

290. 26 U.S.C. § 42 (2012).

291. 26 U.S.C. § 42(h).

292. 26 U.S.C. § 42(m).

293. TEX. GOV'T CODE ANN. § 2306.6701 (West 2013).

294. 26 U.S.C. § 42(m)(1)(B)(ii)(III).

295. TEX. GOV'T. CODE ANN. § 2306.6710(b)(1) (West 2013).

296. *Id.*

factors.[297] Because of these factors, the allocation of LIHTCs in Texas routinely favors existing low-income—and by correlation, minority-occupied—neighborhoods.[298]

The Inclusive Communities Project, Inc. (ICP) is a not-for-profit organization that has a mission of placing low-income, government-assisted tenants in more affluent, privileged neighborhoods in the Dallas, Texas region.[299] One of the goals of ICP is to promote racial integration. Federal law bars any recipient of LIHTCs from discriminating against tenants who receive government assistance.[300] Therefore, ICP in its efforts to place tenants often seeks suburban-area projects receiving LIHTCs.[301]

In 2008, ICP filed suit against TDHCA in federal district court, alleging that TDHCA's allocations of LIHTCs violated the FHA.[302] Specifically, ICP asserted that the allocations of LIHTCs violated 42 U.S.C. § 3604(a) because the allocations had the effect of making housing unavailable or denying housing to persons based on race, and also that TDHCA violated 42 U.S.C. § 3605(a) prohibiting discrimination in real estate transactions.[303] At the heart of ICP's claims was its assertion that TDHCA's application of the eleven-factor LIHTC allocation point system resulted in a disproportionate allocation of LIHTCs to developers of housing in minority-populated areas, which had the effect of increasing racial segregation and concentration, and in turn undermined ICP's efforts to integrate suburban neighborhoods.[304] In its lawsuit, ICP alleged that TDHCA had violated the FHA in two ways: TDHCA had intentionally discriminated on the basis of race, and TDHCA's allocations created a disparate impact on racial minorities.[305] In its complaint, ICP sought a court order requiring TDHCA to issue tax credits equally between minority and non-minority populated neighborhoods, and further sought an order

297. Petition for Writ of Certiorari at 5, *ICP III*, 747 F.3d at 276-77, *petition for cert. filed*, 2014 WL 1989121 (U.S. May 13, 2014) (No. 13-1371), *cert. granted*, 135 S. Ct. 939 (U.S. Jan. 9, 2015) (No. 13-1371).

298. *ICP III*, 747 F.3d at 280.

299. *See* INCLUSIVE COMMUNITIES PROJECT, http://www.inclusivecommunities.net/ (last visited Apr. 12, 2015).

300. 26 U.S.C. § 42(h)(6)(B)(iv).

301. *See generally Fair Housing,* INCLUSIVE COMMUNITIES PROJECT, http://www.inclusivecommunities.net/fairhousing.php (last visited Apr. 12, 2015) (stating that ICP can provide information about where tax credit properties are available and that ICP can help get a landlord to participate in the program).

302. *See ICP III*, 747 F.3d at 278. ICP also asserted claims under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1982 (2012).

303. *Id.* at 280.

304. *Id.*

305. *See id.*

to require TDHCA to account for the racial demographics of a particular area before allocating LIHTCs to a project.[306]

Following trial, the district court found that TDHCA had not intentionally discriminated in its allocation of LIHTCs. In short, TDHCA had limited discretion under federal and state statutes in its allocation of LIHTCs, and evidence presented in the case showed that TDHCA, in its limited discretion, took steps to deconcentrate low-income housing.[307]

However, the district court found that ICP had made out a cognizable claim of disparate impact.[308] On an earlier motion for summary judgment by ICP, the district court had found that:

> ICP has established that its clients are African-Americans, members of a protected class, who rely on government assistance with housing, and that TDHCA has disproportionately approved tax credits for non-elderly developments in minority neighborhoods and, conversely, has disproportionately denied tax credits for non-elderly housing in predominately Caucasian neighborhoods. . . . This evidence establishes that TDHCA disproportionately approves applications for non-elderly LIHTC units in minority neighborhoods, leading to a concentration of such units in these areas. This concentration increases the burden on ICP as it seeks to place African-American Section 8 clients in LIHTC housing in predominately Caucasian neighborhoods.[309]

The court found this evidence sufficient to make out a claim of discrimination under disparate impact theory.[310] Applying the burden-shifting approach established for the analysis of disparate impact claims,[311] the district court held that TDHCA had established a bona fide, legitimate interest in its use and application of the eleven-factor allocation formula, however, the district court held that TDHCA had failed to prove that no less discriminatory alternatives were available to allow TDHCA to achieve its desired outcomes.[312]

The U.S. Court of Appeals for the Fifth Circuit first affirmed the holding of the district court[313] that disparate impact claims are

306. Petition for Writ of Certiorari, *supra* note 297, at 7.

307. *See* Inclusive Communities Project, Inc. v. Tex. Dept. of Hous. & Cmty. Affairs (*ICP II*), 860 F. Supp. 2d 312, 319-20 (N.D. Tex. 2012).

308. *Id.* at 314.

309. Inclusive Communities Project, Inc. v. Tex. Dept. of Housing & Cmty. Affairs (*ICP I*), 749 F. Supp. 2d 486, 499-500 (N.D. Tex. 2010).

310. *Id.* at 500.

311. *See, e.g.*, *Huntington Branch, N.A.A.C.P.*, 844 F.2d at 939. Under the burden-shifting analysis, the plaintiff carries the burden of proving a prima facie case of disparate impact, after which the defendant has the burden of showing a legitimate, nondiscriminatory interest in the policy or program, and the non-existence of any less discriminatory means of achieving the desired ends. *Id.*

312. *ICP II*, 860 F. Supp. 2d at 331.

313. *See ICP III,* 747 F.3d at 276-77.

cognizable FHA claims.[314] In addition to reaffirming its position regarding disparate impact claims, the Fifth Circuit adopted an analytical approach, borrowed from a HUD regulation promulgated in 2013,[315] but reversed and remanded on the merits, concluding that the district court improperly required the TDHCA to prove less discriminatory alternatives.[316] The HUD regulation provides that disparate impact claims should be analyzed as follows: once a plaintiff makes out a prima facie case of discriminatory effect, the defendant must prove that the challenged practice is "necessary to achieve one or more substantial, legitimate, non-discriminatory interests."[317] Once the defendant meets that burden, it is the plaintiff's burden to establish that such interests "could be served by another practice that has a less discriminatory effect."[318]

Following the Fifth Circuit's decision, TDHCA filed a petition for writ of certiorari on the question of whether disparate impact claims are cognizable under the FHAA and the Supreme Court granted certiorari on October 2, 2014.[319] On June 25, 2015, in a 5-4 decision, the Supreme Court held that disparate impact claims are cognizable under the FHAA.[320]

The outcome of the case means that disparate impact will remain available to FHAA plaintiffs. Disparate impact review has proven to be a potent weapon—particularly in the context of racial discrimination—for civil rights plaintiffs, including fair housing activist groups and organizations that seek to challenge government and other policies which may be facially neutral but disproportionately impact certain groups.[321] ICP's briefing in *Inclusive Communities* relied on Congress' sweeping intent in passing the FHA and FHAA, and pointed out the fact that the language of the FHAA does not require a showing of intent, and that Congress failed to amend the FHAA to prohibit disparate impact analysis.[322] The

314. *See id.* at 280-81.
315. 24 C.F.R. § 100.500.
316. *See ICP III*, 747 F.3d at 282.
317. *Id.*
318. *Id.*
319. *ICP III*, 747 F.3d 275, *petition for cert. filed*, 2014 WL 1989121 (U.S. May 13, 2014) (No. 13-1371), *cert. granted,* 135 S. Ct. 46 (mem.) (U.S. Oct. 2, 2014) (No. 13-1371).
320. 135 S.Ct. 2507, 2519 (2015).
321. David G. Savage, *Supreme Court Asked To Scale Back Landmark Fair Housing Law*, L.A. TIMES (Jan. 21, 2015), http://www.latimes.com/nation/la-na-supreme-court-housing-bias-claims—20150120-story.html.
322. Brief for Respondent at 31-32, *ICP III*, 135 S. Ct. 939 (U.S. Dec. 17, 2014) (No. 13-1371), 2014 WL 7242817.

Court agreed holding that the history and intent of Congress indicated that disparate impact claims were viable under the FHAA.[323]

State and local governments must now be aware that neutral policies can give rise to FHAA liability. With respect to certain protected classes (race chief among them), it is often fairly simple for a plaintiff to make out a prima facie case of discriminatory effect, if for no other reason than a strong correlation exists between race and income in the United States.[324]Many states and local governments joined amicus curiae briefs in support of disparate impact analysis, which suggests that state and local governments believe that disparate impact serves important governmental purposes and are unconcerned about suits challenging neutral policies.[325]

Although *Inclusive Communities* will have significance in all FHAA litigation, the case's influence in litigation regarding housing for people with disabilities may be more nuanced. For plaintiffs in disability discrimination cases, disparate impact is typically the most difficult type of FHAA claim to prevail on, for several reasons.[326] Not insignificant among those reasons is a general lack of available, localized, statistical data to support claims of disparate impact by persons with disabilities.[327] Unlike in racial discrimination cases, where United States Census Bureau data provide highly localized data, disability information is more limited. Moreover, while there is much statistical support to establish that there is high demand for housing for people with disabilities,[328] that fact alone is insufficient to establish disparate impact.[329]

The impact of *Inclusive Communities* on disability discrimination litigation may also be limited, since it is almost universally the case that FHAA claims by people with disabilities join disparate impact claims with other claims, including discriminatory intent and reasonable accommodation claims.[330] As discussed above, family composition

323. 135 S. Ct. at 2518-21.

324. Annie Lowrey, *Wealth Gap Among Races Has Widened Since Recession*, N.Y. TIMES, Apr. 28, 2013, at B1.

325. *See e.g.*, Brief for the United States as Amici Curiae Supporting Respondent, *ICP III*, 135 S. Ct. 939 (U.S. Oct 2, 2014) (No. 13-1371), 2014 WL 7336683 (including Massachusetts, New York, Arizona, California, Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, New Mexico, North Carolina, Oregon, Utah, Vermont, Virginia, and Washington).

326. *See supra* notes 191-204 and accompanying text.

327. CONNOLLY & MERRIAM, *supra* note 128, at 28.

328. *See id.* at 28-32.

329. *See, e.g.*, *Quad Enters. Co.*, 369 Fed. App'x at 206; *Budnick*, 518 F.3d at 1119.

330. *See* Schonfeld & Stein, *supra* note 20.

requirements in local zoning codes frequently lead to FHAA litigation because such requirements are often used to keep people with disabilities out of a neighborhood or community.[331] A family composition requirement permitting only blood, marriage or adoption-related family members to reside together in a single-family home—to the exclusion of unrelated persons who live in congregate living facilities—certainly has a disparate impact on people with disabilities. However, the failure of local governments to vary such requirements, or local government restrictive enforcement of family composition requirements, is also suspect as both intentionally discriminatory (if enacted to prohibit the location of group homes in the community) and, if they are not varied upon request, a failure to reasonably accommodate.[332]

IV. Conclusion

As the FHAA moves into its second quarter-century of existence, the Act continues to provide an important tool for local governments, advocacy groups, planners, and most importantly, people with disabilities to provide for equal access to housing opportunities. People with disabilities remain, unfortunately, one of the most discriminated-against segments of the United States population, and the FHAA offers a critical legal remedy for those who experience discrimination as a consequence of local government planning and zoning. As the interpretation of the FHAA has become clearer over the past twenty-seven years, it is apparent that a significant obligation exists for local governments—including planners, lawyers, administrators, and elected officials—to provide for fair and equal housing opportunities for people with disabilities. The consequences of failing to provide for such housing opportunities can be costly to local government officials and taxpayers. Although some changes may be afoot in the judicial interpretation of the FHAA, the FHAA will remain a powerful tool in preserving and promoting equal housing opportunities for people with disabilities. All of the stakeholders should therefore take special care to ensure that the provision of adequate housing for people with disabilities remains an important objective of local planning and available through local zoning.

331. *See, e.g.*, State v. Baker, 405 A.2d 368 (N.J. 1979).
332. *Tsombanidis*, 352 F.3d at 580.