was obtained. Once these facts are assembled, they will dictate whether the building is or is not covered by Section 804(f)(3)(C).

If the building is covered, the next step is to use a check-list of the requirements in the statute and then to examine the building for compliance with each of these. A copy of the blue prints for the building should be obtained. See Exhibit 8-5.

It may also be useful to ask the respondent how he intended to comply with these requirements. One response might be that HUD's "Fair Housing Accessibility Guidelines" were followed; if so, the investigator should ask if there is any evidence supporting the respondent's claim that he did, indeed, follow these guidelines (e.g., written memoranda from the architect on this subject). Another possible response is that the respondent has complied with applicable state or local government rules on accessibility; in this situation, the investigator should obtain a copy of these rules and any documents or other evidence suggesting that state or local officials have or have not certified that the respondent's building is in compliance with these rules. Another possible response is that the respondent has never heard of the accessibility requirements of the Fair Housing Act and/or has no basis for believing that his building is in compliance with these requirements; this would certainly be worth noting, because, although ignorance of the law is no defense, it might well be relevant to relief (e.g., to the appropriateness of a civil penalty or some form of affirmative order).

For each of the required features of Section 804(f)(3)C) that has been omitted, the investigator should inquire into the connection between this omission and any injury claimed by the complainant. For example, if the complainant has a disability that requires use of a wheelchair and the illegal omission is that one of the public areas of the building is not

readily accessible to this person, find out specifically how this area is not accessible to the complainant, why this area is important to the complainant, and what steps the complainant and/or the respondent has taken to make the area accessible short of fully complying with the statute.

It might also be useful to attempt to determine what the cost would be to bring the building into compliance with the requirements of Section 804(f)(3)(C). While cost is not a defense, it might be relevant in assessing the possibility of a successful conciliation and/or the appropriate and feasible relief if the case results in a hearing.

The investigation should also determine the identity of every person who participated in the design and construction of the building and what that person's specific duties were. These potential parties would include the architect and the builders, as well as the developer and the current owner. Copies of any contracts between these parties setting out their respective duties should also be obtained.

E. Summary

In summary, the prima facie case for a complaint involving an alleged failure to make a reasonable accommodation is:

(1) That the complainant was a person with a disability within the meaning of the Act.

(2) That the respondent knew or should have known about the disability.

(3) That the desired accommodation was necessary in order to afford the complainant full enjoyment of equal housing rights and that the respondent knew or should have known this.

(4) That the accommodation was denied or so delayed

that it amounted to a denial.

The prima facie case for a complaint involving the failure to permit a reasonable modification is as follows:

(1) That the complainant was a person with a disability within the meaning of the Act and that the respondent knew this.

(2) That the desired modification was necessary in order to afford the complainant full enjoyment of equal housing rights.

(3) That the complainant was able and willing to pay for the modification.

(4) That the respondent knew or should have known of the complainant's need to make the reasonable modification.

(5) That approval of the modification was denied or so delayed that it amounted to a denial.

The prima facie case for a failure to comply with the accessibility requirements complaint contains only two elements:

(1) That the dwelling is a covered dwelling.

(2) That the dwelling does not comply with the accessibility requirements of the Act.

8-9 ZONING AND OTHER LAND-USE CASES

A. Introduction

Among the types of discrimination prohibited by the Fair Housing Act is the blocking of housing opportunities for protected-class members resulting from the imposition of zoning or other land-use

restrictions by local governments. Indeed, many of the most important early cases brought under the 1968 Fair Housing Act involved challenges to municipal zoning decisions that prevented the development of racially integrated housing projects.

In more recent years, a great deal of litigation under the Fair Housing Amendments Act of 1988 has been based on disputes between group homes for disabled persons and local authorities who sought to prevent the operation of such homes on the basis of zoning or other land-use restrictions. The legislative history of the 1988 amendments makes clear that this law was intended to outlaw land-use practices by local governments that have the effect of discriminating against disabled persons. Thus, the Report of the House Judiciary Committee stated that:

> the 1988 Act was intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of [disabled] individuals to live in the residence of their choice in the community.

While the importance of zoning and other land-use cases under the Fair Housing Act cannot be overstated, these cases do present some special procedural and substantive issues, particularly when they are filed as HUD complaints. For example, Section 810(g)(2)(C) of the Act provides that HUD may not issue a charge with respect to a discrimination complaint that involves "the legality of any State or local zoning or other land use law or ordinance." Instead, HUD must refer such matters to the Department of Justice for possible action under Section 814(b).

This mandatory referral system, however, does not affect HUD's responsibility to investigate and to seek to conciliate complaints involving land-use matters. Each such complaint should be investigated carefully,

so that DOJ, if and when the matter is referred, will have the benefit of a complete record on which to base its decision whether to bring suit. In addition, HUD must make every effort to bring about a conciliation agreement between the parties during the pre-referral stage.

It should be noted at the outset that a HUD complaint challenging the blocking of a housing proposal by a local government may be brought either by the sponsor of the proposed project or by any of the protected-class residents of such a project. From the earliest days of Title VIII zoning litigation, the courts have made clear that proper complainants in such cases are not limited to the residents who are the direct targets of a municipality's discrimination, but also include the housing developer as well. Indeed, most of the modern cases in this field have as their principal complainant the entity that proposed the particular housing development blocked by the respondent.

The next section describes the various types of group homes for disabled persons that are most often involved in land-use litigation and discusses the question of "coverage" of these homes by the Fair Housing Act. Section C provides a basic "primer" on zoning law. Section D deals with the legal theories that are available under the Act to challenge adverse zoning ordinances and other land-use practices that may block group homes. Section E then concludes with some suggestions for investigating these cases. The discussion throughout these sections generally assumes that disability discrimination is the basis of the complaint, but, unless otherwise specifically noted, the same principles would also apply to cases based on race and the other prohibited bases of discrimination under the Fair Housing Act.

B. Types of Group Homes; "Disability" Coverage

The vast majority of zoning and other land-use complaints filed since the enactment of the 1988 Fair

Housing Amendments Act have involved "group homes" for disabled persons. A group home is a communal living arrangement for unrelated persons who, because of their disabilities, cannot live as successfully on their own.

Historically, disabled persons whose families were unwilling or unable to care for them at home were typically confined to large state institutions. In modern times, however, smaller, privately operated group homes have come to be seen as more desirable. The expectation underlying the group home movement is that disabled persons will be more likely to achieve their full potential in an environment that approximates "normal" home life as closely as possible. Locating group homes in traditional residential neighborhoods, particularly single-family areas, is generally thought to be desirable.

Depending on the clientele served and the size of the home (i.e., number of occupants), a group home may have to be licensed by state regulatory authorities, which will require it to meet standards for living space, facilities, fire safety, staffing, and the like. Different states classify different types of group homes in different ways, according to their size and the types of residents served. Terms such as "residential care home," "family care home," "community residential facility," and "adult foster care home" may be used to describe these regulated group homes.

If a group home serves the developmentally disabled or mentally ill, the residents will clearly qualify as "disabled" under the Fair Housing Act (i.e., there will be no question as to the Act's coverage). In addition, persons with communicable diseases, such as those suffering from AIDS and those who are HIV-positive, are considered disabled under the Act, so that homes intended for use by such persons are also protected.

However, some types of group residences are designed for persons whose disability status is more problematical. For example, a "personal care home" may

serve elderly residents who need help in caring for themselves, but do not require the level of care provided by a nursing home. Old age in itself is not a disability under the Act, but experience has shown that many people who need the kind of assistance provided in personal care homes probably have disabilities that would bring them within the statutory definition of disability. The investigation of a complaint that concerns such a residence must make a general inquiry into the physical and/or mental limitations of the residents and the kinds of assistance that the home provides for them in order to determine whether the disability provisions of the Act apply.

Other group homes serve children or adolescents who, for one reason or another, are unable to live with their families. Investigating a complaint of discrimination against such a home may present special problems. While some or all of the residents may suffer from disabilities such as emotional illness, drug or alcohol addiction, or learning disabilities, the official criteria for residence may not <u>require</u> that the residents be disabled. In such a case, the fact that some residents are disabled does not necessarily prove, for example, that disability was the reason for community opposition to the home. In such a situation, efforts should be made to obtain from the sponsors of the home or the administrators of the governmental agency that funds or licenses it what disability conditions the residents or prospective residents may have. (Because of confidentiality and other constraints, it may be difficult to obtain specific information concerning individual residents of such a home; it should be possible, however, to obtain a general profile of a typical member of the group that the home is intended to serve.)

Another type of communal residence is the self-governing home for recovering alcoholics and drug addicts. Residents of this type of home live together as a unit and agree to participate in recovery programs and to abstain from alcohol and drugs; violators are

expelled from the home. Many of these homes have names that include the phrase "Oxford House" (e.g., "Oxford House -- Lexington"), because "Oxford House" was the name of the original home established according to this pattern. That original home eventually grew into a national "Oxford House" organization, which has received funding to establish similar residences in many parts of the country.

C. Basic Zoning Principles and Terms

Most cities, towns, and other units of local government in the United States have adopted zoning ordinances. While there is a great deal of variation in the details of these laws, zoning ordinances generally conform to a standard pattern.

The typical zoning ordinance contains an official map that divides the jurisdiction into various zones. Each zone will be assigned to a particular zoning classification. In a large city, there may be dozens of separate classifications, in each of which a different combination of uses is allowed. Generally, however, three basic classifications predominate: (1) residential; (2) commercial; and (3) industrial (or manufacturing).

Various classifications may exist within each of these three basic classifications. A classification will usually be identified by the initial of the main classification, followed by a number; the higher the number, the more kinds of uses will be allowed there. Thus, most zoning ordinances provide for a residential classification known as "R-1," which is reserved for single-family homes; classification "R-2" may permit single-family homes and duplexes; "R-3," "R-4," and so on will permit apartment complexes, typically larger and larger in size as the numbers go up.

Only certain uses are permitted within each classification. For example, the only use generally permitted in an R-1 district, at least in the absence

of some special exemption, is a single-family home. Other uses are designated as "special" or "conditional" uses, which means that they may be allowed in a particular district with special permission from the proper authorities (through, for example, a "special use permit"). If a use is not listed in the ordinance as a permitted or conditional use for a classification, it is prohibited in that classification.

A typical zoning ordinance will contain as its first major component a lengthy set of definitions of words and phrases used in the other parts of the ordinance. These definitions may be of great significance in interpreting the ordinance. The most important definition in the typical group home case will be the ordinance's definition of the term "family." This definition controls who may live in a single-family district; any group that is not a "family" under this definition will be prohibited. Many disputes involving group homes have resulted from the application of this provision.

Typically, the definition of "family" will read something like this: "Any number of persons related by blood or marriage, or a group of not more than [two to six] persons sharing cooking facilities and forming a single household unit." Some particularly restrictive single-family ordinances purport to prohibit <u>all</u> unrelated groups from living together, regardless of the size of the group (e.g., unmarried couples would not be allowed).

Many zoning ordinances will provide a mechanism by which a property owner may obtain special permission to use his property in a way that is prohibited by the zoning ordinance; this is known as a "variance." A variance is, at least theoretically, harder to obtain than a conditional use permit. The applicant must show that not being able to use the land in the way that he seeks to use it imposes a hardship on him. Another difference between a variance and a conditional use permit is that a variance "runs with the land," which

means that all future owners of the land are also permitted to use the property in the same way. A conditional use permit, on the other hand, is personal to the applicant; if the property is sold, the new owner must obtain a new permit if he or she wants to use the property in the same way. Also, a conditional use permit is frequently restricted to a certain period of time, after which the owner must apply for a renewal.

The third way in which a property owner may obtain permission to use property in a way not permitted by a zoning ordinance is to seek a rezoning, which means a change of the property from one zoning classification to another. In principle, a rezoning should affect more than a single small parcel of land, and the area rezoned should touch another area that is already zoned for the new classification (or one that is less restrictive). Rezoning a single, isolated parcel as an island in the middle of a more restricted area is called "spot zoning," which is generally regarded as a bad practice, although some municipalities do engage in it.

Most zoning ordinances will set up one or more special review boards or commissions -- made up of unpaid citizens appointed by the mayor, the city council, or some other governing body -- to handle requests for zoning actions. Most municipalities will have a planning commission, a board of zoning appeals, or both. One body may have authority to grant variances, another deals with conditional use permits, and so on.

In all but the smallest communities, there will be a paid zoning administrator or planning director to whom requests for zoning actions are initially submitted. In larger urban areas, the administrator will have a professional staff. The administrator and his staff may prepare a written report, with recommendations for action, for the use of the board members in considering the application. A city attorney may also participate in the board's deliberations.

Local governments typically solicit the views of nearby property owners on a proposed zoning change. The applicant may be required to formally notify the owners of all property within a certain distance. The law will probably also mandate a public hearing on the application, where the applicant will first present its case and then members of the public will be given an opportunity to be heard.

Most zoning ordinances provide for one or more appeals within the city government from the ruling of the initial board. The applicant may appeal if the permission is denied, or a neighbor may appeal if it is granted. The final appeal will usually be to the city council or other governing body of the jurisdiction. The ultimate decision of the municipality may then be appealed to the state courts.

In considering appeals from zoning decisions, most courts will give the decision of the responsible officials a good deal of deference, as long as the zoning body can offer some plausible explanation for its decision. Generally, courts do not inquire into the actual motives of the zoning decision-makers, but this rule does not apply in a federal discrimination suit. In these cases, the Supreme Court has directed courts to conduct a searching inquiry into the actual motivations underlying the decision. (This principle may be worth mentioning to the respondent's officials in attempting to conciliate a zoning complaint.)

D. Theories of Liability

Two basic theories of liability are available under the Fair Housing Act to challenge a local government's use of its zoning or other land-use powers to block a housing proposal: (1) discriminatory intent; that is, that the government's action was taken <u>because</u> of the protected-class status of the residents of the proposed housing; and (2) discriminatory impact; that is, that the government's action was based on a policy that

disproportionately harms or excludes a protected group. These theories apply in racial, disability, and all other types of claims under the Fair Housing Act. A third theory, which is available only in disability cases, is that the government failed to make a reasonable accommodation in its rules, policies, practices, or services, as required by Section 804(f)(3)(B) of the Act. More than one of these theories may be pursued in a single case, and if the facts support <u>any</u> of the applicable theories, then the government's behavior violates the Fair Housing Act.

1. <u>Discriminatory Intent: "On its Face" Discrimination</u>

Discriminatory intent may be shown in either of two ways. First, a zoning or other land-use law may reveal its discriminatory nature in the very words used in the ordinance; that is, the ordinance "on its face" discriminates between a protected class and other groups. Second, a decision by a zoning board or other governmental agency, although based on a "neutral" ordinance, may be undertaken because of a discriminatory motive. Either type of discriminatory intent may result in a municipal action being held to violate the Act's prohibition against making housing "unavailable" because of an illegal motive.

A zoning ordinance may on its face treat group homes for disabled persons more restrictively than other groups of unrelated people. Such an ordinance was used by the City of Cleburne, Texas, to block a group home in a case that reached the U.S. Supreme Court prior to the enactment of the 1988 Fair Housing Amendments Act. In this case, a group home for developmentally disabled persons sought to locate in an R-2 zone, where the Cleburne zoning ordinance permitted nursing homes, boarding houses, fraternity and sorority houses, and other communal facilities, but specifically excluded "hospitals for the insane and feeble-minded." The municipality relied on this provision to block the proposed group home, which then brought suit on constitutional grounds. The Supreme Court ruled in

favor of the home, holding that Cleburne's restriction on group homes for the disabled was not rationally related to a legitimate governmental interest and thus violated the Equal Protection Clause. [See Exhibit 8-2].

The Congress that enacted the 1988 amendments to the Fair Housing Act prohibiting disability discrimination took note of the Cleburne case. According to the House Judiciary Report, the new amendments were intended to apply to:

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

As a result of the Cleburne case and the 1988 Fair Housing Act, it is now fairly rare to find zoning ordinances that discriminate against group homes for disabled persons as blatantly as did the Cleburne law. More typical of modern ordinances that discriminate on their face are those that allow group homes, but only if they are located a certain minimum distance from another group home or only if they obtain a conditional use permit to operate in a residential area. Although these ordinances are less restrictive than the Cleburne-type law, they still distinguish between group

homes and other acceptable uses in the very words of the ordinance (i.e., they are discriminatory on their face).

If a municipality with an ordinance that singles out group homes for special treatment thereafter denies permission for a group home to operate or imposes special conditions on such permission, then the home may rely on the fact that the ordinance discriminates on its face to establish a prima facie case of intentional discrimination. This means that the municipality will be able to prevail against a Fair Housing Act claim only if it shows that the restrictions it has placed on the home are justified by public safety concerns.

However, a municipality's requirement of holding a hearing or otherwise requiring public notice of variances, exceptions, or other changes in use will not, in and of itself, violate the Act, unless the requirement singles out uses which are only disability-related or where the application process would be futile. See U.S. v. Palatine, 37 F.3d 1230 (7th Cir. 1994) (group home's concern about the notice and hearing requirements for a special use permit did not outweigh the city's interest in applying a facially neutral law).

2. Intentional Acts of Discrimination

A facially neutral zoning law may be administered in a way that violates the Fair Housing Act if the local government denies a rezoning, a conditional use permit, or otherwise blocks a group home because of the disabilities of its prospective residents. It is not necessary to show that the members of the city council or other governing body who took this action were personally motivated by prejudice or malice toward people based on their protected class status. It is sufficient if they are shown to have treated the home differently because of the residents' protected class status, regardless of their personal motivations for

doing so.

Evidence of the public's hostility toward the residents or potential residents is relevant, but not sufficient, to establish an official's discriminatory intent. According to one early group home decision:

> [I]n the ordinary course of events a decision-maker is not to be saddled with every prejudice and misapprehension of the people he or she serves and represents. On the other hand, a decision-maker has a duty not to allow illegal prejudices of the majority to influence the decision-making process. A racially discriminatory act would be no less illegal simply because it enjoys broad political support. Likewise, if an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decision-maker personally has no strong views on the matter.

Thus, if officials admit that they acted in response to citizen opposition that was based on the disability status of the residents of a proposed home, then the necessary intentional discrimination by those officials is established. In many cases, however, the officials may deny that their opposition to the home was based on illegal considerations and will instead claim that legitimate zoning factors prompted their decision. (Note that complaints against community members for their speech-related activities in such situations are subject to First Amendment protection and careful analysis by Headquarters before filing.)

In these circumstances, the officials' illegal intent will have to be shown by indirect means. This may be done by employing the "prima facie case" approach (see Chapter 2), the key to which usually turns on whether the officials' claimed legitimate reason is borne out by the facts or whether the evidence shows that this reason is merely a "pretext" because the officials have

not used it to block other applications.

For example, if increased traffic is given as the reason for blocking a group home, it will be important to determine whether the staff and residents of the home are, in fact, likely to drive more to and from the home than people do in other family units in the area and also whether traffic concerns have ever been used before to block communal facilities for non-disabled residences. If the proposed home seems unlikely to produce much traffic (e.g., because the staff and residents have few or no cars) and/or if traffic concerns have not been a basis for denying other applications from similarly situated facilities, then the officials' claimed reason may be shown to be a pretext for an illegal intent.

Even if the evidence establishes that discriminatory intent was one of the reasons prompting an adverse zoning decision, a municipal respondent may still prevail if it can show that there was also a valid nondiscriminatory reason that, by itself, would have dictated rejection of the group home's application in the absence of any illegal discrimination. Each such reason given by the municipality must be investigated.

3. Official Acts that Have a Discriminatory Impact

Even if the respondent's zoning ordinance is not discriminatory "on its face" and the local officials have not been shown to have acted for a discriminatory reason, their blocking of a group home may still violate the Act if it was based on a policy that has a substantial disparate impact on a protected group. An example might be a single-family zoning ordinance that prohibits all unrelated groups from living in single-family districts, regardless of whether these groups include disabled persons or not. A number of Oxford Houses for recovering alcohol and drug addicts have sought to occupy dwellings in such districts, arguing that a zoning restriction barring unrelated groups has a greater impact on such disabled persons than on other

individuals, because the type of disabled person who lives in an Oxford House-type setting is more likely to need to live with unrelated individuals during their recovery process than are non-disabled individuals.

The key to a disparate impact challenge is to show that a group protected by the Fair Housing Act is more likely to be harmed by the challenged ordinance or policy than are others in the population. This often requires statistical evidence showing the percentage of persons in the protected group that would be excluded by the respondent's policy as compared to the percentage of non-protected persons that would be excluded. Even in the absence of such statistics, however, some courts in Oxford House cases have accepted the proposition that recovering alcohol and drug addicts are more likely to have to live with unrelated individuals and are therefore more harmed by a single-family zoning ordinance than are non-addicts.

Once the necessary showing of disparate impact has been made, the burden shifts to the respondent to show that its law or policy is necessary to serve an important governmental interest. This will often prompt a municipality in a zoning case to argue that reducing traffic or some other density-related issue is sufficient to justify its position. As with the discussion in the previous section, the investigation of this claim will then have to determine whether, in fact, the group home involved is likely to create the traffic or other problems claimed by the respondent.

In addition, the respondent will have to show that it cannot achieve its zoning goals just as effectively by some means other than blocking the proposed protected-group housing. If there is a "less discriminatory alternative," the respondent will not succeed in rebutting a disparate impact case.

For further discussion of the disparate impact theory, see Chapter 2, Theories of Discrimination.

4. Failure to Make a Reasonable Accommodation in Disability Cases

A zoning decision may violate the Fair Housing Act even if it was not made for discriminatory reasons nor has a discriminatory impact if it amounts to a failure to reasonably accommodate the housing needs of disabled persons. Section 804(f)(3)(B) of the Act provides that illegal disability discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling." This provision, which applies only in disability cases and is therefore not available when racial or some other type of discrimination is alleged, has been applied in a number of group home cases.

The "reasonable accommodation" theory requires that a municipality make an exception to its zoning ordinance or other land-use rules in order to permit the operation of a group home if such an exception is necessary to afford disabled persons equal opportunity to use and enjoy a dwelling. It is not a defense to a charge under this theory that the respondent's ordinance makes no provision for exceptions for group homes.

Note: Some group homes faced with the requirement of having to obtain a conditional use permit have refused even to apply for the required permit, arguing on the basis of the "reasonable accommodation" theory that the municipality must waive its application requirement in order to accommodate them. However, a 1994 appellate decision rejected this argument and required the group home there to apply for the permit and thereby give the respondent-municipality the opportunity to accommodate the home. An exception to this rule that a group home must seek relief under the applicable zoning procedures before bringing a Fair Housing Act claim does exist, however, if the home can show that its application would certainly have been turned down and that applying

would therefore have simply been a "futile gesture" (e.g., because officials have said that their minds were already made up to deny the application).

In a substantive challenge to a municipality's refusal to change an adverse zoning rule or decision, a complainant must make three showings in order to prevail under the "reasonable accommodation" theory: (1) that the accommodation requested "may be necessary" for the group home to operate; (2) that this accommodation will afford disabled persons "equal opportunity" to use and enjoy the proposed home; and (3) that the accommodation is "reasonable."

The "necessary" requirement suggests that a group home is not entitled to an accommodation with respect to a rule that causes mere inconvenience. Thus, for example, a group of physically disabled persons might not be excused from compliance with an ordinance requiring that lawns be mowed regularly, because the residents could hire someone to do this at a modest cost.

The use of the phrase "equal opportunity" in Section 804(f)(3)(B) implies that the rule must be one with which disabled persons are unable to comply <u>because</u> of their disability. Disabled persons are entitled to such accommodations as will put them on an equal footing with similarly situated persons who are not disabled, but to no more. For example, the Fair Housing Act would probably not excuse a group home provider from paying property taxes on the same basis as other homeowners in the neighborhood.[4]

The use of the word "reasonable" to describe the accommodations required by Section 804(f)(3)(B) allows for a good deal of flexibility in interpreting this provision, but some things are clear. First of all,

[4] A non-profit group home may well be exempt from certain taxes, but its exemption from these taxes would derive from a source other than the Fair Housing Act.

the issue in a given case is not whether the respondent's ordinance or adverse decision itself is reasonable, but whether the accommodation sought by the complainant is reasonable. This means that a municipality cannot defend itself on the ground that its ordinance or decision blocking a group home is reasonable; it must show that its decision not to accommodate the home is reasonable.

The key judicial precedents dealing with the "reasonable accommodation" provision hold that an accommodation must be made unless it requires the respondent to fundamentally alter the nature of its program or to incur undue financial or administrative burdens. For example, granting an exception concerning the number of unrelated persons who may live together in a home in a single-family neighborhood would not generally impose any significant burden on the municipality. The crucial question thus becomes whether the exception is fundamentally inconsistent with the underlying purposes of the zoning ordinance.

What are the underlying purposes of residential zoning? Entire treatises have been written on this subject, and only a brief summary of the principal points is possible here. The essence of zoning is that only certain types of uses are compatible with each other, which means that winning a zoning case under the "reasonable accommodation" theory probably requires persuading the court that the operation of the particular group home involved in this case is compatible with the values traditionally associated with residential neighborhoods.

The basic assumption of single-family zoning is that the value of each home in such an area will be maximized by being surrounded by other single-family homes. Proximity to commercial or multi-family uses makes a home less desirable. It would probably be difficult, therefore, for a provider who wanted to build a large nursing-home type facility for the disabled in the middle of a single-family zone to

convince the court that such a use was not fundamentally inconsistent with the zoning ordinance. However, the typical group home does not raise such issues, because it generally seeks to locate in a dwelling that has, itself, been used as a single-family home and is therefore physically compatible with the character of the neighborhood.

What is more likely to be involved is a question as to what types of persons may live in a single-family district without compromising the values that the zoning ordinance seeks to protect. In a 1974 decision upholding a single-family zoning ordinance that was used to bar a group of college students from living in a single-family zone, the Supreme Court noted that:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . [Local governments may] lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

This passage endorses the view that groups of unrelated persons may increase the density of population, which will in turn increase traffic. It is important, therefore, in investigating a zoning complaint, to determine how many people will live in the proposed group home and the effect they might have on traffic and other problems associated with higher-density living.

The Supreme Court's willingness to allow municipalities to bar groups of college students from single-family zones may have also been based on the belief that such persons are likely to keep irregular hours and live without adequate supervision, with the resulting higher noise levels imposing a hardship on the near-by residents. In a group home case, therefore, it is important to discern whether the particular group involved is likely to need the control normally

exercised by parents in conventional families and, if so, whether a plan for such control has been established.

Thus, in order to show that a group home is entitled to an exception from numerical limits on unrelated persons by virtue of Section 804(f)(3)(B), it may be necessary to demonstrate that the particular group home is, or would be, more like a family than a group of college students. In many cases, this will be possible. First, the number of residents in the typical group home, while greater than the number of unrelated persons permitted by the ordinance, is usually well within the normal range for a conventional family. Second, the group home's impact on traffic will ordinarily be less than that of a conventional family, since group home residents often do not drive cars. Finally, the essence of the operation of a typical group home is to provide a structured environment for its residents, who are subject to restraints on their behavior analogous to those exercised by parents upon their children.

Of course, these generalities may or may not apply to the particular case under investigation. Obtaining the relevant facts about the specific home involved in each case will be required.

E. Suggestions for Investigating Group Home Cases

If the particular group home involved is licensed or otherwise operates under a state statute, that law will probably have an important bearing on its zoning status. Therefore, it is important in investigating any zoning discrimination complaint involving a group home to determine whether the home has or will need a license, and to obtain a copy of the state statute describing the licensing procedure. The complainant should be able to direct the investigator to state officials who can provide these materials.

Obtaining information about the sponsor of the home is important, including whether it is a non-profit or for-profit organization; its "track record" of conducting similar activities at other locations; and the identify and background of its principal officers.

Plans for the operation of the home are also important to obtain, including such items as:

(1) The number of residents who will live in the home;

(2) The screening process by which these residents are selected;

(3) The number and qualifications of the staff, if any, who will be on duty at the home and the hours when they will be on duty;

(4) How the staff members will commute to the home (because of possible concerns over the staff's impact on parking and traffic in the area);

(5) The training that the staff will receive, and their role in supervising and controlling the behavior of the residents; and,

(6) The nature of any mechanism for removing disruptive residents from the facility.

It is also essential to obtain copies of all relevant portions of the zoning ordinance. In smaller communities, the ordinance will probably be modest in size, and the investigator should obtain a complete copy of the ordinance and of the zoning map. In larger cities, the zoning ordinance may be as big as a metropolitan telephone directory. If so, the investigator should at least obtain copies of two sections: (1) the complete definition section; and (2) the descriptions of permitted and special uses in the classification in which the subject property is presently zoned, and, if a rezoning is involved, the classification to which the complainant wanted the

property rezoned.

Take note of which of the theories of liability (identified above in Section D) is the basis for the complaint. Some cases involve more than one of these theories, but usually only one will be at the heart of the complaint. For example, the thrust of a "reasonable accommodation" claim, where the respondent is accused of not making a needed change in an otherwise nondiscriminatory law or policy, is generally quite different from the thrust of a claim based on intentional discrimination.

When the allegation is that a particular zoning action was based on intentional discrimination, it will probably be important to assemble as much information as possible concerning the extent and motivation of citizen opposition to the proposal. Some possible sources for this information include the following:

(1) A verbatim transcript of any public hearings that were held on the application. Some jurisdictions routinely record all proceedings on video or audio tape. (Consider the possibility of obtaining a duplicate copy of the tape itself if preparing a written transcript of it will be too time-consuming and expensive.) In many places, however, no such record is kept. In these circumstances, check to see if the complainant has hired a court reporter to make a transcript of the proceedings.

(2) If there is no transcript, there will almost certainly be minutes of the meeting, and these should be obtained. The more detailed the minutes are, the more useful they will be.

(3) In many places, the municipal zoning office will prepare a staff report on each application for a zoning request, with the staff's recommendations for action. Obtain these reports if they are available.

(4) The project sponsor will have attended all public meetings and may also have conducted private meetings with neighborhood residents. Representatives of the sponsor should be interviewed to determine what comments may have been made by officials or residents concerning their motives for opposing the project.

(5) Copies of all reports in the local press concerning the matter should be obtained, including any relevant letters to the editor. The complainant may have a file of these press clippings.

(6) It is also critical to obtain a copy of the relevant passages of the municipal charter or state, county, or city code that identifies the entity with control over the zoning process. In some localities, this will be the zoning board; in other cases, the city council will have the authority to act. It is usually not necessary to name the individual members of such boards or councils as respondents.

When disparate impact is the basis for the claim, it is important to identify the particular law or policy that is alleged to have a greater impact on the complainant's protected group. The key will then be to gather statistical evidence concerning the impact of this law or policy on the protected group and its impact on others in the local population. If such data are not available, an effort must be made at least to articulate a common-sense theory for why the challenged law or policy seems likely to have a greater impact on the protected group.

In a "reasonable accommodation" case, it is important to identify exactly what municipal rule, policy, practice, or service is sought to be changed and in what way. Also, determine as specifically as possible why this change is needed by the group home, and how it

will help the residents of the home to use and enjoy their dwelling. It also is important to identify the entity with control over the zoning process. For example, in some localities, it is the zoning board; in others, the city council that has the authority to act. It is usually not necessary to name individual members of such entities.

Regardless of which of the three theories is involved, it is vital to identify and investigate the respondent's reason(s) for blocking or hindering the home. The key here is to provide some basis for the ultimate decision-maker to be able to evaluate the true significance of this claimed reason. Does this reason make sense <u>in the particular circumstances of this case</u>? Answering this question will be relevant in all cases: in intent cases, because the ability to prove an illegal motivation often turns on the extent to which a respondent's claimed legitimate reason fails to bear up under close scrutiny; in impact cases, because the strength of the respondent's reason is the key to its ability to rebut such cases; and in "reasonable accommodation" cases, because the respondent's rationale for its refusal to grant the requested accommodation will generally be the key to determining whether that refusal was "reasonable."

For example, if the respondent's claimed reason for blocking a group home is concern over the increased traffic that the home is likely to cause, it will be important to determine what the factual basis for this concern is. Did the sponsor of the home and/or the municipality's zoning staff do any studies on this subject, and what did these studies show? Or perhaps the claimed reason is a concern for the health or safety of the residents of the home. If so, it must be determined how the particular restrictions placed on the home by the respondent will actually protect or advance the residents' health or safety.

Whatever the respondent's claimed reason, the key is to gather all facts relevant to an evaluation of whether

this concern is legitimate in light of the particular housing facility being proposed. And even if this concern does appear to be legitimate, there should be an exploration of the additional issue of whether this concern could have been addressed here -- or has been addressed in connection with other proposals -- without employing the same restrictive land-use techniques that have been directed against the complainant's housing.

F. Summary

Discrimination complaints involving zoning decisions may require analysis as disparate treatment cases, disparate impact cases, or denial of a reasonable accommodation. The specifics of the complaint under investigation will determine which of the following prima facie cases must be applied. (Note that more than one may apply to a given case.)

The prima facie case for a disparate treatment zoning complaint is as follows:

(1) That the housing for which the variance or conditional use permit was sought was expected to be used by members of a class protected by the Fair Housing Act.

(2) That the developer or housing provider applied for a zoning variance or conditional use permit and was at least minimally qualified to receive it.

(3) That the respondents rejected the complainant's application despite the complainant's qualifications.

(4) That the respondent approved applications for zoning variances or conditional use permits presented by persons similarly situated to the complainant who differ from the complainant in that they are not associated with persons of a protected class.

The prima facie case for a disparate impact zoning complaint is as follows:

(1) That the respondent's facially neutral zoning restrictions were even-handedly applied.

(2) That the application of the respondent's zoning restrictions had the effect of denying housing to a proportionately larger number of persons of a particular protected class.

The prima facie case for a failure to provide a variance or a conditional use permit in a "reasonable accommodation" case is as follows:

(1) The persons who reside in (or would have resided in) the dwelling are disabled within the meaning of the Act.

(2) The respondents were aware of the status of the residents or prospective residents.

(3) The variance or conditional use permit was necessary to provide the residents full enjoyment of their housing rights.

(4) The respondents knew or should have known of the complainant's need for a variance or a conditional use permit, etc. (i.e., the complainants followed through with local zoning permit application processes).

(5) The requested zoning variance or conditional use permit was reasonable.

(6) The requested zoning variance or conditional use permit was denied.