



Everyone's Neighborhood: Addressing "Not in My Backyard" Opposition to Supportive Housing for People with Mental Health Disabilities

September 2014, Publication #CM53.01

Table of Contents

ACKNOWLEDGEMENTS	4
Chapter 1: Introduction	5
Chapter 2: The Importance of Supportive Housing.....	8
A. What is Supportive Housing?	8
B. Why is Supportive Housing Important?	12
Chapter 3: Legal Protections against NIMBY Barriers	16
A. Overview	16
B. Land Use, Planning and Zoning Laws	16
1. The Significance of Zoning	16
2. Housing Element and Consolidated Plan Obligations	19
3. CA Housing Accountability Act – Government Code Section 65589.5	29
4. Using Land Use, Planning and Zoning Laws as Advocacy Tools to Address NIMBY Opposition	31
C. Fair Housing Laws	36
1. Overview of State and Federal Fair Housing Provisions	36
2. Using Fair Housing Laws to Address NIMBY Barriers	41
Chapter 4: Six Steps to building Community Support	50
Chapter 5: Policy Recommendations	58
Appendix A: Land Use & Fair Housing/Anti-Discrimination Laws	71
Land Use & Planning	71
Fair Housing & Anti-Discrimination Laws	72
Appendix B: Resources	74
21 Elements.....	74
California Affordable Housing Law Project, Public Interest Law Project	74
California Community Choices Project.....	74
California Department of Housing and Community Development	75

California Mental Health Services Authority	75
California Office of the Attorney General.....	76
Californians for Olmstead	76
County of Los Angeles Department of Mental Health	76
County of San Diego Health and Human Services Agency	76
Corporation for Supportive Housing	76
Disability Rights California	77
Housing Alliance of Pennsylvania	77
Judge David L. Bazelon Center for Mental Health Law	78
Mental Health Advocacy Services.....	78
National Association of State Mental Health Program Directors.....	78
National Council on Disability	79
National Governor’s Association, Center for Best Practices.....	79
Non-Profit Housing Association of Northern California.....	79
Technical Assistance Collaborative	80
U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration.....	81
U.S. Department of Housing and Urban Development.....	81
U.S. Surgeon General	82

ACKNOWLEDGEMENTS

We appreciate the many people who have contributed to this policy paper. Members of the CalMHSA Consortium and Disability Rights California's CalMHSA Stigma and Discrimination Reduction Advisory Group provided direction, encouragement and helpful feedback on outlines and drafts. We are also grateful for all of the advocates and supportive housing providers who took time from their busy schedules to discuss their experiences and recommendations. Particular thanks go to: Kirsten Barlow, California Mental Health Directors Association; Jeff Buckley, Senior Advisor to San Francisco Mayor Edwin Lee; Craig Castallanet and Deb Collins, Affordable Housing Law Project; Robert Dolci, Santa Clara County Homeless Concerns Coordinator; Dora Gallo, A Community of Friends; Michael Gause, Mental Health Association of San Francisco; Gail Gilman, Community Housing Partnership; Shashi Hanuman, Public Counsel; Bill Hirsh, Aids Legal Referral Panel; Jamie Holes, Tri-City Mental Health Center; Kyra Kazantzis, Law Foundation of Silicon Valley; Darin Lounds, Housing Consortium of the East Bay; Jim Preis, Mental Health Advocacy Services; Sharon Rapport, Corporation for Supportive Housing; and Kim Savage, Law Office of Kim Savage. Our gratitude also goes out to all of the consumers, family members, providers, policy-makers and advocates who are working to develop and maintain supportive housing for people with mental health disabilities across California.

Chapter 1: Introduction

Organizations that provide housing and supportive services to people with mental health disabilities have their work cut out for them. It is enough of a challenge to identify housing sites, obtain necessary funding, arrange for services, navigate complex administrative systems and secure scarce funding sources if neighbors and local government support the project. But the process becomes much more difficult when neighbors start complaining about housing “those people” in “our” neighborhood. This paper discusses efforts that housing developers, advocates and local governments have made to promote supportive housing for people with mental health disabilities, suggests strategies for bolstering community support, and provides tools for addressing neighborhood opposition if it does arise.

“Not In My Backyard” – or NIMBY¹ – opposition to affordable and supportive housing “has deep roots in fear, racism, classism, ableism, and growing antidevelopment reactions. The problem can be framed as a classic collective action problem, a governance problem, an economic problem, or a civil rights problem (e.g., housing discrimination).”² Examples include:

- a) A supportive housing agency is unable to obtain funding for a proposal to provide housing and services to people with mental

¹ Some commentators have suggested that “NIMBY” has become a pejorative term that can undermine efforts to build community support. See, e.g., Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. Affordable Housing 78, 101 n.5 (Fall 2002), available at: <https://www.bazon.org/LinkClick.aspx?fileticket=FZBvjKqK9hw%3D&tabid=241>; Michael Allen, *Why Not in Our Back Yard?*, 45 Planning Commissioners Journal 1, 2 (Winter 2002), available at: <http://www.bazon.org/LinkClick.aspx?fileticket=siBmVxmVjAM%3D&tabid=241>.

Other acronyms for local opposition to affordable and supportive housing include:

CAVE: Citizens Against Virtually Everything

NIMTOO: Not In My Term Of Office

NOOS: Not On Our Street

NOPE: Not on Planet Earth

BANANA: Build Absolutely Nothing Anywhere Near Anyone

LULU: Locally Unwanted Land Use

Id. at p.2.

² Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. Affordable Housing 78, 81 (Fall 2002), available at: <https://www.bazon.org/LinkClick.aspx?fileticket=FZBvjKqK9hw%3D&tabid=241>.

health disabilities after neighbors testify at a zoning board hearing that the prospective tenants will endanger the safety of children attending a nearby elementary school.

- b) Several neighbors pool their resources to purchase property to keep it out of the hands of a non-profit supportive housing developer.
- c) A zoning board denies approval for a supportive housing development after neighbors complain that it violates a local ordinance prohibiting more than six unrelated individuals from living together.

In contrast to legitimate concerns based on the design, safety or building capacity, NIMBY opposition to supportive housing is based on stereotypes about a home's intended residents.³ It "is often grounded on stereotypical assumptions about people with disabilities and apparently equally unfounded concerns about the impact of such homes on surrounding property values. It is caused by attitudes that have a stigmatizing effect on people with mental health disabilities. It also exacerbates that stigma by fueling misconceptions and prejudice, and by injecting them into the local political process. Once triggered, it is difficult to quell."⁴

While NIMBY opposition often originates from neighbors of a proposed housing development, it is particularly pernicious when it seeps into the local government's land use and zoning decisions. Although many neighbors and governments promote and encourage supportive housing, "[u]ncooperative local governments or Not-In-My-Back-Yard (NIMBY) residents can effectively shutout affordable housing if allowed to do so.

³ Much has been written about the problem of local opposition to supportive and affordable housing. See Appendix B for a list of resources. For additional references, see also Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. Affordable Housing 78, 101 n.5, 105 n.14 (Fall 2002), available at:

<https://www.bazelon.org/LinkClick.aspx?fileticket=FZBvjKqK9hw%3D&tabid=241>

⁴ California Office of the Attorney General, *Adoption of a Reasonable Accommodation Procedure* at p.4 (May 15, 2001), available at:

http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf

Adequate resources cannot produce affordable housing without adequate local planning.”⁵

Fortunately, state and federal law protect supportive housing against many types of NIMBY opposition. And advocates have developed legal, political, media, and other strategies to minimize and manage NIMBY barriers. This paper summarizes many of these laws, discusses how they fit into an advocacy strategy that supportive housing, developers, advocates and residents can use to address NIMBY opposition, and offers policy recommendations for state and local governments. These recommendations are listed below, and are discussed in Chapter 5.

Recommendation #1: State and local governments should continue to support efforts to reduce stigma against people with mental health disabilities.

Recommendation #2: The state and local governments should take all possible steps to develop, fund, and promote affordable housing and supportive services for people with mental health disabilities – including seeing guidance from the discussion and recommendations contained in this paper.

Recommendation #3: The state should revise its *Olmstead* Implementation Plan to promote supportive housing for individuals with mental health disabilities who would otherwise be unnecessarily institutionalized or at risk of institutionalization.

Recommendation #4: Local governments should ensure that their land use, planning and zoning efforts enable supportive housing and discourage NIMBYism.

⁵ California Public Interest Law Project, Affordable Housing Law Project (PILP), *California Housing Element Manual* (3rd Ed. 2013) at p.2, available at: <http://pilpca.org/wp-content/uploads/2013/11/California-Housing-Element-Manual-3rd-Ed.-November-2013.pdf>

Chapter 2: The Importance of Supportive Housing

A. What is Supportive Housing?

While NIMBY opposition can target housing that serves any population, this paper focuses on NIMBY barriers to supportive housing⁶ for people with mental health disabilities. This section discusses the characteristics of supportive housing, how it is defined under California law, and some of the ways in which it is funded. Section B, below, discusses the importance of supportive housing for people with mental health disabilities.

California’s statutory definition of supportive housing is “housing with no limit on length of stay, that is occupied by the target population, and that is linked to onsite or offsite services that assist the supportive housing resident in retaining the housing, improving his or her health status, and maximizing his or her ability to live and, when possible, work in the community.”⁷ Any type of housing can be supportive housing if it meets this definition. Generally, the term “single-site” housing refers to people with disabilities living together in a building or complex of buildings, while “scattered-site” housing refers to residents living in apartments or houses located throughout the community.

The California Community Care Facilities Act exempts supportive housing from state licensing requirements if it provides “community living support services” and has all of the following characteristics:⁸

- A. It is affordable⁹ to people with disabilities.
- B. It is independent housing in which each tenant meets all of the following conditions:

⁶ “Supportive housing” is sometimes also known as “supported housing,” particularly in the context of housing for people with developmental disabilities.

⁷ Health & Safety Code §50675.14(b)(2); Government Code §65582(f).

⁸ Health & Safety Code §1504.5(c)(2).

⁹ Housing is considered “affordable” if rent and utilities or a mortgage payment, inclusive of principal, interest, taxes and insurance, does not consume more than 30% of a household’s income. Health & Safety Code §§50052.5, 50053; 25 Cal. Code Reg. §§6918, 6920.

- i. Holds a lease or rental agreement in his or her own name and is responsible for paying his or her own rent; and
 - ii. Has his or her own room or apartment and is individually responsible for arranging any shared tenancy.
- C. It is permanent, meaning that each tenant may stay as long as he or she pays his or her required share of rent and complies with the terms of his or her lease.
- D. Supportive housing providers are required to comply with applicable state and federal laws governing the landlord-tenant relationship.
- E. Participation in services or any particular type of service is not required as a condition of tenancy.

The Community Care Facilities Act defines “community living support services” as services that are voluntary and chosen by persons with disabilities in accordance with their preferences and goals for independent living.”¹⁰

¹⁰ Health & Safety Code §1504.5(c)(1). Examples of these services are:

- Supports that are designed to develop and improve independent living and problem solving skills;
- Education and training in meal planning and shopping, budgeting and managing finances, medication self-management, transportation, vocational and educational development, and the appropriate use of community resources and leisure activities; and
- Assistance with arrangements to meet the individual’s basic needs such as financial benefits, food, clothing, household goods, and housing, and locating and scheduling for appropriate medical, dental, and vision benefits and care.

All levels of government contribute to funding and administering supportive housing programs.¹¹ The availability of supportive housing in any community relies in large part on collaboration among federal, state and local governmental agencies that provide housing, mental health and other supportive services to people with low incomes and people with disabilities.

An important early source of funding for supportive housing in California was the state Mental Health Services Act (MHSA) Housing Program.¹² The MHSA program was established by executive order in 2006 to create permanent supportive housing for individuals who have a mental illness and are homeless or at risk of homelessness, and their families. The program was funded by one-time set-aside of funds from the MHSA (a state tax initiative), and was jointly administered by the California Department of Health Care Services (DHCS) and the California Housing Finance Agency (CalHFA).

Although the original state funding for MHSA housing has run out, other programs continue to fund supportive housing for people with mental health disabilities. For example, in 2013 the California legislature restructured the Veteran's Bond Act of 2008 authorizing \$600 in existing bond authority to fund housing for veterans, with an emphasis on supportive housing for veterans with disabilities.¹³ Other state and local supportive housing programs include the California Department of Housing and Community Development's (HCD's) Local Housing and Trust (LHTF) Program¹⁴, the

¹¹ For more information on these and other programs, see, e.g., Technical Assistance Collaborative (TAC), *Strategies for Creating Integrated Supportive Housing for People with Disabilities* (2013), available at:

<http://www.tacinc.org/knowledge-resources/publications/issue-briefs/strategies-for-creating-integrated-supportive-housing/>

California Budget Project, *Budget Backgrounder: A Primer on California's Housing Programs* (July 1, 2005), available at http://www.cbp.org/pdfs/2005/0505bb_housing.pdf; California Department of Housing and Community Development (HCD), *Incentives for Housing Element Compliance* (January 2009), available at: http://www.hcd.ca.gov/hpd/hrc/plan/he/loan_grant_hecompl011708.pdf; National Association of State Mental Health Program Directors (NASMHPD), *NASMHPD Policy Brief - Affordable Housing: The Role of the Public Behavioral Health System* (October 2011), available at:

http://www.nasmhpd.org/docs/Policy/PolicyBrief_Housing2011.pdf

¹² See DHCS, *MHSA Housing Program Semi-Annual Update* (April, 2013), available at:

¹³ See <http://www.hcd.ca.gov/fa/vets/>

¹⁴ See <http://www.hcd.ca.gov/fa/ahif/lhtf.html>

Low Income Housing Tax Credit program¹⁵, and taxpayer-funded and county-administered Full Service Partnership programs.¹⁶

Another important source of funding for supportive services is the Medi-Cal program, California's version of the joint federal-state Medicaid program. The Medi-Cal Specialty Mental Health program provides a wide array of services, including mental health services, medication support services, crisis intervention and stabilization, and targeted case management.¹⁷ Medi-Cal home and community-based waiver programs provide services to certain groups of individuals in their own homes or other community-based settings.¹⁸ 2014 revisions to Medicaid regulations for Home and Community Based Services (HCBS) waivers define the types of settings that are considered "home and community based" for the purposes of Medicaid waiver funding.¹⁹

The U.S. Department of Housing and Urban Development (HUD) also funds and administers supportive housing, including through the Community Development Block Grant (CDBG) Program.²⁰ CDBG funds are available mostly to larger cities and counties, known as "entitlement communities."²¹ Other federal programs include HUD's Section 811 Project Rental Assistance program,²² Continuum of Care program,²³ Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH)

¹⁵ See <http://www.treasurer.ca.gov/ctcac/tax.asp>

¹⁶ See http://www.dhcs.ca.gov/services/MH/Documents/FSP_FAQs_04-17-09.pdf

¹⁷ 9 C.C.R. §1810.247

¹⁸ See <http://www.dds.ca.gov/Waiver/Home.cfm>

¹⁹ 79 F.R. 9872. For information about these revisions, see <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>

²⁰ For information about the CDBG program, see HCD's website at: <http://www.hcd.ca.gov/fa/cdbg/>

²¹ Entitlement communities consist of: a) principal cities of Metropolitan Statistical Areas (MSAs); other metropolitan cities with populations of at least 50,000; and qualified urban counties with populations of at least 200,000 (excluding the population of entitled cities). See http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/entitlement.

²² See http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/progdesc/disab811

²³ See <http://portal.hud.gov/hudportal/HUD?src=/hudprograms/continuumofcare>

program²⁴; Home Investment Partnerships (HOME) program,²⁵ and Section 8 vouchers, including under the Veterans' Affairs Supportive Housing (VASH)²⁶ and Non-Elderly Disability (NED Category 2)²⁷ programs.

B. Why is Supportive Housing Important?

Supportive housing is recognized as an evidence-based best practice that allows people with mental health disabilities to live successfully in their communities.²⁸ The National Governors Association²⁹ and the National Association of State Mental Health Program Directors (NASMHPD)³⁰, as

²⁴ See <https://www.onecpd.info/homelessness-assistance/hearth-act/>

²⁵ See

http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/programs/home/

²⁶ See <http://portal.hud.gov/hudportal/HUD?src=/hudprograms/continuumofcare>

²⁷ See

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/ned

²⁸ See, e.g. TAC, *Permanent Supportive Housing: A Proven Solution to Homelessness* (2003), available at: <http://www.tacinc.org/knowledge-resources/publications/opening-doors/permanent-supportive-housing/>

Lisa K. Foster and Patricia Snowdon, *Addressing Long-Term Homelessness: Permanent Supportive Housing* (California Research Bureau CBR 03-012, 2003), available at: <http://www.library.ca.gov/crb/03/12/03-012.pdf>; Dennis P. Culhane et al., *Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing*, 13(1) Housing Policy Debate 107 (2002), available at:

http://repository.upenn.edu/cgi/viewcontent.cgi?article=1067&context=spp_papers; Sam Tsemberis & Ronda Eisenberg, *Pathways to Housing: Supported Housing for Street-Dwelling Homeless Individuals with Psychiatric Disabilities*, 51 *Psychiatric Services* 487 (2000), available at:

<http://ps.psychiatryonline.org/article.aspx?articleID=84342>

²⁹ National Governor's Association, Center for Best Practices, *Supportive Housing for People with Mental Illness: Regaining a Life in the Community* (September 25, 2007) at p.2, available at:

<http://housingtaskforce.org/resources/Supportive+Housing+for+People+with+Mental+Illness.pdf>

("supportive housing is a successful, cost-effective model that combines affordable housing with services to help people live more stable, productive lives").

³⁰ NASMHD, *NASMHPD Policy Brief - Affordable Housing: The Role of the Public Behavioral Health System* (October 2011) at p.1, available at:

http://www.nasmhpd.org/docs/Policy/PolicyBrief_Housing2011.pdf (research on supportive housing "has demonstrated positive impacts in terms of improved quality of life, housing stability, as well as health and behavioral health outcomes").

well as federal agencies including DOJ,³¹ HUD,³² the Surgeon General,³³ the Department of Health and Human Services Substance Abuse and Mental Health Administration (SAMHSA),³⁴ and the National Council on Disability,³⁵ have promoted supportive housing as a successful, cost-effective model for providing housing and services to people who would otherwise be institutionalized or at risk of institutionalization.³⁶

An important benefit of supportive housing is that it allows people with disabilities to live in the community, along with people who do not have disabilities. In the 1999 case of *Olmstead v. L.C.*, the U.S. Supreme Court held that the use of public funds to unnecessarily institutionalize people with disabilities violates the Americans with Disabilities Act (ADA)³⁷ by segregating these individuals from the rest of the population.³⁸ The 2014 revisions to HCBS Medicaid regulations recognize the integration mandate by providing that Medicaid services provided in home and community-based settings must be chosen by the individual, be integrated into the community and supportive of community activities including employment, facilitate the individual's choice in supportive services, and otherwise

³¹ DOJ, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* (2011), available at: www.ada.gov/olmstead;

³² HUD, *Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead* (2013), available at: portal.gov.hud

³³ U.S. Surgeon General, *Mental Health: A Report of the Surgeon General*, Chapter 4 (1999), available at: http://www.surgeongeneral.gov/library/mentalhealth/chapter4/sec6.html#human_services

³⁴ SAMHSA, *Building Your Program: Permanent Supportive Housing* (2010) at p.2, available at: <http://store.samhsa.gov/shin/content/SMA10-4510/SMA10-4510-06-BuildingYourProgram-PSH.pdf>; SAMHSA, *Transforming Housing for People with Psychiatric Disabilities: Report* (2006), available at: <http://research.policyparchive.org/17617.pdf>

³⁵ National Council on Disability, *Inclusive Livable Communities for People with Psychiatric Disabilities* (March 2008) at pp.17-26, available at: <http://www.ncd.gov/newsroom/publications/index.htm>

³⁶ See also, Judge David L. Bazelon Center for Mental Health Law (Bazelon Center), *A Place of My Own: How the ADA is Creative Integrated Housing Opportunities for People with Mental Illnesses* (March 2014), available at:

http://www.bazelon.org/portals/0/Where%20We%20Stand/Community%20Integration/Olmstead/A%20Place%20of%20My%20Own.%20Bazelon%20Center%20for%20Mental%20Health%20Law.pdf?utm_source=4.1.4_A+Place+of+My+Own+Report+&utm_campaign=3.27.14_APlaceofMyOwn&utm_medium=email

³⁷ 42 USC §12210 et seq.

³⁸ 527 U.S. 581 (1999).

promote individual rights such as privacy, dignity, respect and freedom from coercion and restraint.³⁹

The *Olmstead* case has resulted in advocacy efforts across the states to ensure that people with mental health and cognitive disabilities receive services in the least restrictive and most integrated setting that is appropriate to their desires and needs. This has resulted in a tension between advocates and housing providers who believe that the ADA requires the more integrative scattered-site model of supportive housing in all situations, and those who believe that *Olmstead's* emphasis on consumer choice supports an option of single-site housing as well.⁴⁰ The U.S. Department of Justice (DOJ) and HUD have both issued guidelines on interpreting the ADA's integration mandate.⁴¹ A full discussion of this issue is beyond the scope of this paper. However, Policy Recommendation No. 3 in Chapter 5 suggests some ways in which the state of California can use

³⁹ 79 F.R. 9872; Bazelon Center, *A Place of My Own: How the ADA is Creative Integrated Housing Opportunities for People with Mental Illnesses* (March 2014), available at: http://www.bazelon.org/portals/0/Where%20We%20Stand/Community%20Integration/Olmstead/A%20Place%20of%20My%20Own.%20Bazelon%20Center%20for%20Mental%20Health%20Law.pdf?utm_source=4.1.4_A+Place+of+My+Own+Report+&utm_campaign=3.27.14_APlaceofMyOwn&utm_medium=email

⁴⁰ For discussion of this issue, see, e.g. NASMHPD, *NASMHPD Policy Brief - Affordable Housing: The Role of the Public Behavioral Health System* (October 2011), available at: http://www.nasmhpd.org/docs/Policy/PolicyBrief_Housing2011.pdf; CSH, *Supportive Housing & Olmstead, Creating Opportunities for People with Disabilities* (July 2013), available at: http://www.csh.org/wp-content/uploads/2012/12/Supportive_Housing_Olmstead.pdf; Bazelon Center, *A Place of My Own: How the ADA is Creative Integrated Housing Opportunities for People with Mental Illnesses* (March 2014), available at: http://www.bazelon.org/portals/0/Where%20We%20Stand/Community%20Integration/Olmstead/A%20Place%20of%20My%20Own.%20Bazelon%20Center%20for%20Mental%20Health%20Law.pdf?utm_source=4.1.4_A+Place+of+My+Own+Report+&utm_campaign=3.27.14_APlaceofMyOwn&utm_medium=email; Bazelon Center, *Just Like Where You and I Live: Integrated Housing Options for People with Mental Illnesses* (March 19, 2004), available at: <https://www.bazelon.org/LinkClick.aspx?fileticket=4sZjOa313oI%3D&tabid=245>; Bazelon Center, *Supportive Housing: The Most Effective and Integrated Housing for People with Mental Disabilities*, available at: http://www.bazelon.org/LinkClick.aspx?fileticket=q6FsuL6o_Jw%3D&tabid=126

⁴¹ DOJ, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* (2011), available at: www.ada.gov/olmstead ; HUD, *Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead* (2013), available at: <http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf>

its *Olmstead* implementation efforts to increase the availability of supportive housing for people with mental health disabilities.

Chapter 3: Legal Protections against NIMBY Barriers

A. Overview

Laws that protect people with disabilities against neighborhood and local government opposition to supportive housing fall roughly into two categories: 1) land use and planning laws, which require communities to plan for affordable and supportive housing and limit how jurisdictions can restrict that housing through the zoning process; and 2) fair housing laws, which prohibit discrimination against people with disabilities and provide them with a right to reasonable accommodations. These laws exist on both the state and federal levels, and some of the provisions overlap. Appendix A contains a chart comparing the laws that most directly relate to NIMBY barriers to supportive housing.

This chapter describes land use and fair housing laws and discusses how they can be applied in different situations. While it is important for housing developers and advocates to understand their rights and the rights of people with disabilities under the law, it is also important to consider strategies for managing local opposition without putting legal rights to the test. Chapter 4 discusses how these other types of strategies can work with legal advocacy to build community support and help protect supportive housing from NIMBY barriers.

B. Land Use, Planning and Zoning Laws

1. The Significance of Zoning

Under powers granted under the state and federal Constitutions to protect public health, safety and welfare, cities and counties use the zoning process to regulate where certain types of housing can and cannot be located.⁴² Local governments use land use and zoning powers to identify

⁴² U.S. Constitution, Am. X (reserving inherent powers to the states); California Constitution, Article XI Section 7 (a city or county may “make and enforce within its limits all local, police, sanitary, and other ordinances or regulations not in conflict with the general laws.” *See also Euclid v. Amber Realty Company*, 272 U.S. 365 (1926).

important issues (such as new growth, housing needs, and environmental protection), project future demand for services (such as sewer, water and roads), and establish goals and policies for directing and managing growth.⁴³

Local land use and zoning ordinances classify land uses into zones such as industrial, single-family residential, multi-family residential, neighborhood commercial and agricultural.⁴⁴ These categories establish how a property owner can use land in a particular zone “by right,” meaning that the use is permitted without having to apply for discretionary governmental review. This review often comes in the form of application for a Conditional Use Permit (CUP), Special Use Permit, or Planned Unit Development Permit.

Most zoning ordinances identify certain land uses which may be allowed in a particular zone with the approval of a CUP or similar application for discretionary review. Approval of a non-designated land use can also take the form of a zoning variance, which is a limited waiver of land use or zoning restrictions for a particular zone and/or development standards within that zone or, less commonly, an application to have an area re-designated and/or re-zoned to include a particular use. All of these processes require applications, public hearings, and approval by the local zoning authority. These hearings are held before a local zoning board and/or legislative body, are open to the public, and include testimony by interested parties. NIMBY opposition often arises, and can easily be fueled, through this public approval process.⁴⁵

⁴³ For more information on the zoning process, see California Governor’s Office of Planning and Research, *A Citizen’s Guide to Planning*, available at: http://ceres.ca.gov/planning/planning_guide/plan_index.html.

⁴⁴ Licensed residential facilities that serve six or fewer people with mental health disabilities, and mental health facilities, are specifically protected from local zoning authorities by state laws known as “zoning preemptions.” For example, Section 1566.3 of the Health and Safety Code prevents local governments from imposing zoning restrictions on licensed residential facilities serving six or fewer residents, if those restrictions are not imposed on other types of housing in the same zone. In addition, Section 5120 of the Welfare and Institutions Code provides that mental health facilities serving more than six people must be allowed to be located anywhere that nursing facilities and hospitals can be located. Because supportive housing does not fall under categories of licensed residential or mental health facilities, it is not protected by these zoning preemptions.

⁴⁵ See, e.g., California Office of the Attorney General, *Adoption of a Reasonable Accommodation Procedure* (May 15, 2001) at p.4, available at: http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf. *When NIMBY opposition does arise, developers and*

Zoning decisions are made by appointed committees that have various titles and responsibilities, but are often referred to as “planning commissions” or “zoning boards.”⁴⁶ These entities can be heavily influenced by local public opinion. In smaller communities, word of mouth and personal relationships may have a great impact on how local officials exercise their zoning authority. In large communities, neighborhood councils or similar groups may track local land use applications, meet about them, and issue recommendations to the zoning board.⁴⁷ Although these recommendations are not binding, the neighborhood councils often carry a great deal of weight with the government officials on the local zoning board.

Since the enactment of Senate Bill No. 2 (SB 2) in 2008, zoning codes must treat transitional and supportive housing as a residential use of property, and can subject them only to those restrictions that apply to other residential dwellings of the same type in the same zone.⁴⁸ This applies to supportive housing that meets the state’s statutory definition, whether or not it meets the criteria for a licensing exemption under the Community Care Facilities Act.⁴⁹ Developers will often try to site supportive housing developments in zones that allow residential uses by right, in order to avoid the need for public hearings and approval processes. However, in some communities this is becoming increasingly difficult, as for-profit developers

[advocates can use public as well as private processes to manage it. Some of these advocacy strategies are discussed in Chapter 4.](#)

⁴⁶ This paper will refer to these entities as “zoning boards” or “zoning authorities.”

⁴⁷ Los Angeles is an example of a large city with an active neighborhood council which advise its zoning authority.

⁴⁸ See Stats. 2007, Ch. 633 (SB 2), *codified at* Government Code §65583(a)(5). See also HCD, *Memorandum: Senate Bill 2 – Legislation Effective January 1, 2008: Local Planning and Approval for Emergency Shelters and Transitional and Supportive Housing, (Updated April 10, 2013)* http://www.hcd.ca.gov/hpd/sb2_memo050708.pdf

⁴⁹ SB 2 uses the Health and Safety Code definition of supportive housing: “housing with no limit on length of stay, that is occupied by the target population, and that is linked to onsite or offsite services that assist the supportive housing resident in retaining the housing, improving his or her health status, and maximizing his or her ability to live and, when possible, work in the community.” Government Code §65583(a)(2)(f).

are often able to purchase desirable property more quickly than non-profit developers can arrange financing.⁵⁰

Zoning authority has historically been interpreted as broad and “elastic,” giving local authorities a great deal of discretion to determine how the land within their borders is used.⁵¹ When this discretion is influenced by neighbors or elected officials who have prejudicial ideas about people with low incomes or mental health disabilities, zoning authority can pose a significant barrier to the development of affordable and supportive housing. The development of community planning mechanisms such as housing elements and consolidated plans, and the enactment and enforcement of fair housing laws protecting people with disabilities from discrimination, have resulted in greater oversight and restriction of local authority over zoning and land use.

2. Housing Element and Consolidated Plan Obligations

a. Introduction to Housing Elements & Consolidated Plans

The California Government Code provides the framework within which local jurisdictions carry out their zoning and land use authority. The Government Code requires that every city and county⁵² in the state adopt a general plan regulating its land use and planning decisions, and that all land use and planning decisions must be consistent with the general plan.⁵³ The federal government imposes similar consolidated plan requirements as a condition of receiving federal funding for affordable housing.⁵⁴ Since zoning restrictions and hearing requirements often open the door to NIMBY opposition, it is important for advocates and developers to be familiar with

⁵⁰ See Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. Affordable Housing 78, 103 n.11 (Fall 2002), available at: <https://www.bazelon.org/LinkClick.aspx?fileticket=FZBvjkgK9hw%3D&tabid=241>

⁵¹ See, e.g., *Euclid*, 272 U.S. at 387 (1926); *Agins v. City of Tiburon*, 447 U.S. 255, 260-263 (1980).

⁵² General plan requirements do not apply to charter cities unless the city elects to be bound by them. Government Code §65803.

⁵³ Government Code §65860.

⁵⁴ 24 C.F.R. §91.1 *et seq.*

their community's general plan and consolidated plan, and understand how to use them as advocacy tools.

i. Housing Elements

Each jurisdiction's general plan must contain seven elements, including a housing element that makes "adequate provision for the housing needs of all economic segments of the community."⁵⁵ The Government Code recognizes that the "availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian...is a priority of the highest order."⁵⁶ The law further recognizes that the "early attainment of this goal requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels."⁵⁷

Each new housing element must evaluate the community's prior housing elements and: 1) assess current housing needs, including needs for people with low incomes and people with disabilities; 2) identify existing resources, as well as governmental and non-governmental constraints, that are relevant to meeting those needs; 3) determine goals, policies and objectives to meet the community's housing needs; and 4) prepare action programs to address the identified needs, constraints and achieve the community's housing goals.⁵⁸

Housing elements are also tied to a community's zoning authority through a state statute known as the "Least Cost Zoning Law." This law provides that in exercising its authority to zone for land uses and in revising its housing element, a city or county "shall designate and zone sufficient vacant land for residential use with appropriate standards, in relation to zoning for nonresidential use, and in relation to growth projections of the general plan

⁵⁵ Government Code §§65580, 65583.

⁵⁶ Government Code §65580(a).

⁵⁷ Government Code §65580(b).

⁵⁸ See generally Government Code §§65580 – 65589.8. For more information on housing element law, see, e.g., PILP, *California Housing Element Manual* (3rd Ed. 2013), available at: <http://pilpca.org/wp-content/uploads/2013/11/California-Housing-Element-Manual-3rd-Ed.-November-2013.pdf>

to meet housing needs for all income categories as identified in the housing element of the general plan.”⁵⁹

In creating housing elements, local governments must consider advisory guidelines adopted by HCD.⁶⁰ Jurisdictions must review their housing elements “as appropriate,” but no less than each four to eight year planning period, depending on the jurisdiction.⁶¹ The draft housing element for each planning period must be submitted to HCD for review, and HCD will make written findings as to whether the draft substantially complies with housing element law. If the draft does not comply, the jurisdiction may either revise it to achieve compliance, or adopt the element with findings that explain why it the jurisdiction has determined that it is in compliance despite HCD’s findings. If HCD finds that a housing element or amendment is in substantial compliance with the law, that element will be presumed to be valid unless a party establishes otherwise.⁶²

Local governments face consequences if they do not adopt or implement housing elements according to legal requirements. If a housing element is not in compliance with the law, a court can order compliance, and suspend any development, except affordable housing, until compliance is made.⁶³ A zoning action that is inconsistent with a housing element must be brought into compliance within 60 days.⁶⁴ Failure to properly implement a housing element can lead to a court order compelling implementation of the element’s program of action, or to compel re-zoning.⁶⁵ If a local government fails to “identify or make adequate sites available” to accommodate the regional housing needs that are assigned to it each planning period, those unmet housing needs carry over to the next planning period and are added to the jurisdiction’s regional housing needs for the new planning period. The local government also must zone or rezone

⁵⁹ Government Code §§65913, 65913.1.

⁶⁰ Government Code §65585(a).

⁶¹ Government Code §65588.

⁶² Government Code §65589.3.

⁶³ Government Code §§65754(a), 65755(b).

⁶⁴ Government Code §§65587(c); 65754(b).

⁶⁵ Government Code §§65583(c)(1)(A); 65583(h).

sufficient sites to accommodate its carryover within the first year of the new planning period.⁶⁶

Litigation to challenge different actions involving the housing element (e.g., adoption, revision, consistency of other development approvals with the housing element, or implementation of a housing element program) is subject to complex statute of limitations rules that are dependent on the specific nature of the challenge. They can be as short as 90 days or, in some cases, as long as three years.⁶⁷ It is important to discuss these deadlines with an attorney very early in the process, if litigation is contemplated. If the zoning authority has given appropriate notice or the action is brought to promote the development of affordable housing, “pre-litigation” requirements also may be necessary to exhaust administrative remedies. For example, litigation may be limited to issues raised at a public hearing or through written comments, or a pre-lawsuit demand letter and an opportunity to cure may be required.⁶⁸ Once a housing element has been adopted, a party may bring a writ of mandate under Section 1085 of the Code of Civil Procedure in order to challenge the adequacy of the housing element or enforce the program actions of that element subject to the relevant statute of limitations.⁶⁹

A community may also be ineligible for state or federal housing or other infrastructure funds if its housing element is not in compliance with state law. HCD has published a list of funding programs for affordable housing and infrastructure improvements, including the CDBG and HOME programs, for which housing element compliance is used as a rating and ranking criteria when the primary applicants are local governments.⁷⁰ HCD prefaces this list by acknowledging that the “law recognizes that in order for the private sector to adequately address housing needs and demand, local governments must adopt land-use plans and regulatory schemes that

⁶⁶ Government Code §§65584; 65584.09.

⁶⁷ Government Code §§65009(c), 65009(d); 65587; Code of Civ. Proc. §338(a)

⁶⁸ Government Code §§65009(b); 65009(d).

⁶⁹ Government Code §65583(h).

⁷⁰ HCD, *Incentives for Housing Elements Compliance*, available at http://www.hcd.ca.gov/hpd/hrc/plan/he/loan_grant_hecompl011708.pdf

provide opportunities for, and do not unduly constrain, housing development.”⁷¹

ii. Consolidated Plans

Similar to state housing element requirements, federal law also requires local governments that receive certain federal housing funds to plan for affordable and supportive housing. As discussed above, HUD provides grants to state and local governments to fund affordable and supportive housing. In order to receive these funds, cities, counties and the state of California (on behalf of rural jurisdictions) must prepare a consolidated plan.⁷²

The consolidated plan must identify and prioritize affordable housing needs, identify barriers to the development of affordable housing, and establish a strategic plan that addresses those needs and barriers.⁷³ The plan includes a housing and homeless needs assessment, market analysis and strategic plan, and must be submitted to HUD every five years.⁷⁴ The plan also includes a summary of citizen participation and consultation in the planning process, an annual action plan describing the actions the jurisdiction will take each year to carry out its strategic plan, and certifications of compliance⁷⁵ which must be submitted on an annual basis.⁷⁶ Any housing activities that are supported by federal funds must be consistent with the jurisdiction’s consolidated plan.⁷⁷

HUD ensures that the elements of a jurisdiction’s consolidated plan are appropriately carried out through a system of self-monitoring and performance reporting, along with direct annual performance reviews completed by HUD. Every consolidated plan must describe standards and

⁷¹ *Id.*

⁷² For more information about consolidated plans, see, e.g. Ed Gramlich, *Consolidated plan and Community Block Grant Advocacy*, 32 Clearinghouse Review 173 (1998-1999), available at: <http://heinonline.org/HOL/LandingPage?handle=hein.journals/clear32&div=24&id=&page=>

⁷³ 24 C.F.R. § 91.1.

⁷⁴ 24 C.F.R. § 91.15(b)(2).

⁷⁵ See 24 C.F.R. § 91.225 for a complete listing of the certification categories required to be included in local governments’ annual consolidated plan submissions.

⁷⁶ 24 C.F.R. § 91.15(b)(1).

⁷⁷ 24 C.F.R. § 91.2.

procedures that the jurisdiction will use to monitor the activities carried out in furtherance of the plan, and to ensure long-term compliance with the requirements of the programs involved.⁷⁸ Jurisdictions must also include various certifications in their annual action plan submission, including a statement that the plan will “affirmatively further fair housing.”⁷⁹

Every jurisdiction with an approved consolidated plan must also submit annual performance reports to HUD, summarizing the progress it has made in carrying out its strategic plan and its annual action plan.⁸⁰ At least annually, HUD conducts performance reviews of each jurisdiction with an approved consolidated plan, including site visits by HUD employees to assess management of funds, compliance with the consolidated plans, accuracy of the performance reports, the extent to which the jurisdiction made progress towards the overall goals of the community planning and development programs within the consolidated plan, and the efforts to ensure that the programs are administered in compliance with contractual agreements and the requirements of law.⁸¹

b. Needs Assessment

A housing element’s analysis of needs, resources and constraints begins with an assessment of the community’s existing and future housing needs. This includes an inventory of land “suitable for residential development including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites.”⁸² In 2008, SB 2 specified that this includes assessing a community’s unmet needs for emergency shelter and transitional and supportive housing, and designation of adequate zoning districts that permit emergency shelters to be developed by right.⁸³

⁷⁸ 24 C.F.R. §§ 91.230 (local), 91.330 (state), 91.430 (federal HOME consortia).

⁷⁹ 24 C.F.R. §§ 91.225 (local), 91.325 (state), 91.425 (federal HOME consortia).

⁸⁰ 24 C.F.R. § 91.520(a).

⁸¹ 24 C.F.R. § 91.525.

⁸² Government Code §65583(a)(3). “Land suitable for residential development” is defined in Government Code §65583.2.

⁸³ Government Code §§65583(a)(4), 5). SB 2 uses the Health and Safety Code definition of supportive housing: “housing with no limit on length of stay, that is occupied by the target population, and that is linked to onsite or offsite services that assist the supportive housing resident in retaining the housing,

Each region in California has a coalition of local governments that is assigned a Regional Housing Needs Assessment (RHNA) by the state. This local “council of governments” then apportions a “fair share” of the regional housing needs for all income groups (very low, low, moderate, and above-moderate) to each jurisdiction in the region.⁸⁴ In addition to identifying the community’s RHNA responsibilities, the Housing Element must also include an “analysis of any special housing needs, such as those of ... persons with disabilities...”⁸⁵ This analysis must include:

1. A quantification of the total number of persons and households in the special housing needs group;
2. A quantification and qualitative description of the need, including a description of the potential housing problems faced by the special needs groups, a description of any existing resources or programs, and an assessment of unmet needs; and
3. Identification of potential program or policy options and resources to address the need.⁸⁶

Consolidated plans must also include an assessment of the community’s housing needs. This includes a description of the categories of people in need of housing assistance, a description of the nature and extent of sheltered and unsheltered homeless populations, and an estimate of

improving his or her health status, and maximizing his or her ability to live and, when possible, work in the community.” Government Code §65583(a)(2)(f). For more information on how SB 2 amended housing elements law and the Housing Accountability Act, see HCD, Memorandum: Senate Bill 2 – *Legislation Effective January 1, 2008: Local Planning and Approval for Emergency Shelters and Transitional and Supportive Housing*, (May 7, 2008), available at: http://www.hcd.ca.gov/hpd/SB_2_memo050708.pdf; 21 Elements, *San Mateo Housing Element Update Kit: SB 2 Policy and Technical Paper* (October 10, 2008), available at: <http://21elements.com/Resources/table-of-contents.html>; 21 Elements, *Zoning in the Wake of SB 2: Best Practices for Emergency, Supportive and Transitional Housing*, available at:

<http://21elements.com/Resources/table-of-contents.html>

⁸⁴ Government Code §65584.

⁸⁵ Government Code §65583(a)(7).

⁸⁶ HCD, *Guidance on Persons with Disabilities*, available at: http://www.hcd.ca.gov/hpd/housing_element2SHN_disabilities.php.

people, including people with disabilities, who are not homeless but require supportive housing.⁸⁷

c. Constraints Analysis

Housing elements must identify and address potential and actual governmental constraints to meeting the community's identified housing needs. This specifically includes governmental constraints to the development of housing for people with disabilities.⁸⁸ This analysis must evaluate land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures.⁸⁹ It must also "demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of [housing for people at all income levels] and from meeting the need for housing for persons with disabilities, *supportive housing*, transitional housing, and emergency shelters..."⁹⁰ Through SB 2 in 2008, the legislature specified that zoning codes must treat transitional and supportive housing as a proposed residential use and subject only to the same restrictions that apply to other residential uses for the same type of dwelling in the same zone.⁹¹

In addition to addressing governmental constraints, housing elements must include an analysis of potential and actual nongovernmental constraints on the maintenance, improvement, or development of housing for all income levels.⁹² The statute provides that nongovernmental constraints include the availability of financing, the price of land, and the cost of construction.⁹³ Nongovernmental constraints may also include NIMBY barriers to affordable housing or housing for people with disabilities.

Similarly, to be able to certify that a consolidated plan affirmatively furthers fair housing, the city, county or state must prepare and implement an

⁸⁷ 24 C.F.R. §91.205(a).

⁸⁸ Government Code §65583(a)(5).

⁸⁹ *Id.*

⁹⁰ *Id.* (Emphasis added).

⁹¹ *Id.*

⁹² Government Code §65583(a)(6).

⁹³ *Id.*

Analysis of Impediments to fair housing opportunities.⁹⁴ An Analysis of Impediments identifies local barriers to equal housing for all groups that are covered under the federal Fair Housing Act, including people with mental and physical disabilities, and indicates actions that the jurisdiction will take to overcome these impediments.⁹⁵

d. Program of Action

Housing elements must include “a statement of the community’s goals, quantified objectives, and policies relative to the maintenance, preservation, improvement, and development of housing.”⁹⁶ This leads to a program of action in which the jurisdiction must identify steps that will be taken to make sites available as necessary to meet the community’s RHNA obligation, and to “facilitate and encourage the development of a variety of types of housing for all income levels, including ... supportive housing...”⁹⁷ The action plan must “address and, where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing for persons with disabilities.”⁹⁸ The action plan must “remove constraints to, and provide reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities.”⁹⁹ It must also “promote housing opportunities for all persons” regardless of certain personal characteristics of the tenants, including disability.¹⁰⁰

If a housing element does not identify enough sites to meets its RHNA obligation for very low and low-income households, the plan of action must provide for this capacity in zones that permit owner-occupied and multi-family residential use by right.¹⁰¹ Residential “use by right” means “that the local government’s review of the owner-occupied or multifamily residential

⁹⁴ 24 C.F.R. §91.225(a)(1).

⁹⁵ See HUD, *Fair Housing Planning Guide, Vol.1* (March 1996), available at: www.hud.gov/offices/fheo/images/fhpg.pdf

⁹⁶ Government Code §65583(b).

⁹⁷ Government Code §65583(c)(1).

⁹⁸ Government Code §65583(c)(3).

⁹⁹ *Id.*

¹⁰⁰ Government Code §65583(c)(5).

¹⁰¹ Government Code §65583.2(i).

use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval.”¹⁰²

Local governments must provide in their housing elements a program that provides reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, people with disabilities.¹⁰³ The reasonableness of an accommodation is determined by state and federal fair housing laws, as discussed in Section C, below. Examples of reasonable accommodations that might be appropriate for supportive housing for people with mental health disabilities include waiving a spacing requirement or a prohibition against residential uses in a commercial zone so that a home can be built near mental health services, or waiving a fence height restriction so that tenants who fear unprotected spaces can use the backyard.¹⁰⁴

In evaluating a program of action, HCD will check to make sure it contains an adequate reasonable accommodations provision.¹⁰⁵ The California Office of the Attorney General, and the U.S. Department of Justice (DOJ) and HUD, have issued statements encouraging jurisdictions to adopt reasonable accommodation procedures into their zoning and land use laws, and to publicize the availability of these procedures in the community.¹⁰⁶ The Attorney General’s statement emphasizes that CUP and variance procedures do not substitute for reasonable accommodations procedures, since fair housing laws provide additional protection to people with disabilities who require accommodations.¹⁰⁷

¹⁰² Government Code §65583.2(j).

¹⁰³ Government Code §65583(c)(3).

¹⁰⁴ See Mental Health Advocacy Services (MHAS), *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* at pp.5, 11 (February 2005), available at: <http://www.mhas-la.org/developerguide3-9-05.pdf>

¹⁰⁵ See HCD, *Model Ordinance for Providing Reasonable Accommodations Under Federal and State Fair Housing Laws*, available at: http://www.hcd.ca.gov/hpd/housing_element2/documents/MODEL_REASONABLE_ACCOMODATION_ORDINANCE.pdf

¹⁰⁶ California Office of the Attorney General, *Adoption of a Reasonable Accommodation Procedure* (May 15, 2001), available at: http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf; Joint Statement of DOJ and HUD, *Group Homes, Local Land Use and the Fair Housing Act* (August 18, 1999), available at: http://www.justice.gov/crt/about/hce/final8_1.php

¹⁰⁷ California Office of the Attorney General, *Adoption of a Reasonable Accommodation Procedure* (May 15, 2001), available at: http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf

e. Public Participation Requirements

A housing element's program of action must include and describe "a diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element."¹⁰⁸ Opportunities for public participation include participating in drafting workshops and public hearings related to the housing element, and submitting comments to HCD as part of the approval process.¹⁰⁹

Similarly, each consolidated plan must contain a "citizen participation plan" which provides for and encourages public involvement in the preparation of the consolidated plan, including the strategic plan and performance reports.¹¹⁰ The governmental entity must hold public hearings at accessible locations and convenient times, and must respond in writing to any written comments that are submitted by the public.¹¹¹

3. CA Housing Accountability Act – Government Code Section 65589.5

The Housing Accountability Act (HAA), previously known as California's "Anti-NIMBY law," can help combat neighborhood opposition to supportive housing that is cited for a zone that requires approval for residential use. The HAA requires that zoning boards make specific written findings before denying approval of a housing development or imposing unreasonable conditions on approval, and allow a court to overturn the board's decision if these requirements are not met. Enacted in 1984, the HAA recognizes that the "lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California".¹¹² The Act further recognizes that a consequence of this shortage is "discrimination against low-income and minority households."¹¹³

¹⁰⁸ Government Code §65583(c)(8).

¹⁰⁹ HCD, *Guidance on Persons with Disabilities*, available at: http://www.hcd.ca.gov/hpd/housing_element2/GS_publicparticipation.php

¹¹⁰ 24 C.F.R. §91.105.

¹¹¹ 24 C.F.R. §91.105(b).

¹¹² Government Code §65589.5(a)(1).

¹¹³ Government Code §65589.5(a)(3).

To address these issues, the HAA prohibits a local jurisdiction from disapproving a proposed housing development,¹¹⁴ or imposing conditions on approval that make the development infeasible, unless it makes one of five specific written findings based on substantial evidence in the record. These findings are:

- a. The locality has adopted an up to date housing element that is in substantial compliance with state law, and the housing development is not needed for the community to meet its fair share RHNA obligations for very low, low or moderate-income housing;
- b. The development project would have a specific, adverse impact upon the public health or safety, and there is no feasible¹¹⁵ method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable;
- c. The denial of the project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable;
- d. The project is proposed on certain types of land zoned for agriculture or resource preservation; or
- e. The project is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation, and the jurisdiction has adopted a valid housing element.¹¹⁶

¹¹⁴ In 2008, SB 2 clarified that transitional and supportive housing are considered "housing developments" under the Housing Accountability Act. Government Code §65589.5(h)(2)(C). In 2011, a state Court of Appeal held that the HAA refers to all proposed housing developments, not just affordable housing. *Honchariw v. City of Stanislaus*, 200 Cal. App. 4th 1066 (2011).

¹¹⁵ "Feasible" is defined as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Government Code §65589.5(h)(1).

¹¹⁶ Government Code §65589.5(d). The statute specifies that the last item on this list cannot be used to disapprove or conditionally approve a housing development project if the development project is

An applicant for approval of a housing development, or any person who would be eligible to apply for residency in the development, may sue to enforce the HAA through a writ of mandate filed under Code of Civil Procedure Section 1094.5.¹¹⁷ In these proceedings, the local government has the burden of proving that its actions comply with the HAA.¹¹⁸ As discussed above with regard to housing elements, litigation challenging the decision of a zoning authority under the HAA may be subject to statute of limitations as short as 90 days.¹¹⁹ If a court finds that the local government denies or unreasonably conditions approval of a housing development without making one of the required findings in writing, or without providing substantial evidence to support one of the findings, it must order the government to comply with the HAA within 60 days.¹²⁰ This may include an order for the government to approve the development.¹²¹ If the government fails to comply, the court may issue “further orders as provided by law to ensure that the purposes and policies of this section are fulfilled.”¹²²

4. Using Land Use, Planning and Zoning Laws as Advocacy Tools to Address NIMBY Opposition

As discussed below, housing providers and advocates can use the public participation mandates of the housing element and consolidated plan processes to help ensure that their local governments identify and analyze their needs for affordable and supportive housing, and develop and implement programs that will address those needs. These laws, as well as the Housing Accountability Act and the fair housing laws discussed in Section C, below, can also be used to challenge a denial in court if necessary. The role of these laws in a larger advocacy strategy is discussed in Chapter 4. Keep in mind that all of these laws are subject to

proposed on a site that is identified as suitable or available for very low, low-, or moderate-income households in the jurisdiction’s housing element, and consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation. Government Code §65589.5(d)(5)(a).

¹¹⁷ Government Code §§65589.5(k),(m).

¹¹⁸ Government Code §65589.6.

¹¹⁹ Government Code §65509; *Stockton Citizens for Sensible Planning v. City of Stockton*, 210 Cal.App.4th 1484 (3d Dist. 2012).

¹²⁰ Government Code §65589.5(k).

¹²¹ *Id.*

¹²² *Id.*

statutes of limitations and other time frames, including exhaustion of administrative remedies, which should be discussed with an attorney very early in the process.¹²³

a. Ensuring that Housing Elements and Consolidated Plans Comply with Applicable Laws

Housing elements and consolidated plans can be important advocacy tools for supportive housing developers.¹²⁴ They can be used to protect a proposed housing development from actual or potential NIMBY barriers, and to create a zoning code that discourages NIMBY opposition and minimizes its impact on affordable and supportive housing. The housing elements and consolidated plan processes can also be used to educate neighbors and public officials about the need to plan for affordable and supportive housing.

Section B(2), above, discusses what housing elements and consolidated plans should address. In general, these documents must identify the housing needs of various groups, including people with low incomes and people with disabilities, and plan to meet those needs. Housing developers and advocates should make sure that their community's planning documents adequately identify its housing needs and constraints, that they adequately plan to address those needs and constraints, and that the programs of action are, in fact, being carried out.

In *Hoffmaster v. City of San Diego*,¹²⁵ the California Court of Appeal emphasized the importance of housing elements in controlling NIMBY opposition. The *Hoffmaster* court invalidated a 1500 foot separation requirement for homeless shelters contained in San Diego's zoning

¹²³ For more on using housing elements law in advocacy for supportive housing, see PILP, *Laws Affecting the Location & Approval of Affordable Housing for Families and Homeless People: How They Work & How to Use Them* (March 2000) at pp.7, 22, available at: <http://pilpca.org/wp-content/uploads/2010/10/CASCMannual-Title.pdf>

(note that this manual was published before the adoption of Senate Bill 2 in 2008).

¹²⁴ For a guide to public participation in the housing element process, see PILP, *California Housing Element Manual* at pp. 71-90 (3rd Ed. 2013), available at: <http://pilpca.org/wp-content/uploads/2013/11/California-Housing-Element-Manual-3rd-Ed.-November-2013.pdf>

¹²⁵ 55 Cal.App.4th 1098 (4th Dist. 1997).

ordinance because its housing element did not adequately identify sites to meet the needs of people who are homeless. The court held that “[a]dequate funding and ownership of land does not equate to available usable sites, absent a program of zoning development controls, meaningful regulatory concessions and incentives which will permit and encourage such development.” The court went on to make an explicit link between the housing element’s site analysis and NIMBY barriers to homeless shelters: “[F]or identification to be meaningful, it must necessarily be specific. It must set forth sites which will be available to be developed, without restrictive zoning burdens which combined with the NIMBY (Not In My Back Yard) factors...become insurmountable or produce protracted delays and deterrent cost increases.”¹²⁶

When proposing a supportive housing project, housing developers and advocates can use favorable housing elements and consolidated plans to bolster applications for funding and/or zoning approval. Before any NIMBY opposition arises, the community’s planning documents can be used to support a proposal at the application stage. If NIMBY opposition arises, favorable aspects of housing elements and consolidated plans can be used in legal, public relations and other advocacy strategies.

If the community’s planning documents do not support a proposed supportive housing development, consider using the public participation processes to have input into the next draft of the housing element and/or consolidated plan. Check to see if the housing element has been approved by HCD, and the consolidated plan has been approved by HUD. If they have not been approved, use that as an opportunity to have input into revisions that will bring the planning documents into compliance. If the planning documents are inadequate, “this is the time to make the jurisdiction aware of its obligation to plan *for* affordable housing, not against it.”¹²⁷

¹²⁶ *Id.* at 1114

¹²⁷ PILP, *Laws Affecting the Location & Approval of Affordable Housing for Families and Homeless People: How They Work & How to Use Them* (March 2000) at p. 21, available at: <http://pilpca.org/wp-content/uploads/2010/10/CASCMannual-Title.pdf>

Housing elements and consolidated plans should specifically address the community’s needs, constraints, and plans with regard to supportive housing. “One of the best strategies that a jurisdiction can use to develop programs to eliminate barriers to supportive housing is simply to take existing programs and policies designed to reduce barriers to affordable housing and modify them so that they explicitly include supportive housing.”¹²⁸ Recommendation #4 in Chapter 5 includes some considerations for local governments in ensuring that their housing elements and consolidated plans enable supportive housing and discourage NIMBYism.

The Housing Accountability Act is also an important tool when zoning approval for a supportive housing development is denied, or is granted under unreasonable conditions, based on NIMBY opposition without adequate written findings by the local government.¹²⁹ Because the law requires specific written findings with substantial factual support, it can provide local officials with a basis for approving a housing project that faces NIMBY opposition. For example, a zoning board may deny a Conditional Use Permit (CUP) after neighbors testify at a planning commission that the housing development would cause traffic problems and “overcrowding” in the neighborhood. If the zoning board did not make written findings about these concerns and relied only on the planning commission minutes – or if it did make written findings but they are not all supported by substantial evidence - the decision may be overturned. A zoning ordinance that has the effect of denying zoning applications can also be challenged and overturned if it does not meet the requirements of the HAA.¹³⁰

¹²⁸ See 21 Elements, *San Mateo Housing Element Update Kit: SB 2 Policy and Technical Paper* at p.15 (October 10, 2008), available at: <http://21elements.com/Resources/table-of-contents.html>;

¹²⁹ See *Honchariw v. City of Stanislaus*, 200 Cal. App. 4th 1066 (2011)(invalidating county’s denial of proposed housing development on “health and safety” grounds without written findings).

¹³⁰ See, *Hoffman Street, LLC v. City of West Hollywood*, 179 Cal.App.4th 754 (2009)(invalidating extension of city’s interim zoning ordinance prohibiting the issuance of permits or other approvals for the development of any “new multi-family structures” in certain zoning districts based on inadequate written findings).

b. Ensuring that Proposed or Existing Restrictive Zoning Ordinances Comply with Local Planning Documents

While it is important for a community to have current and adequate land use planning documents, their practical value is limited if they are not incorporated into the zoning code. When housing providers determine whether a supportive housing project can be sited by right in a particular zone, or when local officials consider an application for a CUP or a variance, they will consult the local zoning code rather than the planning documents on which the code is based. Therefore, it is important for housing providers and advocates not to stop at the planning process, but also to ensure that the plans, and their action programs, are adequately reflected in the local zoning code.

Recommendation #4 in Chapter 5 includes some considerations for local governments in ensuring that their zoning codes enable supportive housing and discourage NIMBYism. Of particular relevance to supportive housing for people with mental health disabilities, zoning codes must treat transitional and supportive housing as proposed residential uses,¹³¹ designate sufficient sites in zones that allow supportive housing by right,¹³² and provide an adequate process for requesting and obtaining reasonable accommodations.¹³³ Advocates and providers of housing for supportive services for people with mental health and other disabilities should pay

¹³¹ Government Code §65583(a)(5).

¹³² Government Code §65583.2(i).

¹³³ Government Code §65583(c)(3). See Section (C)(1)(b), below, for a discussion of reasonable accommodations under state and federal fair housing laws.

particular consideration to the zoning code's reasonable accommodations ordinance¹³⁴ and siting provisions for supportive housing.¹³⁵

C. Fair Housing Laws

1. Overview of State and Federal Fair Housing Provisions

The land use and planning laws discussed above must be read in connection with state and federal laws that protect certain groups, including people with disabilities, from discrimination in the land use process. Those laws are discussed below.¹³⁶

a. U.S and California Constitutions

Both the United States and California Constitutions provide some protection against land use decisions that discriminate against people with disabilities. However, the scope of constitutional protection is limited, and it

¹³⁴ For a model reasonable accommodations ordinance with explanation, see HCD, *Model Ordinance for Providing Reasonable Accommodations Under Federal and State Fair Housing Laws*, available at: http://www.hcd.ca.gov/hpd/housing_element2/documents/MODEL_REASONABLE_ACCOMODATION_ORDINANCE.pdf. For more information on reasonable accommodations ordinances, see, e.g., California Office of the Attorney General, *Adoption of a Reasonable Accommodation Procedure* (May 15, 2001), available at: http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf; Joint Statement of DOJ and HUD, *Group Homes, Local Land Use and the Fair Housing Act* (August 18, 1999), available at: http://www.justice.gov/crt/about/hce/final8_1.php; MHAS, *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* (February 2005), available at: <http://www.mhas-la.org/developerguide3-9-05.pdf>

¹³⁵ SB 2's requirement that housing elements evaluate a community's unmet needs for emergency shelter, and designate adequate zoning districts that permit those shelters to operate by right, can be used to promote supportive housing. Following a "Housing First" model, SB 2 did not require that communities create emergency shelters to fill their unmet needs. Advocates can use the requirement to zone for emergency shelters as an incentive to promote transitional and supportive housing, since adding transitional and supportive housing would reduce the community's need to designate zones to permit emergency shelters by right. See Government Code § 65583(a)(4); 21 Elements, *San Mateo Housing Element Update Kit: SB 2 Policy and Technical Paper* at p.3 (October 10, 2008), available at: <http://21elements.com/Resources/table-of-contents.html>

¹³⁶ For more information on fair housing laws as they relate to supportive housing, see, e.g., CSH, *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing* (2010), available at: http://www.csh.org/wp-content/uploads/2011/12/Tool_BTL_CA1.pdf; MHAS, *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* (February 2005), available at: <http://www.mhas-la.org/developerguide3-9-05.pdf>

is often necessary to look to state and federal fair housing statutes which have broader application.

The Fourteenth Amendment to the U.S. Constitution provides that no state may “deprive any person of life, liberty, or property, without due process of law [or] deny to any person within its jurisdiction the equal protection of the laws.”¹³⁷ In *City of Cleburne v. Cleburne Living Center, Inc.*, the U.S. Supreme Court held that people with disabilities are not a “protected class” requiring “strict scrutiny” under the equal protection clause. Therefore, a law distinguishing people with disabilities from other groups will be constitutional if it is rationally related to a legitimate governmental purpose.¹³⁸ The *Cleburne* Court used this “rational basis” test to overturn a Texas ordinance that required a special use permit for the operation of a home for people with development disabilities. Echoing the trial court’s finding that shared housing is “an essential ingredient of normal living patterns” for people with developmental disabilities,¹³⁹ the Court overturned the ordinance on the basis that it rested on an “irrational prejudice” and was not rationally related to any legitimate state interest.¹⁴⁰

Supportive housing is also protected by the California Constitution. Article I of the state Constitution grants all people “inalienable rights,” including “enjoying life and liberty, ...possessing...property, and pursuing and obtaining...happiness and privacy.”¹⁴¹ In *Santa Barbara v. Adamson*,¹⁴² the state Supreme Court held that a city ordinance regulating the number of unrelated people who can live together violated the state Constitution. The Court reasoned that “zoning ordinances are much less suspect when they

¹³⁷ U.S. Const. Am. XIV.

¹³⁸ 473 U.S. 432, 446 (1985). The same test is used to determine constitutionality of a zoning ordinance under the Fourteenth Amendment’s Due Process Clause. *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1996).

¹³⁹ 473 U.S. 432, 439 n.6.

¹⁴⁰ *Id.* at 450. Since the *Cleburne* decision, some courts have upheld the constitutionality of zoning ordinances under the rational basis test. See, e.g, *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1996).

¹⁴¹ California Const. Article I.

¹⁴² 27 Cal.3d 123 (1980).

focus on the use than when they command inquiry into who are the users.”¹⁴³

b. Laws Supporting Equal Housing Opportunities for People with Mental Health Disabilities: The FHAA, The ADA, Section 504, Section 11135 & FEHA

Because constitutional protection against disability-related discrimination is limited, state and federal fair housing statutes have stepped in to fill the gap. The federal Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988¹⁴⁴ (the FHAA), the Americans with Disabilities Act of 1990¹⁴⁵ (the ADA), Section 504 of the Rehabilitation Act of 1973¹⁴⁶ (Section 504), California Government Code Section 11135 (Section 11135)¹⁴⁷ and the California Fair Employment and Housing Act (FEHA)¹⁴⁸ all protect against disability-based discrimination in similar ways. The FHAA and FEHA prohibit discrimination in most types of housing, Title II of the ADA prohibits land use discrimination by state or local governments, Section 11135 prohibits discrimination by the state government and entities receiving state funding, and Section 504 prohibits land use discrimination involving the receipt of federal funds. All of these provisions prohibit disability-based discrimination in zoning and other local government land

¹⁴³ *Id.* at 133.

¹⁴⁴ 42 U.S.C § 3601 *et seq.* The FHAA makes it unlawful to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of that buyer or renter, a person residing or intending to reside in that dwelling after it is sold, rented or made available, or any person associated with that buyer or renter.” 42 U.S.C § 3604(f)(1).

¹⁴⁵ 42 U.S.C § 12101 *et seq.* Title II of the ADA provides, in relevant part, that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C § 12132. The ADA reflected the Congressional goal of “providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C § 12101(b)(1).

¹⁴⁶ 29 U.S.C § 794 (“No otherwise qualified individual with a disability...shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

¹⁴⁷ Government Code §11135

¹⁴⁸ Government Code §12900 *et seq.* FEHA expressly prohibits discrimination in land use planning activities, and states that its housing discrimination provisions shall be construed to be no less protective than those of the FHAA. Government Code §§ 12955(l), 12955.6.

use and planning decisions,¹⁴⁹ and are interpreted by courts similarly in this context.

The FHAA, Section 504, the ADA, Section 11135 and FEHA were designed to protect people with disabilities¹⁵⁰ from discrimination “based on prejudice, stereotypes, or unfounded fear.”¹⁵¹ All of these laws prohibit actions that have a discriminatory effect (or “disparate impact”) on people with disabilities and other protected groups, as well as intentional discrimination.¹⁵² In addition to conduct that directly excludes or disfavors people with disabilities,¹⁵³ these laws also protect against discriminatory statements,¹⁵⁴ intimidation¹⁵⁵ and retaliation.¹⁵⁶

These state and federal fair housing and anti-discrimination laws also impose an affirmative obligation on local governments to provide

¹⁴⁹ *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999)(Title II of the ADA and Section 504 apply to discriminatory zoning practices because zoning is a normal function of a government entity); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (FHAA applies to municipalities); The Americans with Disabilities Act: Title II Technical Assistance Manual § II-3.6100, illus.1 (1993) (zoning is covered by the ADA); Joint Statement of DOJ and HUD, *Group Homes, Local Land Use and the Fair Housing Act* (August 18, 1999), available at: http://www.justice.gov/crt/about/hce/final8_1.php (the FHAA prohibits disability-based discrimination in the application of land use policies). Note, however, that individual government officials may be immune from liability under these statutes for actions that taken in their legislative, rather than administrative capacities. See, *San Pedro Hotel v. Los Angeles*, 159 F.3d 470, 476 (9th Cir. 1998) (city councilman immune from FHAA liability for voting not to approve a housing loan because that was part of the legislative process, but not for allegedly retaliatory actions).

¹⁵⁰ A “person with a disability” is someone who has a physical or mental impairment that limits a major life activity, has a record of such impairment, or is regarded as having such an impairment. Government Code § 12955.3.

¹⁵¹ *Bay Area Addiction Research & Treatment, Inc.*, 179 F.3d at 737. See also, e.g. *Chalk v. United States District Court*, 840 F.2d 701, 707-08 (9th Cir. 1988) (to “allow the court to base its decision on the fear and apprehension of others would frustrate the goals of Section 504”).

¹⁵² See, e.g., 24 C.F.R. § 100.5 (b)(under the FHAA, unlawful housing discrimination “may be established by a practice’s discriminatory effect, even if not motivated by discriminatory intent”); *Pacific Shores v. Newport Beach*, 2013 WL 5289100 (9th Cir. 2013)(“zoning practices that discriminate against disabled individuals can be discriminatory, and thereby violate [FHAA, ADA and FEHA] if they contribute to making unavailable or denying housing to those persons”)(internal quotation omitted); *Hunsaker v. Contra Costa County*, 149 F.3d 1041(9th Cir. 1998)(governments can be liable under the ADA if they deny people with disabilities meaningful access to their programs, services and activities, even if the provision at issue is not discriminatory on its face); Government Code § 12955.8(b)(FEHA prohibits actions with a discriminatory effect on protected groups).

¹⁵³ 42 U.S.C. § 3604(f); 42 U.S.C. § 12132; 29 U.S.C. § 794; Government Code § 12955(a) (FEHA).

¹⁵⁴ E.g., 42 U.S.C. § 3604(c).

¹⁵⁵ Government Code § 12955.7.

¹⁵⁶ 42 U.S.C. § 3617; Government Code § 12955.7.

“reasonable accommodations” (known under the ADA as “program modifications”) to zoning and land use rules as necessary to allow people with disabilities equal opportunity to use and enjoy a particular form of housing.¹⁵⁷ If a person with a disability, or a housing developer acting on behalf of a group of people with disabilities, requests a reasonable accommodation in the zoning process, the government must grant the request unless the accommodation would fundamentally alter the nature of the zoning scheme or pose an undue financial or administrative burden on the zoning authority.¹⁵⁸

Although some courts have required housing developers to request zoning approval before obtaining a reasonable accommodation,¹⁵⁹ these decisions ignore the different substantive standards and confidential procedures that apply to obtaining a reasonable accommodation under the fair housing laws. The California Attorney General has acknowledged that municipalities should make exceptions to their zoning restrictions as reasonable accommodations under fair housing laws, even if they would not otherwise be required under the local land use scheme.¹⁶⁰

Any person or organization that is harmed by discrimination in a land use decision, including a housing provider, can file an administrative

¹⁵⁷ 42 U.S.C. § 3604(f)(3)(B); Government Code § 12957(c)(1).

¹⁵⁸ See, e.g. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994); Joint Statement of DOJ and HUD, *Group Homes, Local Land Use and the Fair Housing Act* (August 18, 1999), available at: http://www.justice.gov/crt/about/hce/final8_1.php; Joint Statement of HUD and DOJ, *Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004), available at: <http://www.hud.gov/offices/ftheo/library/hud DOJ statement.pdf>; MHAS, *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* at pp. 6-7 (February 2005), available at: <http://www.mhas-la.org/developerguide3-9-05.pdf>

¹⁵⁹ See, e.g. *U.S. v. Village of Palantine*, 37 F.3d 1230 (7th Cir. 1994); *Oxford House, Inc., v. City of Albany*, 819 F.Supp. 1168 (N.D. N.Y. 1993).

¹⁶⁰ California Office of the Attorney General, *Adoption of a Reasonable Accommodation Procedure* at p.3 (May 15, 2001), available at: http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf, citing *Hovson's Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996) (township violated FHAA's reasonable accommodation mandate in refusing to grant a CUP to allow construction of a nursing home in a Rural Residential zone, even though the denial was sustained by the state courts under applicable zoning criteria); *Trovato v. City of Manchester*, 992 F.Supp.493 (D.N.H. 1997) (city violated FHAA reasonable accommodations requirement by denying permission to allow tenants with muscular dystrophy to build a paved parking space in front of their house).

complaint¹⁶¹ or sue a municipality¹⁶² under the fair housing laws. Administrative complaints and litigation carry strict deadlines that should be discussed with an attorney. The application of these laws to various types of NIMBY barriers to supportive housing is discussed below.

c. California Government Code § 65008

Section 65008 of the California Government Code (sometimes known as the “Discrimination Against Affordable Housing” Law), prohibits discrimination against affordable housing, its developers, and its tenants and prospective tenants.¹⁶³ The law provides that any planning and zoning action taken by a city is “null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use” on the basis of a number of factors.¹⁶⁴ The protected factors include the source of the housing development’s financing, the income level of the intended tenants, and characteristics of tenants that are protected under the Fair Employment and Housing Act, including disability.¹⁶⁵ Although discrimination is prohibited, preferential treatment of assisted housing and emergency shelters is expressly allowed.¹⁶⁶

As discussed above, litigation challenging the decision of a zoning authority under Section 65008 may be subject to statute of limitations as short as 90 days.¹⁶⁷ This should be discussed with an attorney if litigation is contemplated.

2. Using Fair Housing Laws to Address NIMBY Barriers

Fair housing laws can be used in conjunction with land use and planning laws to counteract NIMBY opposition to supportive housing. How the laws are used will depend, in part, on what type of NIMBY barriers are

¹⁶¹ See *Walker v. City of Lakewood*, 272 F.3d 1114, 1122-26 (9th Cir. 2001). Joint Statement of DOJ and HUD, *Group Homes, Local Land Use and the Fair Housing Act* (August 18, 1999), available at: http://www.justice.gov/crt/about/hce/final8_1.php

¹⁶² 42 U.S.C. §§ 3610, 3612.

¹⁶³ Government Code § 65008.

¹⁶⁴ Government Code § 65008(a).

¹⁶⁵ Government Code §§ 65008, 12955.

¹⁶⁶ Government Code § 65008(e)(2).

¹⁶⁷ Government Code §65009; *Stockton Citizens for Sensible Planning v. City of Stockton*, 210 Cal.App.4th 1484 (3d Dist. 2012).

presented. NIMBY opposition can come from either neighbors or local governments, and often spreads from one to the other. This section addresses the application of fair housing laws in both situations.

a. Discriminatory Actions Directly by Neighbors

i. Intimidations, Threats, Harassment & Coercion by Neighbors

The most straightforward type of NIMBY opposition is when neighbors make derogatory, false and/or misinformed statements which have the purpose and effect of deterring the development of supportive housing. However, this is also the most difficult type of opposition to challenge, because the fair housing rights of the developers and prospective tenants must be balanced against the neighbors' right to free speech.

The First Amendment to the U.S. Constitution prohibits the making of any law that abridges the freedom of free speech.¹⁶⁸ In the early 1990's, HUD received a great deal of publicity for investigating complaints against neighbors who asserted a First Amendment right to protest housing for people with disabilities.¹⁶⁹ Two of the more highly publicized investigations involved neighborhood protests against proposed housing developments in Berkeley, California: one for people with mental health and substance abuse disabilities, and one for people with HIV/AIDs.¹⁷⁰ The housing developers complained that the protests discriminated against, intimidated, threatened, and interfered with their fair housing rights in violation of the FHAA.¹⁷¹

In 1994, HUD issued a memorandum stating that when HUD complaints implicate the right to free speech, "HUD chooses to err on the side of the First Amendment."¹⁷² The memorandum stated that HUD would not

¹⁶⁸ U.S. Constitution Amend. I.

¹⁶⁹ See Mary Caroline Lee, *The Conflict Between "Fair Housing" and Free Speech*, 12 Wm. & Mary Bill Rts. J. 1223, 1231-1237 (1996), available at: <http://scholarship.law.wm.edu/wmborj/vol4/iss3/12>.

¹⁷⁰ *Id.* at 1232-33.

¹⁷¹ *Id.*; 42 U.S.C.A. § 3604 (discrimination); 42 U.S.C.A. § 3604 (intimidation, threats and interference).

¹⁷² HUD, *Memorandum from Roberta Achtenberg: Filings that May Implicate the First Amendment* at p.1 (Sept. 2, 1994), available at:

<http://www.fairhousing.com/index.cfm?method=page.display&pageID=257>

investigate complaints of “public activities,” including statements, publications and demonstrations opposing housing developments, that “were directed toward achieving action by a governmental entity or official” and “did not involve force, physical harm, or the threat of force or physical harm to one or more individuals.”¹⁷³ The memorandum specified that an “intemperate and perhaps even hostile statement made at a zoning hearing that has the effect of making persons protected by the Fair Housing Act feel unwelcome in a neighborhood will not be sufficient for filing a complaint or beginning an investigation” under the FHAA.¹⁷⁴

Accordingly, courts have found that neighbors’ statements, protests, frivolous lawsuits and other behavior based on NIMBY opposition to housing developments violate the FHAA only if the behavior rises to the level of coercion, intimidation or harassment.¹⁷⁵ This type of behavior may also violate California’s Ralph Act, which prohibits violence or threats of violence based on protected characteristics, including disability.¹⁷⁶

ii. Neighbor Buy-Outs

Another way for neighbors to impose NIMBY barriers is to band together to purchase property in order to keep it out of the hands of a supportive housing provider. Whether courts find this conduct to violate the FHAA turns on whether they consider it to constitute “normal economic competition.”¹⁷⁷

The FHAA contains an exemption for the sale or rental of single-family houses that are sold or rented by the owner, provided that the owner: does not use the services of a real estate agent or broker; does not own more than three single-family houses; and, if the owner is not a resident, has not

¹⁷³ *Id.* at p.3

¹⁷⁴ *Id.* at p.4.

¹⁷⁵ See, e.g., *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991)(neighbors left note threatening to break African-American homeowner “in half” if he did not leave the neighborhood, hit homeowner’s truck, and spit and shouted obscenities at him); *People Helpers Foundation v. Richmond*, 781 F.Supp. 1132 (E.D. Va. 1992)(neighbors created atmosphere of intimidation and fear by making derogatory and sarcastic comments related to the race of tenants in proposed housing project for people with disabilities).

¹⁷⁶ Civil Code §51.7.

¹⁷⁷ See generally, Bazelon Center, *Fair Housing Information Sheet #3: Neighbors Buying Property to Prevent the Establishment of a Group Home*, available at:

http://www.bazelon.org/LinkClick.aspx?fileticket=nNj8tBn_DgQ%3D&tabid=245

completed more than one sale within a 24-month period.¹⁷⁸ In *Michigan Protection and Advocacy Service v. Babin*¹⁷⁹, a group of neighbors opposed the proposed sale of a house to a state agency to use for supportive housing. After circulating a petition, contacting local newspapers and preparing a mailing urging opposition to the proposal, a group of neighbors pooled their money to finance the purchase of the property. The court held that this conduct did not violate the FHAA because the sale of the home fit within the single-family-owner exemption, and because the transaction constituted “normal economic competition” on the part of the neighbors.¹⁸⁰

Other courts have distinguished the Sixth Circuit’s analysis by holding that coercive, intimidating and harassing conduct does not constitute “normal economic competition.” For example, an Ohio court distinguished *Babin* by holding that real estate agents who were engaged in a campaign to drive a women’s residence out of a neighborhood were “in a position directly to disrupt the exercise or enjoyment” of the residents’ rights under the FHAA.¹⁸¹ A Nebraska court went one step further, holding that the *Babin* opinion was “plainly wrong,” that a bank’s purchase of property in order to prevent a supportive housing project was not “economic competition,” and that even economic competition would violate the FHAA if it had a discriminatory intent.¹⁸² These cases indicate that whether a neighbor buy-out situation violates the FHAA will depend largely on the specifics of the case and the perspective of the court.

a. Barriers Imposed by Local Governments

Despite the best efforts of land use and planning officials to address community concerns, local governments can sometimes be influenced by neighborhood opposition to supportive housing. NIMBY opposition on the part of local government falls into two categories: barriers to siting supportive housing in a particular location (“siting barriers”), and refusal to

¹⁷⁸ 42 USC §3603(b).

¹⁷⁹ 18 F.3d 337(6th Cir 1994).

¹⁸⁰ *Id.* at 355.

¹⁸¹ *Cooper v. Western & Southern Financial Group*, 847 F.Supp.2d 1031, 1039 (S.D. Oh. 2012).

¹⁸² *U.S. v. Hughes*, 849 F.Supp. 685, 685 (D. Neb. 1994).

cooperate in a developer's application for government development funds ("refusal to fund").

i. Siting Barriers

Siting barriers to supportive housing can be classified roughly into: a) restrictions on the number of people living together; b) spatial separation and "over-concentration" restrictions; and c) pretextual "health and safety" restrictions. This section discusses cases that have evaluated these claims under the FHAA, but a similar analysis would apply under the ADA, Section 504, Section 11135 or FEHA. In addition, housing providers and advocates should always consider whether a siting barrier might violate Government Code Section 65008, California's law prohibiting discrimination against affordable housing.¹⁸³

a) Restrictions on the Number of People Living Together

Some jurisdictions allow shared housing to be sited by right in certain residential zones only if the residents function as a "household" or a "family." Otherwise, the housing must apply for a conditional use permit, special use permit or variance, all of which require a public process which can foster NIMBY opposition. These types of restrictions are clearly discriminatory under state and federal law.

In 1980, the California Supreme Court held that zoning ordinances that regulate the number of unrelated people living together violate the state Constitution's right to privacy.¹⁸⁴ The U.S. Supreme Court later held that while maximum occupancy restrictions are exempt from the FHAA,¹⁸⁵ this does not include family composition rules that are "designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants" that living

¹⁸³ Government Code § 65008.

¹⁸⁴ *Santa Barbara v. Adamson*, 27 Cal.3d 123 (1980).

¹⁸⁵ 42 U.S.C. § 3607(b)(1).

quarters can contain.¹⁸⁶ Housing providers can also request a waiver of a family composition or maximum occupancy restriction as a reasonable accommodation for prospective tenants with disabilities.¹⁸⁷

b) Spatial Separation & “Over-Concentration” Restrictions

Local governments may also restrict siting of supportive housing through ordinances that regulate the distance between homes or services (“spatial separation restrictions”), or their density in a particular area (“over-concentration restrictions”). Many courts have held that these ordinances violate state and federal fair housing laws, particularly in the context of housing and treatment facilities for people recovering from drug and alcohol addiction.

For example, the Ninth Circuit Court of Appeal addressed a Newport Beach, California ordinance requiring that group homes for people recovering from alcohol and drug addiction undergo a permit process which considered, among other things, the number of similar facilities in the neighborhood.¹⁸⁸ The court found substantial evidence that this ordinance violated the FHAA, ADA, and FEHA, either because it was intentionally discriminatory or because it had a disparate impact on people with disabilities.¹⁸⁹ As with restrictions on the number of people living together, spatial separation and over-concentration requirements may also be

¹⁸⁶ *City of Edmonds v. Oxford House*, 514 U.S. 725, 735 (1995) (holding that a 10-12 resident group homes for individuals recovering from alcohol or drug addiction is not exempt from the FHAA as a maximum occupancy restriction).

¹⁸⁷ See MHAS, *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* at p.11 (February 2005), available at: <http://www.mhas-la.org/developerguide3-9-05.pdf>

¹⁸⁸ *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013).

¹⁸⁹ *Id.* See also *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d at 725 (9th Cir 1999) (city ordinance prohibiting methadone recovery clinics from operating within 500 feet of any residential property held discriminatory). Courts in other jurisdictions have made similar rulings. See, e.g., *New Directions Treatment Services v. City of Reading*, 490 F.3d 293, 304 (3d Cir. 2007) (ban on the establishment of methadone clinics within 500 feet many structures, including schools, churches, and residential housing developments, violated ADA and Section 504); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) (“Although [a city] may consider legitimate safety concerns in its zoning decisions, it may not base its decision on the perceived harm from...stereotypes and generalized fears”).

required to be waived as reasonable accommodations for residents of supportive housing.¹⁹⁰

c) Pretextual “Health & Safety” Restrictions

Sometimes, burdensome requirements are placed on supportive housing on the pretext that they are necessary to protect public safety. Examples include installing firewalls or mandating the hiring of additional staff.¹⁹¹ These requirements violate fair housing laws if they are applied only to housing for people with disabilities, unless they are warranted by the specific needs and abilities of the intended residents. Neighbors may also base objections to supportive housing on purported concerns about increased traffic or parking issues, without evidence to support those concerns. Even if health or safety restrictions are applied to all group residences, they may violate fair housing laws if they have a disparate impact on housing for people with disabilities, or if the government refuses to provide reasonable accommodation to waive or reduce the requirements.¹⁹²

For example, in opposing a home for people with developmental disabilities and brain injuries, individuals in a Milwaukee neighborhood expressed concern that the prospective residents would be violent, that the home would increase traffic congestion, and that the area’s parking restrictions, lack of sidewalk, and propensity for flooding would pose problems for the residents.¹⁹³ The Seventh Circuit Court of Appeals held that the neighbors’ purported concerns lacked sufficient factual support, and that the city must

¹⁹⁰ See, e.g., *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002)(waiver of special separation restriction was reasonable accommodation for community living for people with developmental disabilities and brain injuries); See MHAS, *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* at p.13 (February 2005), available at: <http://www.mhas-la.org/developerguide3-9-05.pdf>

¹⁹¹ See PILP, *Laws Affecting the Location & Approval of Affordable Housing for Families and Homeless People: How They Work & How to Use Them* (March 2000) at pp.48-49, available at: <http://pilpca.org/wp-content/uploads/2010/10/CASCMannual-Title.pdf>

¹⁹² See PILP, *Laws Affecting the Location & Approval of Affordable Housing for Families and Homeless People: How They Work & How to Use Them* at pp.48-49 (March 2000), available at: <http://pilpca.org/wp-content/uploads/2010/10/CASCMannual-Title.pdf>

¹⁹³ *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002). See also *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 49 (2^d Cir. 1997) (“Although [a city] may consider legitimate safety concerns in its zoning decisions, it may not base its decision on the perceived harm from...stereotypes and generalized fears.”)

waive any applicable restrictions as a reasonable accommodation.¹⁹⁴ The court specified that the city cannot “rely on the anecdotal evidence of neighbors opposing the group home as evidence of unreasonableness. A denial of a variance due to public safety concerns or concerns for the safety of the residents themselves cannot be based on blanket stereotypes about disabled persons rather than particularized concerns about individual residents.”¹⁹⁵

ii. Refusal to Fund

Even if a supportive housing developer successfully navigates its way through the local zoning process, it might still encounter NIMBY barriers in applying for public funds. If a government’s refusal to cooperate with a housing developer’s funding application is based on neighborhood opposition to housing for people with disabilities, it may constitute illegal interference¹⁹⁶ with fair housing rights, or retaliation¹⁹⁷, under the FHAA and other fair housing and anti-discrimination laws.¹⁹⁸

For example, in *San Pedro Hotel Co., Inc. v. City of Los Angeles*, the Ninth Circuit Court of Appeals held that the city’s refusal to cooperate with a non-profit housing provider’s loan application may violate the FHAA.¹⁹⁹ The provider, A Community of Friends (ACOF), had entered into an agreement with the owners of the California Hotel to purchase the property for use as supportive housing for people with mental health disabilities. The development encountered NIMBY opposition - including the words “no mental tenants” handwritten in the margin of a letter about the project - and the city refused to approve its application for federal financing.²⁰⁰ The Court

¹⁹⁴ *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 786 (7th Cir. 2002).

¹⁹⁵ *Id.* See also, e.g., *Hovson’s, Inc. v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996) (FHAA required variance as reasonable accommodation for nursing facility despite purported concerns about facility’s impact on city services); *Bangerter v. Orem City Corporation*, 46 F.3d 1491 (10th Cir. 1995) (CUP and staff supervision requirements for home for people with developmental disabilities violated FHAA because they were based on NIMBY opposition rather than factually-supported health and safety concerns).

¹⁹⁶ 42 U.S.C. § 3604(f)(1).

¹⁹⁷ 42 U.S.C. § 3617.

¹⁹⁸ See PILP, *Laws Affecting the Location & Approval of Affordable Housing for Families and Homeless People: How They Work & How to Use Them* at pp.50-51 (March 2000), available at: <http://pilpca.org/wp-content/uploads/2010/10/CASCManual-Title.pdf>

¹⁹⁹ 159 F.3d 470 (9th Cir. 1998).

²⁰⁰ *Id.* at 473 n.2, 478.

of Appeals held that while a city does not have an obligation to promote or approve any particular housing development, when it takes action it must do so in a non-discriminatory manner.²⁰¹ The court held that ACOF had established a triable issue of fact as to whether the city's actions were discriminatory or retaliatory in this case.²⁰²

²⁰¹ *Id.* at 476.

²⁰² *Id.* at 477-78. See also Consent Order, *Family Alliance for the Mentally Ill, Affordable Homes, Inc., et al. v. City of Fresno, et al.*, (Case No. CV-F-97-5360 OWW SMS, E.D. CA April 14, 1997)(consent order requiring city to cooperate with funding for supportive housing for people with disabilities, and establishing mandatory training and community outreach programs on fair housing rights).

Chapter 4: Six Steps to building Community Support

Understanding legal rights and how to use them is just one aspect of an overall advocacy strategy to prevent and manage NIMBY opposition to affordable and supportive housing. The Non-Profit Housing Association of Northern California (NPH) has developed a guide for housing developers and advocates called *Six Steps to Getting Local Government Approvals*.²⁰³ Based on a longer publication by the Housing Alliance of Pennsylvania,²⁰⁴ *Six Steps* has helped many housing developers in the San Francisco Bay Area and elsewhere,²⁰⁵ and HCD has posted it as a resource on its website.²⁰⁶

This section addresses each of the six steps under separate headings. However, it is important to keep in mind that these steps are part of an overall advocacy strategy that should be tailored to each individual housing project.²⁰⁷ In conjunction with the six step process, NPH recommends that advocates and housing developers “participate in on-going, community-wide strategies to improve the political climate for affordable housing and services in your community, e.g. tenant organizing, voter registration, participating in the development of local housing policy, promoting pro-housing candidates in local elections, and promoting the enforcement of fair housing laws.”²⁰⁸ As discussed in Step #3 and Policy Recommendation #1, below, these strategies should include efforts at all levels of

²⁰³ NPH, *Six Steps to Getting Local Government Approvals*, available at: http://www.hcd.ca.gov/hpd/nimby/six_steps.pdf

²⁰⁴ Housing Alliance of Pennsylvania, *Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit*, available at: <http://www.fhcsp.com/Links/toolkit.pdf>

²⁰⁵ NPH, *Six Steps to Getting Local Government Approvals*, available at: http://www.hcd.ca.gov/hpd/nimby/six_steps.pdf; NPH, *Siting of Homeless Housing and Services: Best Practices for Community Acceptance* (October 200), available at: <http://nonprofithousing.org/wp-content/uploads/Documents/Toolkits/Original%20Toolkit/CASC2000report.pdf>; Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. Affordable Housing No.1 (Fall 2002), available at: <https://www.bazelon.org/LinkClick.aspx?fileticket=FZBvjkgK9hw%3D&tabid=241>

²⁰⁶ <http://www.csh.org/wp-content/uploads/2012/07/SixStepspdf.pdf>

²⁰⁷ NPH, *Six Steps to Getting Local Government Approvals* at p.1, available at: http://www.hcd.ca.gov/hpd/nimby/six_steps.pdf

²⁰⁸ *Id.*

government to ensure that people with mental health disabilities are free from stigma and discrimination in all aspects of life.²⁰⁹

- Step #1: Plan at least two meetings to research, assess and plan strategies in key areas.

Step #1 is to schedule two or more meetings of the development team and local advocates for a housing project to conduct research, assess the situation, and develop a plan to obtain any necessary local government approvals.²¹⁰

The goal of the first meeting should be to identify and assess the following:²¹¹

- The organization's reputation, capacity to attract broad community support, and previous experience in dealing with local government, opponents and media;
- The government approvals that will be needed, identities of relevant decision-makers, and the process and criteria for decisions;
- The local government's current knowledge of and support for affordable housing, the organization's work, and the current proposal;
- Any relevant history, problems, organizations and/or assets of the neighborhood surrounding the site;
- Likely neighborhood concerns, and any neighborhood experience in dealing with similar concerns;
- Potential legal issues associated with the proposed development; and
- The regional and local media's approach to the organization's work and the proposed residents.

²⁰⁹ As discussed below, one example of successful stigma reduction program is the California Mental Health Services Authority's (CalMHSA's) *Each Mind Matters* program, <http://www.eachmindmatters.org/get-informed/>

²¹⁰ *Id.*; Housing Alliance of Pennsylvania, *Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit* at pp. 21-30 (1996), available at: <http://www.fhcsp.com/Links/toolkit.pdf>

²¹¹ NPH, *Six Steps to Getting Local Government Approvals* at p.1, available at: http://www.hcd.ca.gov/hpd/nimby/six_steps.pdf

The second, and any subsequent meetings, should use the assessments made at the first meeting to determine:²¹²

- Strategies toward local government, potential supporters and opponents, legal issues and the media;
- Staffing to implement those strategies; and
- Any consequences for the proposal's timeline, funding needs, or site selection.

- Step #2: Prepare a political strategy.

Step #2 involves preparing a political strategy that coordinates all of the team's work toward getting the votes needed for approval. This includes:²¹³

- Getting to know the local government officials and key community leaders, as well as relevant government policies;
- Identifying solid supporters, committed opponents, and uncertain votes;
- Determining education and advocacy efforts needed to keep supporters, neutralize opponents and win uncertain votes; and
- Documenting everything to tell the best possible story at public hearings.

Keep in mind that if the zoning authority gives appropriate notice before a zoning hearing, subsequent litigation may be limited to matters raised at the hearing or through the written comment process.²¹⁴

²¹² *Id.*

²¹³ *Id.* at pp.1-2; Housing Alliance of Pennsylvania, *Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit* at pp. 27, 29, 31-32 (1996), available at: <http://www.fhcsp.com/Links/toolkit.pdf>. For more information on building a political strategy, see MHAS, *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* at pp. 9-13, 65-70 (February 2005), available at: <http://www.mhas-la.org/developerguide3-9-05.pdf>; Michael Allen, *Opening the Door: Why Not In Our Backyard?*, 45 Planning Commissioner's Journal 1 (Winter 2002), available at: <http://www.bazelon.org/LinkClick.aspx?fileticket=siBmVxmVjAM%3D&tabid=241>

²¹⁴ Government Code §65009(b).

- Step #3: Prepare a strategy to build public support.

Step #3 is to develop a strategy to build active community support. This includes:²¹⁵

- Developing solid support for the proposal in the broader community, before contacting potential opponents;
- Identifying and prioritizing actual and potential supporters, including tactical allies;
- Planning how to recruit and make use of supporters;
- Organizing and supporting allies with background information, housing tours and up-to-date information;
- Mobilizing supporters at critical points in the process; and
- Keeping allies informed and encouraged.

Step #3 is closely related to Step #2, since both political and community outreach strategies involve presenting a supportive housing proposal in its strongest possible light. Of course, this will be much easier to do if the proposed development is designed to be a positive force in the neighborhood. For example, tenants should understand what kinds of behavior (such as excessive noise or public drunkenness) might violate nuisance or other laws, and the community should be made aware that the supportive housing provider expects its tenants to be good neighbors. Strategies such as increasing tenant involvement in supportive housing and promoting consumer choice can increase residents' sense of investment and pride in their home and their neighborhood.²¹⁶ Community outreach and education programs such as CalMHSA's *Each Mind Matters*,²¹⁷ *Walk*

²¹⁵ NPH, *Six Steps to Getting Local Government Approvals* at p.1, available at: http://www.hcd.ca.gov/hpd/nimby/six_steps.pdf; Housing Alliance of Pennsylvania, *Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit* at pp. 31-40 (1996), available at: <http://www.fhcsp.com/Links/toolkit.pdf>. For more information on building community support, see MHAS, *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* at pp. 14-34, 51-55, 60-64, 56-69, 71-73, 82-86 (February 2005), available at: <http://www.mhas-la.org/developerguide3-9-05.pdf>

²¹⁶ See CSH, *Mental Health Services Act Housing Toolkit* at pp. 53-54 (November 2005), available at: www.dhcs.ca.gov/services/MH/documents/MHSAToolKit-final.pdf

²¹⁷ <http://www.eachmindmatters.org/get-informed/>

In Our Shoes,²¹⁸ *ReachOutHere*²¹⁹ and *BuscaApoyo*²²⁰ programs can help by reducing stigma and dispelling stereotypes about people with mental health disabilities.

Like building a political strategy in Step #2, Step #3 must be informed by the assessments that were made in Step #1, and will not be the same for every project. In some situations, effective community outreach may consist of showing how a well-kept home will improve the look and value of the neighborhood, without advertising that the home is providing supportive services for people with disabilities. However, other situations will require a more proactive community outreach plan. Below are two examples of the latter approach:

Pine Street Inn

*Pine Street Inn (PSI) provides supportive housing and other services to people in Boston who are homeless. In 1993, PSI decided to buy and renovate a large duplex to provide ten supportive housing units and an on-site manager's apartment. Anticipating possible neighborhood opposition, PSI developed a plan focused on elected officials and neighborhood residents. It provided tours of the proposed site, gave a neighborhood presentation, and conducted door-to-door canvassing to meet residents, explain the project, answer questions, and determine the extent of initial opposition. Using this strategy, PSI obtained a number of neighborhood supporters, a letter of support from the neighborhood organization, and ultimate approval of the project.*²²¹

Villas at Gower

Villas at Gower is a 70-unit supportive housing project that is home to individuals and families who have been homeless and affected by a mental health disability. The building is located in Hollywood near the famous

²¹⁸ <http://walkinourshoes.org/>

²¹⁹ <http://us.reachout.com/reachouthere>

²²⁰ <http://us.reachout.com/buscaapoyo>

²²¹ Michael Allen, *Opening the Door: Why Not In Our Backyard?*, 45 Planning Commissioner's Journal at p.1 (Winter 2002), available at:

<http://www.bazelon.org/LinkClick.aspx?fileticket=siBmVxmVjAM%3D&tabid=241>

corner of Hollywood and Vine. The non-profit developers, A Community of Friends (ACOF) and PATH Ventures, faced significant opposition from homeowner groups and business leaders, some of whom were organized into a neighborhood council with an advisory role to the redevelopment agency that owned the land. Some of the neighbors framed their concerns in terms of parking, density, aesthetics and property values. Others resorted to uglier tactics, including calling the intended tenants derogatory names. The developers chose to approach this intense NIMBY opposition by focusing on the architectural elements of the project, drawing attention away from the personal characteristics of the tenants and involving the neighbors directly in the design process. They formed the Gower Advisory Council (GAC), consisting of neighborhood council representatives, adjacent business, a church leader, and homeowners – many of whom did not support the development. The GAC, each of the two housing developers, and the local redevelopment agency worked together to select the building’s architect. Each of the four entities had one vote in the process, requiring compromise, collaboration and communication. The parties grew to trust the process and each other, and in the end the neighbors felt that they had a hand in creating a building that was worthy of the neighborhood. Both the groundbreaking and the grand opening of Villas at Gower drew record crowds for an ACOF event. Moreover, the new level of community support allowed the developers to overcome a downturn in the economy and combine nearly a dozen funding sources to bring the project to completion in December, 2011.²²²

- Step #4: Prepare a strategy to work through community issues.

Step #4 is to prepare a strategy to work through community concerns and deal with active opposition. Important factors to consider in Step #4 include:²²³

²²² Communication with Dora Leong Gallo, C.E.O., A Community of Friends (March 24, 2014).

²²³ NPH, *Six Steps to Getting Local Government Approvals* at p.2, available at:

http://www.hcd.ca.gov/hpd/nimby/six_steps.pdf; Housing Alliance of Pennsylvania, *Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit* at pp. 41-58 (1996), available at: <http://www.fhcsp.com/Links/toolkit.pdf> . For more information on dealing with community opposition, see MHAS, *Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California* at pp. 74-79 (February 2005), available at:

- Notification and community outreach decisions should be designed to surface and deal effectively with legitimate concerns, and for positive presentation of the proposal, not to create an open forum for opponents to organize themselves against the project;
- Consider small house meetings, door-to-door canvassing and other alternatives to large open community meetings;
- Work to understand why each neighbor is opposing the proposal (e.g. misinformation, fears about impacts, expectation to participate, legitimate conflicts of interest, prejudice, or unrelated issues);
- Prepare appropriate responses to each kind of concern (e.g. education, reassurance by trusted authority, appropriate forum for participation, negotiation, clarifying legitimate from illegitimate issues);
- Peel away layers of opposition to leave only “unreasonable” opponents.

- Step #5: Prepare a legal strategy.

Step #5 involves preparing a strategy to identify and protect the legal rights of the organization and prospective tenants. Chapter 3, above, discusses some of the legal rights that protect supportive housing developers from the negative effects of NIMBY opposition. Housing developers and advocates can use this information, and the resources listed in Appendix B, to identify legal rights and prepare a legal strategy. This step includes:²²⁴

<http://www.mhas-la.org/developerguide3-9-05.pdf>; NPH, *Let’s Talk About Contemporary Affordable Housing: Dealing with Fearful Opponents of Housing*, available at:

http://nonprofithousing.org/wp-content/uploads/Documents/Toolkits/Original%20Toolkit/Fearful_Opponents_march.pdf; NPH, *What Works in Affordable Housing Education?*, available at: <http://nonprofithousing.org/wp-content/uploads/Documents/Toolkits/Original%20Toolkit/whatworksaffhsgeduc.pdf>

²²⁴ NPH, *Six Steps to Getting Local Government Approvals* at p.2, available at:

http://www.hcd.ca.gov/hpd/nimby/six_steps.pdf; Housing Alliance of Pennsylvania, *Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit* at pp. 59-67 (1996), available at: <http://www.fhcsp.com/Links/toolkit.pdf> . For more information on preparing a legal strategy,

see, e.g., CSH, *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing* (2010), available at:

http://www.csh.org/wp-content/uploads/2011/12/Tool_BTL_CA1.pdf; CSH, *Toolkit for Developing and Operating Supportive Housing*, available at: http://www.csh.org/wp-content/uploads/2011/12/Tool_DevelopingOperating-Toolkik.pdf; *California Affordable Housing Law*

- Identifying the relevant legal rights of the organization and prospective tenants;
- Working with legal advocates early in the process to identify the best ways to protect and assert those rights;
- Using knowledge of legal rights to educate neighbors and the city attorney or county counsel as soon as you have identified potential illegal or discriminatory conduct;
- Exploring litigation or administrative complaints only as a last resort, keeping in mind that strict filing deadlines and statutes of limitations may apply,²²⁵ and that this process could affect time frames on funding applications and options to purchase property;
- Keep records of all actions that are taken from the time the development is proposed to the time it is approved or denied, including contemporaneous notes, correspondence (including emails or letters confirming significant telephone conversations or meetings), newspaper articles, flyers, and copies of comments posted on websites.

- Step #6: Prepare a public relations/media strategy.

Step #6 involves preparing a public relations/media strategy to send the housing developer's message to decision-makers and the public. This includes:²²⁶

Project, Laws Affecting the Location & Approval of Affordable Housing for Families and Homeless People: How They Work & How to Use Them (March 2000), available at:

http://www.csh.org/wp-content/uploads/2011/12/Tool_DevelopingOperating-Toolkit.pdf; and other resources listed in Appendix B.

²²⁵ See Appendix A for some of these deadlines. For a directory of attorneys in California who practice in the area of fair housing and land use law, see <http://lawhelpca.org/issues/housing>

²²⁶ NPH, *Six Steps to Getting Local Government Approvals* at p.2, available at:

http://www.hcd.ca.gov/hpd/nimby/six_steps.pdf; Housing Alliance of Pennsylvania, *Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit* at pp. 69-70(1996), available at: <http://www.fhcsp.com/Links/toolkit.pdf>. For more information about creating a public relations or media strategy, see, e.g., NPH, *What Works in Affordable Housing Education?*, available at:

<http://nonprofithousing.org/wp-content/uploads/Documents/Toolkits/Original%20Toolkit/whatworksaffhsgeduc.pdf>;

NPH, *How to Create a Cable TV Show About Affordable Housing*, available at:

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.hcd.ca.gov%2Fhpd%2Fnimby%2Fhow_cable.pdf&ei=JLooU8TKFJDqoASEilHoBg&u

- Deciding whether to take a proactive approach by generating media coverage, or a reactive approach by preparing to respond effectively to media coverage as it occurs;
- Designating and preparing spokesperson(s);
- Developing the message(s) and stories targeted to specific audiences;
- Preparing brief fact sheets about the housing developer, the proposal, its supporters, efforts to resolve legitimate community concerns, and other information to support the message and stories; and
- In a proactive approach, inviting reporters for a tour of existing supportive housing units and introducing them to residents and staff.

Social media can also play an important role in getting your message out to supporters, opponents, print and broadcast media, and government officials.²²⁷ CalMHSA has developed and supported media materials, and launched a social marketing campaign, as part of its mental health stigma and reduction efforts.²²⁸ HUD has also developed media materials related to fair housing.²²⁹ These materials can be used as part of a media strategy that is targeted to your individual project, neighborhood and circumstances.

Chapter 5: Policy Recommendations

Recommendation #1:

[sg=AFQjCNHDKCNhRGFsZXsBnO1XEwWjHb-MIQ&sig2=Xa5k8whlg_C59lbt7HC4aQ&bvm=bv.62922401,d.cGU](http://www.mhac.org/inthenews/new-social-marketing-campaign.cfm)

²²⁷ <http://www.mhac.org/inthenews/new-social-marketing-campaign.cfm>;
<http://calmhsa.org/programs/stigma-discrimination-reduction-sdr/>; <http://us.reachout.com/reachouthere>;
<http://us.reachout.com/buscaapoyo>

²²⁸ See www.calmhsa.org; <http://www.eiconline.org/topic-areas/mental-health/> .

²²⁹ http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/adcampaign

The state and local governments should continue to support efforts to reduce stigma against people with mental health disabilities.

Below are some examples of measures that can be taken in furtherance of this recommendation. The state and local governments should solicit input from people with mental health disabilities, their representatives as appropriate, and supportive housing developers in determining the best methods for implementing these measures.

- a. The state of California should continue to fund outreach efforts such as Each Mind Matters, Reach Out Here, Busca Apoyo and Walk In Our Shoes which are designed to reduce stigma and discrimination against people with mental health disabilities, and counties should continue and expand similar local efforts.
- b. The California Department of Housing and Community Development (HCD) should post on its website outreach materials developed by the California Mental Health Services Authority (CalMHSA), the federal Department of Housing and Urban Development (HUD) and other sources²³⁰ to reduce stigma and discrimination against people with mental health disabilities, and distribute targeted materials to housing providers, local governments, and community groups that play a role in developing, supporting and funding supportive housing for people with mental health disabilities.
- c. Cities and counties should conduct community outreach, and train community development, fair housing, land use and planning staff, Section 504 coordinators and other staff working on issues relating to stigma reduction and land use and fair housing rights of people with mental health disabilities. Speaker bureaus and CalMHSA's Speak Our Minds website²³¹ can help connect local governments with speakers on issues relating to stigma and discrimination against people with mental health disabilities.

²³⁰ See Appendix B for a list of some of these resources.

²³¹ <http://www.speakourminds.org/>

- d. To the extent that local governments facilitate or participate in community discussions regarding zoning approval for affordable or supportive housing, they should communicate to all parties that housing providers and prospective tenants have land use and fair housing rights that protect housing developments against NIMBY opposition, and should distribute to all parties targeted outreach materials that explain these rights.

Recommendation #2:

The state and local governments should take all possible steps to develop, fund, and promote affordable housing and supportive services for people with mental health disabilities – including seeking guidance from the discussion and recommendations contained in this paper.

Below are some examples of measures that can be taken in furtherance of this recommendation. The state and local governments should solicit input from people with mental health disabilities, their representatives as appropriate, and supportive housing developers in determining the best methods for implementing these measures.

- a. The state *Olmstead* Task Force, Department of Housing and Community Development (HCD), Department of Health Care Services (DHCS) and Housing Finance Agency (CalHFA) should develop a plan to utilize available federal and state sources of housing and health care funding to maximize opportunities to develop, fund and promote affordable and supportive housing for people with mental health disabilities, and should seek to expand funding resources.
 - i. Under a program of the federal Substance Abuse and Mental Health Services Administration, the California Policy Academy to Reduce Chronic Homelessness (Policy Academy) has met to consider ways to reduce homelessness in the state, including among people with disabilities. The Policy Academy recently published a guide to Medi-Cal eligibility and enrollment tips for providers of

homeless assistance and supportive housing,²³² and is in the process of finalizing its recommendations. The state should consider these recommendations in developing ways to reduce homelessness for people with mental health disabilities through the development of supportive housing.

- ii. The California Community Choices project was a five-year grant funded by the federal Centers for Medicare and Medicaid Services to increase consumer access to home and community-based long-term care services through one-stop resource centers, a website guide to long-term care services, and a financing study to examine the laws, regulations, policies and payment methodologies related to long-term care financing in California. As recommended in the project's Long-Term Care Financing Report,²³³ the state should develop a strategic plan describing the state's mission, values, and goals for long-term care services and supports, and setting specific tasks for achieving those goals.
- iii. The state should develop one or more mechanisms to continue and expand funding for the Mental Health Services Act (MHSA) Housing Program and similar supportive housing programs, and address current constraints to development as discussed in the SAMHSA Policy Academy's upcoming recommendations. To the extent that MHSA funding is no longer available for supportive housing, the state should identify other funding sources.
- iv. The state should continue to apply for funding from the federal Section 811 Project Rental Assistance (PRA) Program, which provides project-based rental assistance to state housing agencies to create permanent supportive

²³² <http://www.hcd.ca.gov/LetsGetEveryoneCovered.pdf>

²³³ California Community Choices Project, *Long-Term Care Financing Report: Home and Community-Based Long-Term Care: Recommendations to Improve Access for Californians* (Nov. 2009), available at: <http://www.communitychoices.info/reports.html>

housing for extremely low-income persons with disabilities, and requires coordination between state housing and health agencies.

- v. The state should take all possible steps to increase and fund development of affordable, accessible, and supportive housing stock. The state should also develop additional resources for ongoing operational support and services in supportive housing. Previous programs that could serve as models for funding supportive housing include the Mental Health Services Act, the Supportive Housing Initiatives Act, the Housing and Emergency Shelter Trust Fund, and the Local Housing Trust Fund. The state should also sustain and expand the Veterans Housing and Homelessness Prevention Program, as a significant source of supportive housing funding for veterans with disabilities. The state should also establish a housing fund with a permanent funding source, to supplement housing bond financing which is sporadic and subject to significant market fluctuation. The state should also explore collaborations with DHCS around the use of Medi-Cal waivers and other mechanisms to provide funding for services in supportive housing.
- vi. The Department of Health Care Services (DHCS) should leverage Medicaid dollars to support home-based services, and services that can be used in connection with supportive housing, for people with mental health disabilities.²³⁴ For example, the Health Homes for Enrollees with Chronic Conditions option of the federal Patient Protection and Affordable Care Act²³⁵ offers an opportunity for California to provide home-based services, including mental health services, to Medi-Cal beneficiaries with chronic and complex health conditions through the Medi-Cal Section 1115 Home

²³⁴ See HCD and DHCS, *Let's Get Everyone Covered! Medi-Cal Eligibility and Enrollment Tips for Providers of Homeless Assistance and Supportive Housing* (March, 2014) <http://www.hcd.ca.gov/LetsGetEveryoneCovered.pdf>

²³⁵ 42 U.S.C. §1396(w)(4).

and Community Based Waiver program. These services would be funded through federal Medicaid dollars, with matching state funds. The California Legislature enacted the Health Homes option through Assembly Bill 361 in 2013.²³⁶ DHCS should move forward to implement the program, which would provide a significant source of funding for services in supportive housing.

- vii. To ensure consistency, the state should use the statutory definition of supportive housing²³⁷ wherever possible, including in funding source requirements, planning documents such as housing elements, and other policy documents.
- viii. State housing and Medi-Cal funds should be better coordinated to ensure consistent requirements and more support for supportive housing, including Medi-Cal funds and funds utilized by the California Tax Credit Allocation Committee (TCAC), the California Department of Housing and Community Development (HCD), the California Housing Finance Agency (CalHFA), and Veterans' programs.
- ix. Work with DHCS on strategies to encourage local governments to obtain Section 8 housing vouchers under HUD's Non-Elderly Disabled (NED) and Veterans' Affairs Supportive Housing (VASH) programs.
- x. The state should increase coordination between state housing and health care agencies to better connect housing and supportive services for people with mental health disabilities, including expanding any interagency partnership agreements. The state should also provide resources to

²³⁶ Welfare & Institutions Code §14127.

²³⁷ The statutory definition of supportive housing is "housing with no limit on length of stay, that is occupied by the target population, and that is linked to onsite or offsite services that assist the supportive housing resident in retaining the housing, improving his or her health status, and maximizing his or her ability to live and, when possible, work in the community." Health & Safety Code §50675.14(b)(2); Government Code §65582(f).

local governments to assist them in coordinating activities of their housing and mental health/behavioral health departments. These resources could be derived from federal/state Medicaid Home and Community Based Waiver funding, or state housing funds.

- xi. Because public processes can fuel NIMBY opposition, the state's funding mechanisms for housing and supportive services should not require that housing developers conduct community outreach in order to obtain funding for supportive housing.
 - xii. State funding incentives should require not only that housing elements are in compliance with statutory mandates, but also that zoning codes are amended to accurately reflect those housing elements.
 - xiii. Consider developing additional state level incentives for housing element compliance, including ones pertaining to funding for transportation and other infrastructure programs (which may be of more importance to individuals and local governments that do not support affordable housing in their neighborhoods).
- b. Local governments should take advantage of all available funding sources for affordable housing and supportive services for people with mental health disabilities.
- i. The Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009²³⁸ consolidated three programs under the McKinney-Vento Homeless Assistance Act: the Supportive Housing Program, the Shelter Plus Care Program, and the Section 8 Moderate Rehabilitation SRO Program into a single grant program known as the Continuum of Care Program. The Continuum of Care program provides a source of funding for housing and

²³⁸ 42 USC §11302

supportive services for people, including people with mental health disabilities, who are moving from homelessness to supportive living. Local governments should pursue all available funding under this program to develop supportive housing and service for people with mental health disabilities in California.²³⁹

- ii. Local governments and public housing authorities should take advantage of any other opportunities for funding of housing and supportive services, such as loans from the Corporation for Supportive Housing (CSH), funding from transit districts and general housing funds, and use of locally controlled federal housing dollars.²⁴⁰
- c. As part of their mandate to review and evaluate the community's mental health needs, services, and facilities,²⁴¹ local mental health boards and commissions should take active oversight and planning roles in promoting supportive housing for people with mental health disabilities. For example, mental health boards and commissions should actively participate in the development and monitoring of their local housing elements and consolidated plans, to ensure that the community's need for supportive housing is adequately identified and addressed. In developing, funding and promoting affordable housing and supportive services for people with mental health and other disabilities, state and local governments should take steps to ensure that these programs support consumer choice and are consistent with residents' legal rights.
 - i. Supportive housing models should include housing that meets the statutory definition of supportive housing,²⁴² even

²³⁹ For information about funding opportunities under the Continuum of Care and other HUD programs, see http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/homeless/programs/coc

²⁴⁰ For information about CSH loans, see <http://www.csh.org/lending>

²⁴¹ Welfare & Institutions Code § 5604.2(a).

²⁴² Supportive Housing is defined in statute as "housing with no limit on length of stay, that is occupied by the target population, and that is linked to onsite or offsite services that assist the supportive housing resident in retaining the housing, improving his or her health status, and maximizing his or her ability to live and, when possible, work in the community." Health & Safety Code §50675.14(b)(2); Government Code §65582(f).

if it does not qualify for a licensing exemption under the Community Care Facilities Act.²⁴³

- ii. Supportive services should always be voluntary, and acceptance of services should not be connected to a resident's ability to maintain his or her housing.
- iii. Supportive housing should recognize that people have multiple needs, and should have some percentage of units that are fully accessible to people with mobility and sensory disabilities.
- iv. Supportive housing units and services should be integrated into communities so that people with mental health disabilities are not required to live in housing that is segregated in particular buildings.

Recommendation #3:

The state should revise its *Olmstead* Implementation Plan to promote supportive housing for individuals with mental health disabilities who would otherwise be unnecessarily institutionalized or at risk of institutionalization.²⁴⁴

Below are some examples of measures that can be taken in furtherance of this recommendation. The state should solicit input from people with mental health disabilities, their representatives as appropriate, and supportive housing developers in determining the best methods for implementing these measures.

²⁴³ Health & Safety Code §1504.5(c).

²⁴⁴ For more specific recommendations on California's implementation of its *Olmstead* plan in light of recent developments including health care reform and managed care, see Californians for *Olmstead*, *A Blueprint for Advocates: Recommended Next Steps to Advance California's Implementation of the Supreme Court's Olmstead Decision* (September 30, 2011), available at: <http://www.momentumformentalhealth.org/document.doc?id=65>

- a. The *Olmstead* Plan should address the problem of stigma against people with mental health disabilities, and set specific goals for promoting supportive housing as a mechanism for reducing stigma and avoiding unnecessary institutionalization.
- b. The *Olmstead* Plan should be revised to comply with the guidance issued to states by the U.S. Health Care Financing Administration (HCFA)²⁴⁵ to ensure that *Olmstead* plans effectively promote community-based alternatives for people who are unnecessarily institutionalized or at risk of institutionalization. For example:
 - i. The *Olmstead* Plan should evaluate the adequacy with which the state is conducting thorough, objective and periodic reviews of all individuals with disabilities in institutional settings, and at risk of institutionalization, to determine the extent to which they can and should receive services in a more integrated setting.
 - ii. The *Olmstead* Plan should assess the availability and adequacy of integrated community-based supports and services for people with mental health disabilities, review available funding mechanisms, and present a plan for improving the system of community-based care.
 - iii. The *Olmstead* Plan should address what information, education, and referral systems would be useful to ensure that people with disabilities receive the information necessary to make informed choices about community-based services and supports.
 - iv. The state should involve people with mental health disabilities (and their representatives, where appropriate) in the development and implementation of the *Olmstead* Plan,

²⁴⁵ HCFA, *Dear State Medicaid Director Letter* (2000), available at: <http://www.healthlaw.org/issues/disability-rights/hcfa-dear-state-medicaid-director-letter-provides-guidance-on-olmstead-decision>

and consider what methods could be employed to ensure constructive, on-going involvement and dialogue.

- v. As part of its mandate to address care for people with mental health disabilities in the most integrated setting, the *Olmstead* Plan should address the need for supportive housing and create a plan and process for creating more housing and supportive services. This includes identification and development of funding sources for both housing development and delivery of associated services and supports for the duration of the housing.

Recommendation #4:

Local governments should ensure that their land use, planning and zoning efforts enable supportive housing and discourage NIMBYism.

Below are some examples of measures that can be taken in furtherance of this recommendation. Local governments should solicit input from people with mental health disabilities, their representatives as appropriate, and supportive housing developers in determining the best methods for implementing these measures.

- a. Local governments should ensure that their housing elements and consolidated plans are current and approved, that the disability and fair housing assessment and program portions of these planning documents promote and encourage supportive housing, and that changes are made to zoning codes as needed to comply with current and approved housing elements and consolidated plans.
 - i. Planning documents and zoning codes should specify that supportive housing, including supportive housing that does not qualify for a licensing exemption, must be treated like residential housing that is sited in the same zone.
 - ii. Planning documents and zoning codes should include reasonable accommodations provisions that offer a no-cost administrative process for requesting a reasonable accommodation in a manner that complies with state and

federal fair housing laws, without public notice or hearing requirements.

- iii. Housing elements should address and analyze NIMBY barriers as non-governmental constraints to housing for people with mental health and other disabilities.²⁴⁶
- iv. Planning documents and zoning codes should acknowledge that people with disabilities are a diverse group with diverse needs. For example, people with physical disabilities may need fully accessible units, people with vision disabilities may need auditory alarms and accessible signage, and people with hearing disabilities may need individuals in management who can use American Sign Language or the availability of technologies such as video relay services. Similarly, people with mental health, cognitive and development disabilities may require alternate housing models such as supportive housing to meet their needs.
- v. Planning documents and zoning codes should specify what efforts the jurisdiction has taken, and plans to take, to make sure that the public is aware that reasonable accommodations are available, and explain the process for requesting an accommodation.
- vi. Reasonable accommodation ordinances should explain the standards that the jurisdiction will use to grant reasonable accommodations, as well as the procedures that housing developers should use to request them. These ordinances should explain that the standards for reasonable accommodations are different than the standards for CUPs or zoning variances, and indicate that accommodation requests will be granted unless they constitute a

²⁴⁶ The California Department of Housing and Community Developments has resources available to assist local government in developing and updating their housing elements. See <http://www.hcd.ca.gov/hpd/hrc/plan/he/> , and the resources listed in Appendix B.

fundamental alteration of the local land use program or pose an undue administrative or financial burden.

- vii. Reasonable accommodation ordinances should use definitions of “people with disabilities” that are consistent with state and federal law.
- b. Local governments should make efforts to ensure that they do not pass ordinances which have the unintended consequence of limiting supportive housing options for people with disabilities.
- c. In order to ensure meaningful participation by and on behalf of people with disabilities, local governments should make diligent efforts to include people with disabilities, their representatives as appropriate, supportive housing developers, and service providers in the land use and planning process. For example, local governments should take active measures to encourage these groups to participate in the ongoing housing element process.
- d. All types of shared housing, including sober living homes, should be permitted by right in all residential zones.

Appendix A: Land Use & Fair Housing/Anti-Discrimination Laws

Land Use & Planning

Provision	Citation	Summary
Federal Law		
Federal Consolidated Plan Obligation	42 USC §12701 et seq.; 24 CFR Parts 91 & 570	Requires cities, counties, and states (on behalf of rural communities) to prioritize and plan how it will allocate HUD federal community development funds
California Law		
Housing Elements Planning Obligations	Government Code §65580 <i>et seq.</i>	Requires local governments to plan for housing to meet the needs of certain populations, including people with disabilities
California Housing Accountability (“Anti-NIMBY”) Act	Govt Code §65589.5	Prohibits local governments from making land use decision that disapprove, or make infeasible, housing developments, including supportive housing, without specified written findings

Fair Housing & Anti-Discrimination Laws

Provision	Citation	Summary
Federal Law		
U.S. Constitution Due Process & Equal Protection Clauses	U.S. Const. Amend. XIV	Requires that zoning ordinances have a rational relationship to legitimate governmental interests
Fair Housing Amendments Act	42 USC §3601 <i>et seq.</i> 24 CFR §100.1 <i>et seq.</i>	Prohibits discrimination in all housing, unless excluded
Americans with Disabilities Act, Title II	42 USC §12101 <i>et seq.</i> 28 CFR §35.101 <i>et seq.</i>	Prohibits discrimination by state or local governments, including land use & zoning
Rehabilitation Act, Section 504	29 USC §794 24 CFR §9.1901 <i>et seq.</i>	Prohibits discrimination in housing operated with federal funds
California Constitution Article I		Protects enjoyment of life, liberty, property and privacy
Fair Employment & Housing Act	Govt Code §12900 <i>et seq.</i>	Prohibits discrimination in all housing, unless excluded
Discrimination Against Affordable Housing Law	Govt Code §65008	Prohibits discrimination by local governments against affordable housing, developers, or residents based on method of financing, income of tenants, or protected status of tenants including disability

Provision	Citation	Summary
Prohibition Against Discrimination by State Governments and State-Funded Entities	Govt Code §11135	Prohibits discrimination by state governments and entities receiving state funding

Appendix B: Resources

21 Elements

San Mateo Housing Element Update Kit: SB 2 Policy and Technical Paper (October 10, 2008)

<http://21elements.com/Resources/table-of-contents.html>

Zoning in the Wake of SB 2: Best Practices for Emergency, Supportive and Transitional Housing

<http://21elements.com/Resources/table-of-contents.html>

California Affordable Housing Law Project, Public Interest Law Project

Anti-NIMBY Tools (2006)

<http://www.housingadvocates.org/docs/antinimbytools.pdf>

California Housing Element Manual (3rd Ed. 2013)

<http://pilpca.org/wp-content/uploads/2013/11/California-Housing-Element-Manual-3rd-Ed.-November-2013.pdf>

California Housing Element Manual, Appendices (2nd Ed. 2013)

<http://pilpca.org/wp-content/uploads/2010/10/California-Housing-Element-Manual-3rd-Ed.-Appendices-2013.pdf>

Laws Affecting the Location & Approval of Affordable Housing for Families and Homeless People: How They Work & How to Use Them (March 2000)

<http://pilpca.org/wp-content/uploads/2010/10/CASCSManual-Title.pdf>

California Community Choices Project

Long-Term Care Financing Report - Home and Community-Based Long-Term Care: Recommendations to Improve Access for Californians (Nov. 2009)

<http://www.communitychoices.info/reports.html>

California Department of Housing and Community Development

Building Blocks for Effective Housing Elements

http://www.hcd.ca.gov/hpd/housing_element2/

Guidance on Persons with Disabilities

http://www.hcd.ca.gov/hpd/housing_element2/SHN_disabilities.php

Housing Elements Compliance Report

<http://www.hcd.ca.gov/hpd/hrc/plan/he/status.pdf>

Incentives for Housing Elements Compliance

http://www.hcd.ca.gov/hpd/hrc/plan/he/loan_grant_hecompl011708.pdf

[Let's Get Everyone Covered! Medi-Cal Eligibility and Enrollment Tips for Providers of Homeless Assistance and Supportive Housing](http://www.hcd.ca.gov/LetsGetEveryoneCovered.pdf)
(March, 2014)

<http://www.hcd.ca.gov/LetsGetEveryoneCovered.pdf>

Memorandum: Senate Bill 2 – Legislation Effective January 1, 2008: Local Planning and Approval for Emergency Shelters and Transitional and Supportive Housing, (Updated April 10, 2013)

http://www.hcd.ca.gov/hpd/sb2_memo050708.pdf

Model Ordinance for Providing Reasonable Accommodations Under Federal and State Fair Housing Laws

http://www.hcd.ca.gov/hpd/housing_element2/documents/MODEL_REASONABLE_ACCOMODATION_ORDINANCE.pdf

NIMBY Resources

<http://www.hcd.ca.gov/hpd/nimby.htm>

California Mental Health Services Authority

Busca Apoyo

<http://us.reachout.com/buscaapoyo>

Each Mind Matters

<http://www.eachmindmatters.org/get-informed/>

Reach Out Here

<http://us.reachout.com/reachouthere>

Walk In Our Shoes

<http://walkinourshoes.org/>

California Office of the Attorney General

Adoption of a Reasonable Accommodation Procedure (May 15, 2001)

http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf

Californians for Olmstead

A Blueprint for Advocates: Recommended Next Steps to Advance California's Implementation of the Supreme Court's Olmstead Decision (September 30, 2011)

<http://www.momentumformentalhealth.org/document.doc?id=65>

County of Los Angeles Department of Mental Health

A Guide to Successful Siting Strategies: Ensuring Delivery of Mental Health Services and Supportive Housing in Community Settings (2009)

http://file.lacounty.gov/dmh/cms1_159835.pdf

County of San Diego Health and Human Services Agency

Housing Matters

<http://housingmatterssd.org>

Corporation for Supportive Housing

Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing (2010)

http://www.csh.org/wp-content/uploads/2011/12/Tool_BTL_CA1.pdf

Mental Health Services Act Housing Toolkit (November 2005)

www.dhcs.ca.gov/services/MH/documents/MHSAToolKit-final.pdf

Resources (Tools, Case Studies, Reports & Templates)

www.csh.org/resources/

Supportive Housing & Olmstead: Creating Opportunities for People with Disabilities (November, 2012)

http://www.csh.org/wp-content/uploads/2012/12/Supportive_Housing_Olmstead.pdf

Six Steps to Building Community Support (March, 2006)

<http://www.csh.org/wp-content/uploads/2012/07/SixStepspdf.pdf>

Supportive Housing Facts

<http://www.csh.org/supportive-housing-facts/>

Toolkit for Developing and Operating Supportive Housing

http://www.csh.org/wp-content/uploads/2011/12/Tool_DevelopingOperating-Toolkik.pdf

Disability Rights California

Supportive Housing under the Mental Health Services Act (Pub #CM35.01, March 2014)

<http://www.disabilityrightsca.org/CalMHSA/CalMHSAfactsheets.html>

Housing Resources for People with Mental Health Disabilities (Pub #CM34.01, March 2014)

<http://www.disabilityrightsca.org/CalMHSA/CalMHSAfactsheets.html>

Housing Alliance of Pennsylvania

Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit (1996)

<http://www.fhcsp.com/Links/toolkit.pdf>

Judge David L. Bazelon Center for Mental Health Law

A Place of My Own: How the ADA is Creative Integrated Housing Opportunities for People with Mental Illnesses (March 2014)

http://www.bazelon.org/portals/0/Where%20We%20Stand/Community%20Integration/Olmstead/A%20Place%20of%20My%20Own.%20Bazelon%20Center%20for%20Mental%20Health%20Law.pdf?utm_source=4.1.4_A+Place+of+My+Own+Report+&utm_campaign=3.27.14_APlaceofMyOwn&utm_medium=email

Fair Housing Information Sheet #3: Neighbors Buying Property to Prevent the Establishment of a Group Home

http://www.bazelon.org/LinkClick.aspx?fileticket=nNj8tBn_DgQ%3D&tabid=245

Just Like Where You and I Live: Integrated Housing Options for People with Mental Illnesses (March 2004)

<https://www.bazelon.org/LinkClick.aspx?fileticket=4sZjOa313ol%3D&tabid=245>

Supportive Housing: The Most Effective and Integrated Housing for People with Mental Disabilities

http://www.bazelon.org/LinkClick.aspx?fileticket=q6FsuL6o_Jw%3D&tabid=126

Mental Health Advocacy Services

Fair Housing Reasonable Accommodation: A Guide to Assist Developers and Providers of Housing for People with Disabilities in California (February 2005)

<http://www.mhas-la.org/developerguide3-9-05.pdf>

National Association of State Mental Health Program Directors

NASMHPD Policy Brief - Affordable Housing: The Role of the Public Behavioral Health System (October 2011)

http://www.nasmhpd.org/docs/Policy/PolicyBrief_Housing2011.pdf

National Council on Disability

Inclusive Livable Communities for People with Psychiatric Disabilities
(March 2008)

<http://www.ncd.gov/newsroom/publications/index.htm>

National Governor's Association, Center for Best Practices

Supportive Housing for People with Mental Illness: Regaining a Life in the Community (September 25, 2007)

<http://housingtaskforce.org/resources/Supportive+Housing+for+People+with+Mental+Illness.pdf>

Non-Profit Housing Association of Northern California

Fair Housing Toolkit

<http://nonprofithousing.org/resources/fair-housing-toolkit/>

Housing Elements Toolkit

<http://nonprofithousing.org/resources/zone-for-homes-and-the-housing-element-toolkit/>

How to Create a Cable TV Show About Affordable Housing

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.hcd.ca.gov%2Fhpd%2Fnimby%2Fhow_cable.pdf&ei=JLooU8TKFJDqoASEilHoBg&usg=AFQjCNHDKCNhRGFsZXsBnO1XEwWjHb-MIQ&sig2=Xa5k8whlg_C59lbt7HC4aQ&bvm=bv.62922401,d.cGU

Inclusionary Housing Toolkit

<http://nonprofithousing.org/resources/inclusionary-housing-advocacy-toolkit/>

Let's Talk About Contemporary Affordable Housing: Dealing with Fearful Opponents of Housing

http://nonprofithousing.org/wp-content/uploads/Documents/Toolkits/Original%20Toolkit/Fearful_Opponents_march.pdf

Original NPH Toolkit

<http://nonprofithousing.org/resources/the-original-nph-toolkit/>

Siting of Homeless Housing and Services: Best Practices for Community Acceptance (October 200)

<http://nonprofithousing.org/wp-content/uploads/Documents/Toolkits/Original%20Toolkit/CASC2000report.pdf>

What Works in Affordable Housing Education?

<http://nonprofithousing.org/wp-content/uploads/Documents/Toolkits/Original%20Toolkit/whatworksaffhseduc.pdf>

Technical Assistance Collaborative

Best Practice Principles for Achieving Civil Rights in Permanent Supportive Housing (2006)

<http://www.tacinc.org/knowledge-resources/publications/opening-doors/best-practices-civil-rights-psh/>

Olmstead and Supportive Housing: a Vision for the Future (2001)

<http://www.tacinc.org/knowledge-resources/publications/issue-briefs/olmstead-supportive-housing/>

Permanent Supportive Housing: A Proven Solution to Homelessness (2003)

<http://www.tacinc.org/knowledge-resources/publications/opening-doors/permanent-supportive-housing/>

Strategies for Creating Integrated Supportive Housing for People with Disabilities (2013)

<http://www.tacinc.org/knowledge-resources/publications/issue-briefs/strategies-for-creating-integrated-supportive-housing/>

U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration

HCFA Dear State Medicaid Director Letter (2000)

<http://www.healthlaw.org/issues/disability-rights/hcfa-dear-state-medicaid-director-letter-provides-guidance-on-olmstead-decision>

President's New Freedom Commission on Mental Health, Achieving the Promise: Transforming Mental Health Care in America, Executive Summary (July 2003)

<http://store.samhsa.gov/product/Achieving-the-Promise-Transforming-Mental-Health-Care-in-America-Executive-Summary/SMA03-3831>

Building Your Program: Permanent Supportive Housing (2010)

<http://store.samhsa.gov/shin/content/SMA10-4510/SMA10-4510-06-BuildingYourProgram-PSH.pdf>

<http://research.policyarchive.org/17617.pdf>

<http://research.policyarchive.org/17617.pdf>

U.S. Department of Housing and Urban Development

Fair Housing Planning Guide, Vol.1 (March 1996)

www.hud.gov/offices/fheo/images/fhpg.pdf

Joint Statement of the U.S. Department of Housing and Urban Development and the U.S. Department of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004)

<http://www.hud.gov/offices/fheo/library/huddojstatement.pdf>

Joint Statement of the U.S. Department of Justice and the U.S. Department of Housing and Urban Development: Group Homes, Local Land Use and the Fair Housing Act (August 18, 1999)

http://www.justice.gov/crt/about/hce/final8_1.php

Memorandum from Roberta Achtenberg: Filings that May Implicate the First Amendment (Sept. 2, 1994)

<http://www.fairhousing.com/index.cfm?method=page.display&pageID=257>

U.S. Surgeon General

Mental Health: A Report of the Surgeon General, Chapter 4 (1999)

http://www.surgeongeneral.gov/library/mentalhealth/chapter4/sec6.html#human_services

We want to hear from you! After reading this report please take this short survey and give us your feedback.

English version:

<http://fs12.formsite.com/disabilityrightscsca/form54/index.html>

Disability Rights California is funded by a variety of sources, for a complete list of funders, go to <http://www.disabilityrightscsca.org/Documents/ListofGrantsAndContracts.html>.

The California Mental Health Services Authority (CalMHSA) is an organization of county governments working to improve mental health outcomes for individuals, families and communities. Prevention and Early Intervention programs implemented by CalMHSA are funded by counties through the voter-approved Mental Health Services Act (Prop 63). Prop. 63 provides the funding and framework needed to expand mental health services to previously underserved populations and all of California's diverse communities.



WELLNESS • RECOVERY • RESILIENCE