SANNA R. SINGER
ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

NOAH J. BRAZIER
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

MARA W. ELLIOTT

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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REPORT TO THE CITY COUNCILMEMBERS

LEGALITY OF COMMUNITY NOTICING REQUIREMENT FOR TRANSITIONAL AND PERMANENT SUPPORTIVE HOUSING PROJECTS

INTRODUCTION

On July 23, 2019, the City Council is scheduled to consider the 12th Update to the Land Development Code (12th Update), a part of the San Diego Municipal Code (Municipal Code or SDMC). One portion of the 12th Update proposes a newly designated land use category for permanent supportive housing, and amends transitional housing from a conditional to a limited use in commercial and residential zones. In part, transitional and permanent supportive housing may provide mental health support and counseling to disabled persons and families who are homeless. *See* San Diego Ordinance No. O-2020-2, proposed amendments to SDMC § 113.0103 (adding definitions of permanent supportive housing and target population). While this Report focuses on disability discrimination, it is possible that a noticing requirement would affect another protected class.

At the Land Use and Housing Committee meeting on June 12, 2019, Councilmember Moreno asked this Office if the 12th Update could include a requirement to notify community planning groups before the City approves transitional or permanent supportive housing projects.

Some prospective residents of transitional and permanent supportive housing projects are protected under the Federal Fair Housing Act (FHAA) and California's Fair Employment and Housing Act (FEHA). Thus, a noticing requirement is likely facially discriminatory and subject to a heightened scrutiny standard of review because it would create different approval processes for transitional and permanent supportive housing projects. Unless the City could prove that a noticing requirement was justified by legitimate public safety concerns or provides benefits to the protected class, the requirement likely would be deemed invalid.

ANALYSIS

I. FEDERAL AND STATE LAW PROHIBIT HOUSING DISCRIMINATION

Both the FHAA and the FEHA prohibit discrimination in housing against protected classes of people, including those with a disability.[1] *See Community House, Inc. v. City of Boise, Idaho*, 490 F.3d 1041 (9th Cir. 2007); *Broadmoor San Clemente Home Owners Assn. v. Nelson*, 25 Cal. App. 4th 1, 9 (1994). Disability[2] under the FHAA includes "(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities; (2) a record of having an impairment, or (3) being regarded as having an impairment." *Nevada Fair Housing Ctr., Inc. v. Clark County*, 565 F. Supp. 2d 1178, 1182 (D. Nev. 2008). FEHA is even more inclusive, and replaces the phrase "substantially limits" in subsection (1) of the FHAA law with "limits"; no substantial limitation is required. Cal. Gov't Code § 12926.

Courts have determined the following types of housing to be for protected classes of people: drug addiction and recovery facilities, homeless shelters, transitional housing facilities, nursing homes, and group homes. *See, e.g*. *Community House, Inc. v. City of Boise, Idaho*, 490 F.3d 1041 (9th Cir. 2007); *United States v. The Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D. Puerto Rico 1991); *Nevada Fair Hous*ing *Ctr*., 565 F. Supp. 2d 1178 (D. Nev. 2008); *Jeffery O. v. City of Boca Raton*, 511 F. Supp. 2d 1339 (S.D. Fla. 2007); *Broadmoor San Clemente Homeowners Assn. v. Nelson*, 25 Cal. App. 4th 1 (1994); *Hall v. Butte Home Health*, 60 Cal. App. 4th 308 (1997). Therefore, housing types similar to the proposed transitional housing and permanent supportive housing use category are considered by the courts to be housing for protected classes.

II. A FACIAL DISCRIMINATION CLAIM WOULD BE REVIEWED UNDER A HEIGHTENED SCRUTINY STANDARD

Adding procedural or substantive requirements that treat housing for a protected class less favorably than similar non-protected class housing is facial discrimination under the FHAA. *Nevada Fair Housing Ctr.*, 565 F. Supp. 2d at 1182. A facially discriminatory law or regulation is "one which on its face applies less favorably to a protected group." *Community House, Inc.*, 490 F.3d at 1048. A law or regulation can be facially discriminatory regardless of how it is or would be enforced.

Facially discriminatory laws or requirements are subject to "heightened scrutiny" by the courts. *Human Resource Research and Management Group, Inc., v. County of Suffolk*, 687 F. Supp. 2d 237, 256 (E.D.N.Y. 2010). Courts will only uphold a facially discriminatory law or regulation if there are "(1) legitimate public safety concerns (not stereotypes); or (2) benefits to

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[1] The FHAA also prohibits discrimination based on: race, color, religion, national origin, sex, and familial status. *See* 42 U.S.C. § 3604 (2019). FEHA is broader, applying to all the FHAA protected classes as well as: sexual orientation, gender identity, gender expression, marital status, medical condition, ancestry, source of income, age, genetic information, and arbitrary discrimination. Cal. Gov't Code § 12955.

[2] Many FHAA and FEHA cases, laws, and regulations use the term "handicap" interchangeably with the term "disability." We will do the same in this Report.

the protected class." *Potomac Group Home Corp. v. Montgomery County*, *Md.*, 823 F. Supp. 1285, 1296 (D. Md. 1993); *Community House, Inc.*, 490 F.3d at 1050.

A legitimate public safety concern must be based on police reports, incident reports, or other documentation sufficient to justify discriminatory procedures. *Community House, Inc.*, 490 F.3d at 1051. For example, evidence of citizen petitions and "sparse anecdotal testimony regarding certain individuals with substance abuse problems" is not enough to meet the heightened scrutiny standard. *Human Resource Research and Management Group*, 687 F. Supp. 2d at 258. Additionally, a facially discriminatory law was not justified by the sole affidavit of an expert. *Community House, Inc.*, 490 F.3d at 1051 (men only homeless housing policy stricken for having insufficient evidence in the record supporting city's argument of safety concerns).

An alleged benefit to the protected class only passes heightened scrutiny if the facially discriminatory law or regulation is narrowly tailored and the benefit "clearly outweigh[s] whatever burden may result" to members of a protected class. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504 (10th Cir. 1995). Courts have not yet described a set of facts that would show how this rule would apply to laws or regulations similar to transitional or permanent supportive housing.

III. A COMMUNITY NOTICING REQUIREMENT SOLELY FOR TRANSITIONAL AND PERMANENT SUPPORTIVE HOUSING PROJECTS WOULD LIKELY BE FOUND FACIALLY DISCRIMINATORY UNDER THE LAW

A community planning group noticing requirement would likely be found facially discriminatory because it would impose additional burdens on transitional and permanent supportive housing projects. There are no other forms of ministerial housing in the Land Development Code that have a similar community planning group noticing requirement.[3]

In the 12th Update, transitional and permanent supportive housing is meant to assist persons, including disabled persons, who are unable to obtain housing themselves, and may provide "mental health support and counseling, as well as other services needed to support families and individuals with independent living." *See* the definition of disabled persons in SDMC § 113.0103; *see also* San Diego Ordinance No. O-2020-2, proposed amendments to SDMC § 113.0103 (adding definitions of permanent supportive housing and target population). Because the proposed transitional housing amendments and permanent supportive housing land use category are meant to provide services, including mental health services, to persons who cannot obtain housing unassisted, these persons would likely be either "substantially limited" in major life activities, be persons with records of impairments, or be persons regarded as having an impairment. These persons, who would be allowed to utilize permanent supportive housing, may fit the FHAA definition of persons with a disability as well as the broader FEHA definition.

In addition, permanent supportive housing is similar to other forms of housing that are intended for protected classes, such as transitional housing facilities, as it is meant to provide

[3] The Council may wish to explore whether the Municipal Code can be amended to include similar noticing for all housing development approvals. Any potential amendments could not be considered with the 12th Update on July 23, 2019 because amendment on the floor would not be Brown Act compliant.

support, shelter, and services to those with mental health issues. Courts have consistently found that laws and regulations applying to these types of housing are subject to heightened scrutiny.

The California Government Code also requires equal treatment of transitional housing and supportive housing in the housing element of local plans throughout the state because "[t]he availability of housing is of vital statewide importance." Cal. Gov't Code § 65580(a). Supportive housing under state law is analogous to permanent supportive housing in the 12th Update. *See* Cal. Gov't Code § 65582(g); Cal. Health and Safety Code § 50675.14. Under state law, within a local plan "[t]ransitional housing and supportive housing shall be considered a residential use of property and shall be subject only to those restrictions that apply to other residential dwellings of the same type in the same zone." Cal. Gov't Code § 65583(c)(3). While the 12th Update does not amend the City's local plans, these state laws underscore the public policy in favor of treating housing for members of a protected class the same as other residential housing. Because a community planning group noticing requirement is not placed on other ministerial development, including residential dwellings of the same type in the same zone, a court is likely to view such a requirement as additionally burdensome and therefore discriminatory.

If a court determined that a community planning group noticing requirement was facially discriminatory, it would be invalid unless the justification for the requirement was able to pass the heightened scrutiny standard used by the courts. The City would need to prove that there was a legitimate public safety concern based on police reports, incident reports, or other documentation. Concerns from citizens, citizen petitions, and lone expert opinions would not be enough to meet this standard. This Office is not aware of any court decision upholding a similar noticing requirement under this heightened standard.

CONCLUSION

A community planning group noticing requirement solely for transitional and permanent supportive housing could be challenged as facially discriminatory under the FHAA and FEHA because it creates different standards for housing projects for persons with a disability. To overcome this facially discriminatory laws or requirements are subject to heightened scrutiny by the courts. The City would need to provide (1) evidence of a legitimate and documented public safety concern, or (2) evidence that the noticing requirement provided a benefit that outweighed the additional burden to the protected class. If a court found that a noticing requirement violated the fair housing laws, the requirement would be deemed invalid.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ *Noah J. Brazier*
Noah J. Brazier
Deputy City Attorney

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