



Regulating Sober Living Homes and the Challenges of Implementing ADA & FHA

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I. Introduction

In the last 10 to 15 years, a unique type of group home has proliferated throughout California – the sober living home operated and managed not by the residents who live in the home, but by corporations and other business entities that house dozens of people in a single residence. These large homes often generate secondary effects burdening public services more so than other single-family uses, including smaller sober living homes, with fewer people. Quite commonly, large sober living homes are clustered in one residential area of a city such that smaller residential uses in the area experience disproportionately the impacts of the larger homes.

As used here, the term “large sober living home” refers to an unlicensed group home with seven or more residents. Other than occupancy restrictions applicable to all residential uses, there is no limit under federal law or California law on the number of persons who may live in a large sober living home.

Nothing in federal law categorically precludes a city from applying zoning laws to a sober living home, but those laws cannot discriminate against persons recovering from alcoholism or drug addiction. California law requires cities to treat a licensed “alcoholism or drug abuse recovery or treatment facility” with six or fewer residents the same as it treats any single-family residence. (Health and Safety Code section 11834.23.)¹ An

¹ The term “sober living home” as used here means an unlicensed group home which provides the same services as an “alcoholism or drug abuse recovery or treatment facility.” The latter term is broadly defined under California law as any premises that provides “24-hour nonmedical

unlicensed “alcoholism or drug abuse recovery or treatment facility” is illegal under California law. (Health and Safety Code section 11834.30.) A city may therefore regulate an unlicensed sober living home with six or fewer residents without running afoul of California licensing laws, but federal law still constrains that regulation. Sober living homes with six or fewer residents are less likely to generate negative secondary impacts, and less likely to create an institutionalized atmosphere, than their larger counterparts.

This paper explores some of the options for regulating large sober living homes, and how cities may exercise those options consistently with the federal Fair Housing Act (as amended in 1988 by the Fair Housing Amendments Act) (FHA) and the Americans with Disabilities Act (ADA).² Also discussed below are the obstacles cities have faced in court, and practical tips for avoiding those obstacles.

II. The Federal Government’s Position Regarding Local Regulation of Group Homes

The U.S. Department of Justice and the U.S. Department of Housing and Urban Development in August 2015 updated their joint statement on “Group Homes, Local Land Use, and the Fair Housing Act.” (“DOJ/HUD Joint Statement.”) A copy of the DOJ/HUD Joint Statement is attached to this paper. It includes a number of questions frequently posed by local officials, and provides answers to those questions. Those answers must be approached with extreme caution. Local officials walk a fine line in attempting to implement a policy that seemingly meets with federal

residential services to adults” recovering from alcoholism or drug addiction. (Health and Safety Code section 11834.02, subd. (a).) Those services, which are customarily provided in sober living homes, include group sessions, individual sessions, educational sessions, and treatment planning. (9 Cal. Code. Reg. § 10501.)

² Persons recovering from alcoholism or drug addiction are disabled under both the FHA and the ADA. *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1156-57 (9th Cir. 2013).

approval under one part of the DOJ/HUD Joint Statement, but comes very close to running afoul of federal law as articulated in another part.

The federal government recognizes that cities, under certain circumstances, may treat sober living homes differently than they treat other single-family uses:³

“A local government that believes a particular area within its boundaries has its ‘fair share’ of group homes could offer incentives to providers to locate future homes in other neighborhoods.

However, some state and local governments have tried to address this concern by enacting laws requiring that group homes be at a certain minimum distance from one another. The Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act. We also believe, however, that if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.”

(DOJ/HUD Joint Statement, p. 4.)

³ Even where a city does not violate federal law, a city could still violate California law by treating a licensed sober living home differently than other single-family uses. Again, California Health and Safety Code section 11834.23 requires cities to treat a licensed “alcoholism or drug abuse recovery or treatment facility” with six or fewer residents the same as it treats a single-family residence.

As the case law discussed below shows, courts look skeptically upon a city's self-serving pronouncement that a new zoning regulation aims to integrate residents of sober living homes into the community. This paper aims to assist local officials in navigating the pitfalls of federal law as interpreted and applied by the courts.⁴

III. Challenges in Implementing the FHA and ADA.

The most common type of FHA or ADA challenge to a zoning law asserts discriminatory treatment (also known as disparate treatment). A local zoning law that professes to protect residents of sober living homes commonly faces a "facial" challenge or an "as-applied" challenge under a discriminatory treatment theory.⁵

No citation to authority is needed for the well-established principle that a zoning law discriminates on its face when by its very terms disabled persons are treated less favorably than non-disabled persons. In those circumstances, courts invalidate the law and it can no longer be applied at all.

If a zoning law is facially neutral (i.e., it does not discriminate on its face), it may nevertheless be invalid as applied in particular circumstances. Often, these "as-applied" challenges result in invalidation of a specific decision on a land use application, but the zoning law remains in effect on the theory that it may be validly applied in other circumstances.

In the FHA and ADA contexts, however, a facially neutral zoning law that has been applied in a discriminatory manner may lead not only to

⁴ Although this paper does not expressly address the restrictions on local regulation imposed by California's Fair Employment and Housing Act (FEHA), courts generally employ the same legal analysis in evaluating local laws under FEHA as they do in evaluating local laws under the FHA and ADA. See generally *Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008); *Auburn Woods I Homeowners Assn. v. Fair Employment and Hous. Comm'n*, 121 Cal.App.4th 1578, 1591 (2004).

⁵ This paper does not examine the other two theories under which an FHA or ADA violation may be established: (1) Disparate impact theory (recently reaffirmed in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015); and (2) Failure to provide a reasonable accommodation with respect to land use restrictions.

invalidation of the specific decision applying the law, but also to invalidation of the law itself. Although we often think of “as-applied” challenges to a facially neutral law as a challenge only to a particular application of that law, it is a mistake to assume in FHA and ADA cases that a facially neutral law will be upheld simply because discrimination is not apparent on its face.

This paper first examines FHA and ADA challenges to local zoning laws that are alleged to discriminate on their face. Next, the paper addresses cases in which local zoning laws neutral on their face are nevertheless invalid altogether, or invalid in particular circumstances.

A. Challenges to Local Zoning Laws That Discriminate On Their Face

In *Community House, Inc. v. City of Boise*, 490 F.3d 1041 (9th Cir. 2007) (*Community House*), the Ninth Circuit explained the standard for establishing a prima facie case of facial discrimination under the FHA. “[A] plaintiff makes out a prima facie case of intentional discrimination under the [Fair Housing Act] merely by showing that a protected group has been subjected to explicitly differential – i.e., discriminatory – treatment.” *Id.* at 1050 (internal citation and quotation omitted). A governmental agency that has adopted facially discriminatory zoning rules “must show either: (1) that the restriction benefits the protected class or (2) that it responds to the legitimate safety concerns raised by the individuals affected, rather than based on stereotypes.” *Id.* at 1050 (internal citation omitted).

A non-profit corporation in *Community House* had formerly managed a city-owned homeless shelter. The corporation sued the City under the FHA after a religious organization to which the City had later leased the shelter instituted a male-only policy. The complaint asserted that the male-only policy facially discriminated on the basis of gender and familial status. The Ninth Circuit held that plaintiff could likely establish a prima facie case of discrimination under the FHA. As justifications for the male-only

policy, the City asserted general safety concerns and the need to house homeless men so that a second facility could be made available for women and children. *Community House*, 490 F.3d at 1051. The court held that the City might later in the litigation prove that safety concerns warranted a male-only policy, but that the plaintiff had raised questions that were serious enough to warrant the issuance of an injunction. *Id.* at 1052.

Community House was followed by the District Court in *Nevada Fair Housing Center, Inc. v. Clark Co.*, 2007 U.S. Dist. Lexis 12800 (D.Nev. 2007) (*Nevada Fair Housing*). In that case, the County's group home ordinance prohibited group homes for the disabled that housed more than six persons. *Id.* at *18. The ordinance also required a special use permit for homes housing six or fewer persons to locate within 1500 feet of a similar home. *Id.* at *18. A non-profit corporation advocating for housing rights filed suit under the FHA, asserting that the ordinance facially discriminated against the disabled. *Id.* at *1-*2. The District court held that the County's ordinance was facially discriminatory and failed the test adopted by the Ninth Circuit in *Community House*. The County argued that the spacing requirement was necessary to comply with state law and to prevent the clustering of group homes in certain areas. *Id.* at *26. The court refrained from addressing whether the relevant state law violated the FHA; noting instead that the County's Ordinance "did not track the language of [the statute]." *Id.* at *27. The court also found that the County failed to provide any evidence that its Ordinance promoted deinstitutionalization. *Ibid.*

More recently, the Central District of California rejected a facial challenge to an ordinance of the City of Costa Mesa regulating sober living homes. *Solid Landings Behavioral Health, Inc. v. City of Costa Mesa*, (unpublished Order, dismissing lawsuit, filed April 21, 2015). Costa Mesa requires residential uses in its R-1 residential zone to function as "single housekeeping units." The primary hallmarks of a "single housekeeping unit" in Costa Mesa are (1) that household members share responsibilities and expenses; (2) that members have "some control" over the membership

of the household; and (3) that the residential activities of the household are conducted on a nonprofit basis.

Costa Mesa defines a “sober living home” as a group of persons in recovery from alcohol and/or drug addiction who are considered disabled under federal or state law. Sober living homes do not include residences operating as a single-housekeeping unit. A sober living home, which is by definition not a single housekeeping unit, may operate in the R-1 residential zone only with a special use permit or a reasonable accommodation.

The findings in Costa Mesa’s ordinance establishing these requirements include concerns that its neighborhoods not become institutionalized with sober living homes such that residents of those homes fail to integrate into the community.

Plaintiffs challenged Costa Mesa’s ordinance on its face. They alleged that the ordinance was born of discriminatory animus by City officials; that the ordinance’s special use permit and reasonable accommodation processes are discriminatory; and that the City subjected them to embarrassment and ridicule by imposing a condition on any special use permit that a sober living home not be located within 650 feet of another sober living home or a state licensed alcoholism or drug abuse recovery or treatment facility.

The court found that plaintiffs had not stated a facial challenge under either the FHA or the ADA. The court found that Costa Mesa’s ordinance treats sober living homes more favorably than other residential uses that also did not qualify as single housekeeping units. The ordinance provides the special use permit option for sober living homes to locate in the R-1 residential zone; that option is not available to other residential uses with only non-disabled residents.

The court also concluded that Costa Mesa’s 650-foot separation rule for sober living homes is not facially unreasonable. To the extent plaintiffs challenged the special use permit and reasonable accommodation

processes, their claims constituted unripe as-applied challenges because they had not yet sought either approval. The court also rejected equal protection and due process claims. Notably, the Court did not expressly rule upon or discuss the allegations that Costa Mesa had adopted the ordinance for a discriminatory purpose. The court entered judgment in favor of Costa Mesa.

Plaintiffs appealed from the judgment. The Ninth Circuit has enjoined enforcement of Costa Mesa's ordinance pending further court order. An appellate mediation conference is scheduled for May 17, 2016.

The above cases bring to mind the rule that local government may not defeat a facial challenge simply by implementing an approval procedure for group homes (e.g., a use permit or reasonable accommodation program). In *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999), operators of a methadone clinic announced their plans to open in the City, which enacted a moratorium against substance abuse clinics in response to the proposal. *Id.* at 727-28. The basis for the moratorium was the City's finding that the clinic would attract drug dealers and lead to an increase in crime in the surrounding area. *Id.* at 729. The clinic filed suit under the ADA and the Rehabilitation act, and sought a preliminary injunction. The District Court denied the request for an injunction, but the Ninth Circuit reversed and remanded the matter. Because the clinic had alleged that the moratorium was facially discriminatory, the District Court had erred by requiring the clinic to show that the City had failed to provide a reasonable accommodation. *Id.* at 733-734. Facially discriminatory ordinances are not subject to a reasonable accommodation analysis, and the availability of a reasonable accommodation procedure cannot rescue a facially discriminatory ordinance.

A separate strand of facial challenge involves a facially valid regulation where the government uses a proxy (i.e. service dogs) as a substitute for identifying the protected class (handicapped). In *Children's Alliance v. City of Bellevue*, 950 F.Supp. 1491 (W.D.Wash. 1997) (*Children's*

Alliance), an ordinance required group homes to be separated by 1000 feet and limited to six or fewer residents. The defining difference between a “family” and a group home under the ordinance was the addition of staff operating at the latter. *Id.* at 1493-94. The District Court held “that this use of ‘staff’ was a proxy for a classification based on the presence of individuals under eighteen and the handicapped as both groups require supervision and assistance.” *Id.* at 1496. Thus, the ordinance was facially discriminatory. The dispersal did not sufficiently benefit the handicapped by preventing the development of institutional neighborhoods because the City then had no group homes. The court also remarked that any alleged benefit would be closely scrutinized and found sufficient only if the benefits of the regulation clearly outweighed its burdens. *Id.* at 1499 (internal citations omitted). The District Court also held that the City’s repeated statements that it would be willing to reasonably accommodate the plaintiff’s group home was insufficient to rebut a finding of facial discrimination. *Id.* at 1500.

Proxy cases are common. *See, e.g., McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (gray hair may be a proxy for age); *Erie County Retirees Ass’n v. County of Erie*, 220 F.3d 193, 211 (3rd Cir. 2000) (“Medicare status is a direct proxy for age.”); *Cnty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 179 (3d Cir. 2005) (service dogs or wheelchairs are a proxy for handicapped status).

Zoning laws that discriminate on their face against disabled persons face substantial obstacles in court. Before a city adopts an ordinance which on its face treats disabled persons differently than non-disabled persons, it should consider the following tips:

- To survive a facial challenge under federal and California anti-discrimination laws, government must make a concrete evidentiary showing that the *plaintiffs themselves* pose a legitimate threat to public safety. It is not sufficient to rely upon stereotypes of unidentified people who share the same disability as plaintiffs.

- A generalized concern about retaining neighborhood character is likely insufficient to make the required showing of a legitimate threat to public safety.
- Any regulation which treats a protected class differently than others, no matter how seemingly innocuous, or even well-intentioned, is ill-advised. For example, persons in recovery are being harassed by residents who did not know that a sober living home was opening in the community. In response, the municipality adopts a neighbor notification law with the intent of diffusing the situation and assisting the residents in the sober living home. That law is invalid because it treats sober living homes for persons who are legally disabled differently than it treats other residential uses.
- Rigid distancing requirements face a high risk of being found by a court to be facially invalid, but an unsettled question is whether distancing requirements may be considered as one factor among others when clustering of housing serving the disabled has occurred in one area.

B. Challenges to Local Zoning Laws That are Facially Neutral

A plaintiff may establish a prima facie case of discriminatory application of a facially neutral ordinance in one of two ways.

First, a plaintiff may establish a prima facie case of discriminatory treatment by simply producing “‘direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated’ the defendant and that the defendant’s actions adversely affected the plaintiff in some way.” *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) (*Pacific Shores*), citing *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (*McGinest*). This standard is at times referred to as the “direct evidence test.”

Second, and alternatively, a plaintiff may satisfy the elements of the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1981) (*McDonnell Douglas*). *Pacific Shores*, 730 F.3d at 1158. Plaintiff establishes a prima facie case of discriminatory treatment under *McDonnell Douglas* by showing: (1) plaintiff is a member of a protected group, (2) plaintiff sought use and enjoyment of a particular dwelling (or type of dwelling, or housing in a particular zone) and was qualified to use and enjoy such dwelling; (3) plaintiff was denied the opportunity to use and enjoy such dwelling (or zoning) despite being qualified; and (4) defendant permitted use and enjoyment of such a dwelling (or zoning) by a similarly situated party during a period relatively near the time plaintiff was being denied use and enjoyment. See *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997). (*Gamble*).

“[I]t is not particularly significant whether [a plaintiff] relies on the *McDonnell Douglas* [factors] or, whether he relies on direct or circumstantial evidence of discriminatory intent” to establish a prima facie case of discriminatory treatment. *McGinest*, 360 F.3d at 1123. “[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.” *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985).

If a plaintiff establishes a prima facie case of discriminatory treatment, “the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action.” *Gamble*, 104 F.3d at 305. If the defendant articulates a legitimate, nondiscriminatory reason for its action, “the burden shifts to [plaintiff] to present evidence that [the] reason [asserted by defendant] is pretextual....” *Gamble*, 104 F.3d at 306. Whether furnishing direct evidence that discriminatory intent motivated the challenged action, or proceeding instead under the *McDonnell Douglas* framework, a plaintiff must respond to defendant’s articulated reason by producing “some evidence suggesting that the challenged action ‘was due in part or whole to discriminatory intent.’ [Citation.]” *Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008) (*Budnick*).

A survey of cases reveals that zoning laws are more vulnerable to successful challenge under the “direct evidence test” than under the *McDonnell Douglas* factors. This appears to arise from differences between the two approaches with respect to the reasons behind the challenged law. The “direct evidence test” focuses more on reasons or motivations, whereas the *McDonnell Douglas* test focuses more on the mechanics of the challenged decision. The *McDonnell Douglas* test requires a showing that the government treated the plaintiff less favorably than a similarly situated third party. The “direct evidence test” does not look to comparator evidence. Thus, the “direct evidence test” is more likely to lead to complete invalidation of a facially neutral law on the ground that it was adopted for discriminatory reasons, and the *McDonnell Douglas* test is more likely to lead to invalidation of only a particular application of a facially neutral law. This paper addresses only the “direct evidence test.”

1. Establishing a prima facie case under the direct evidence test.

a. Case Law

The somewhat malleable factors comprising the direct evidence test flow from the seminal decision in *Village of Arlington Heights, et al. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (*Arlington Heights*). “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.* at 266. Thus, the Supreme Court articulated several nonexclusive criteria which courts should evaluate in deciding whether the challenged action was motivated by discriminatory intent. “The historical background of the decision is one evidentiary source” to examine. *Id.* at 267. “The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.” *Id.* at 267. “Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant[.]” *Id.* at 267. “The legislative or administrative history may be highly relevant,

especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Id.* at 268. *Arlington Heights* involved race-based discrimination, but its list of criteria has guided courts in evaluating claims brought by disabled persons, as set forth below.

Courts have applied the *Arlington Heights* criteria in various formulations. Some courts have invalidated regulations based on fewer than all of the criteria. In many cases, plaintiffs rely only upon one or two of the criteria, with mixed results. There is no bright-line rule articulating the number of *Arlington Heights* factors that must be satisfied to establish a *prima facie* case of discriminatory intent under the direct evidence test. Nor is there a rule establishing which particular factors must be satisfied. Courts enjoy considerable discretion in employing and weighing the factors in each case.

(i) Recent Ninth Circuit Cases

In *Pacific Shores*, the Ninth Circuit applied the *Arlington Heights* factors to conclude that plaintiffs had marshaled strong evidence warranting a trial under the direct evidence test. Newport Beach’s ordinance regulating group homes did not single out sober living homes on its face; “the Ordinance facially imposed restrictions on some other types of group living arrangements as well.” 730 F.3d at 1147. The Court nevertheless examined the circumstances surrounding the preparation, adoption and implementation of the ordinance and concluded that “the City’s purpose in enacting the Ordinance was to exclude group homes from most residential districts and to bring about the closure of existing group homes in those areas.” *Ibid.*

In reaching this conclusion, the Court relied upon the following factors:

- Some of the restrictions on sober living homes originally had applied to properties rented to vacationing tourists, who would generate the same secondary effects as sober living home

residents, but after objections from those in the vacation rental industry, the City lifted the restrictions on the vacation properties. 730 F.3d at 1147.

- Concerned citizens in the community used derogatory terms when referring to residents of sober living homes, and the Court stated that the City appeared to adopt its ordinance in response to those comments. 730 F.3d at 1149.
- Before the ordinance was adopted, the City Council formed a committee comprised of two council members, a planning commissioner, and private citizens to review laws governing residential uses and to recommend solutions to preserve the residential character of the neighborhood. 730 F.3d at 1149.
- Before the ordinance was adopted, City staff created a task force to locate sober living homes, conduct surveillance of them, and enforce the existing zoning code against them. 730 F.3d at 1162, 1164.
- Before the ordinance was adopted, the City Council created an ad hoc committee of a minority of its members and met privately off the record with legal counsel to prepare the ordinance. The City Council had never before created an ad hoc committee of its members to assist in preparing an ordinance. 730 F.3d at 1151, 1164.
- Before the ordinance was adopted, City staff distributed surveys to residents, many of whom lived in neighborhoods opposed to sober living homes, to inquire of their views of group uses. The City had never before done this with respect to proposed legislation. 730 F.3d at 1150, 1164.
- One City Council member inquired on the record about whether sober living homes are effective in treating alcoholism or drug addiction. 730 F.3d at 1149.

- Another City Council member said the City's goal in preparing the ordinance was to ensure that no new sober living homes opened in the community; and that through strict enforcement of the ordinance, the existing over-concentration of those homes would subside. The Council member also characterized the ordinance as the most aggressive challenge in California to the over-concentration of sober living homes, and invited residents to judge the Council by the actual results generated by the ordinance. 730 F.3d at 1152.
- One planning commissioner said there was no need to be concerned about issues of discrimination, and that those issues are better saved for the courtroom. 730 F.3d at 1151.
- After the ordinance was adopted and the 90-day period to seek a use permit to continue operating had lapsed, the City sent abatement notices to sober living homes, but not to other non-conforming uses (until much later). 730 F.3d 1154, 1162.
- Public hearings on use permit applications submitted by sober living home operators were attended by residents who repeated the same derogatory comments they had made about sober living residents before the ordinance was adopted. 730 F.3d at 1154.

The Ninth Circuit concluded that all of these factors together clearly constituted an inference that the ordinance was enacted with the discriminatory purpose of harming sober living homes, and that plaintiffs were entitled to proceed to trial on their discriminatory treatment claim. 730 F.3d at 1164. The City could not rebut the inference of discriminatory intent just because the ordinance discriminated against non-disabled groups also. 730 F.3d at 1159-60.

Plaintiffs also produced evidence that the ordinance adversely affected them. The use permit and reasonable accommodation applications submitted by plaintiffs were denied except for one reasonable accommodation application that was granted on the condition that no more

than 12 residents live in each of two houses. 730 F.3d at 1154. The ordinance led to the closure of one-third of the sober living homes in the city and restricted new ones to multi-family zones; the city granted few use permit and reasonable accommodation applications submitted by other sober living home operators. 730 F.3d at 1155, 1165. Plaintiffs expended substantial time and money to comply with the use permit and reasonable accommodation application procedures. 730 F.3d at 1165.

In contrast, the Ninth Circuit in *Budnick* looked to the legislative record and concluded that comments made by neighbors did not evince a discriminatory motive on the part of the town. The court explained:

“[P]ermitting town councils, planning commissions, and the like to hear the views of concerned citizens and other interested parties about proposed projects is the essence of all zoning hearings. There is no evidence in the record to suggest that the cited comments or similar ones, which were a small part of the total comments, motivated the commissioners or Town Council members to vote against the [Special Use Permit], and we decline to make such an inference based solely on the fact that the comments were made.”

Budnick, 518 F.3d at 1117-18.

Although not a group home case, the Ninth Circuit most recently employed the *Arlington Heights* factors, and cited extensively to *Pacific Shores*, in *Avenue 6E Investments, Inc. v. City of Yuma*, 2016 WL 1169080 (9th Cir. March 25, 2016) (*Avenue 6E*). In that case, the Ninth Circuit reversed the dismissal of a discriminatory treatment claim under the FHA. *Id.* at *1.

Avenue 6E arose from the denial of an application to rezone land to permit higher density development in a neighborhood populated largely by Hispanic residents. 2016 WL 1169080, *1. The Ninth Circuit held that the plaintiff developers had stated a plausible claim under the FHA based on the following allegations:

- The City Council denied the application despite the advice of its own experts to grant the application. *Id.* at *1, *3.
- The application for rezoning was the only one of 76 such applications that the City denied in the last three years; all others were granted. *Id.* at *1, *5.
- The City Council capitulated to the animus expressed by opponents of high density development. *Id.* at *1, *2, *4, *8, *9. The City Council received letters and comments tinged with discriminatory animus toward Hispanic residents. *Id.* at *4, *8-*10. The City Council then denied the application, overruling the recommendations of the zoning commission and planning staff to approve it. *Id.* at *11.

Thus the Ninth Circuit observed: “The presence of community animus can support a finding of discriminatory motives by government officials even if the officials do not personally hold such views.” 2016 WL 1169080 at *8. “[U]nlike in *Budnick*, community members’ opposition to Developers’ application, using language indicating animus toward a protected class, provides circumstantial evidence of discriminatory intent by the City.” *Id.* at *9. Parsing the comments of community members, the Ninth Circuit iterated that “[w]e have held, however, that the use of ‘code words’ may demonstrate discriminatory intent.” *Id.* at *9. The court focused on comments such as “the type of people living in . . . large households;” or who “used single-family homes as multi-family dwellings;” or who “own numerous vehicles which they park in the streets and yards, [and] fail to maintain their residences, and lack pride of ownership.” *Id.* at *10. These comments, the court found, reflect “stereotypes of Hispanics that would be well-understood in Yuma.” *Id.* at *10.

(ii) Cases Outside the Ninth Circuit

In numerous other cases, courts have attributed the discriminatory comments of members of the community, or their concerns, to the governing board of the local agency, and have found discrimination based in part on those comments or concerns.

In *Stewart B. McKinney Foundation, Inc v. Town Plan and Zoning Com.*, 790 F.Supp. 1197 (D.Conn. 1992), the plaintiff, a nonprofit organization, sought to operate a group home for HIV-infected persons. The town sent to plaintiff thirteen written questions about the operational details of the house and the medical needs of its intended occupants. *Id.* at 1204-1205. The town zoning commission determined the plaintiff needed to obtain a “special exception” to its zoning requirements in order to operate the home in a residential neighborhood. The plaintiff had not applied for a special exception, and asked the commission to reverse its decision, arguing that its proposed group home complied with the town’s definition of “family” for purposes of the zoning code. *Id.* at 1205-06. The Commission refused on the grounds that special exceptions are required for both “charitable uses” and “nursing homes.” *Ibid.*

The plaintiff sought a preliminary injunction against the special exception requirement. *Id.* at 1207. The District Court issued the injunction and found that plaintiff was likely to prevail on its discriminatory treatment claim under the FHA. The court relied heavily on the comments of opponents of the group home. Those comments were evidence that the commission acted with discriminatory intent. *Id.* at 1212-1213. The court also found that the commission had discriminated because it had departed from its normal procedures by (1) requiring a special exception for a group that qualified as a “family,” (2) requesting that the plaintiff answer the thirteen questions before any use was formally proposed; and (3) conducting a hearing in the absence of any application by the plaintiff. *Id.* at 1213.

In *Potomac Group Home Corp. v. Montgomery County*, 823 F.Supp. 1285 (D. Md. 1993), the District Court reviewed several aspects of a county's licensing program for group homes for the elderly. The County allowed such homes by right in all residential zones, but (1) required the operators of the group homes to send letters to each neighboring property owner setting forth their plans to operate, (2) subjected each proposed home to a program review board hearing; and (3) excluded from group homes persons who were emotionally, mentally, or socially incapable of taking action for self-preservation under emergency conditions, or who were insufficiently mobile to exit a building in an emergency. *Id.* at 1289-91.

The District Court held that all three of these provisions violated the FHA. *Id.* at 1302. The neighbor notification requirement was declared facially invalid because it applied to no other groups and was unsupported by any rational basis. *Id.* at 1296. The notification rule instead caused a great deal of harm by provoking a negative reaction from the community and stigmatizing the disabled. *Ibid.* Likewise, the program review board hearing was declared invalid because the County selectively applied it only to projects that provoked community opposition. *Ibid.* Moreover, the review boards included neighborhood representatives, but no one from the group home community. *Id.* at 1297. Thus, the County had given undue weight to community concerns and prejudices. *Id.* at 1298. The court dismissed the County's argument that it was required to hold public meetings by state law. *Id.* at 1299. "To the extent that the state Open Meetings Act 'stands as an obstacle to the accomplishment of the full purposes and objectives' of the FHAA, it may not be enforced." *Ibid.* Finally, the exclusion from group homes of persons incapable of exiting a building during an emergency was declared invalid because it irrationally excluded disabled persons from group homes. *Id.* at 1300. Fire code regulations already addressed the emergency needs of disabled persons to such an extent that the exclusion lacked any rational basis. *Ibid.*

In *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 122 (N.D.N.Y. 1992), plaintiff alleged discrimination arising from a village's rejection of a residence for HIV-infected homeless

persons. The village had drafted Local Law No. 2 of 1990, which amended the zoning ordinance's definition of the term "boarding house" to exclude plaintiff's facility. *Id.* at 125. The ordinance was passed quickly during the period plaintiff was completing purchase of the property, and there was no other indication that amending this definition was otherwise needed. *Ibid.* Comments of Village board members revealed discriminatory animus. *See id.* at 123-28. The court found that plaintiffs established both discriminatory intent and disparate impact, stating, "[i]t is crystal clear that Local Law No. 2 of 1990 was enacted by the board members to prevent Support Ministries from establishing its adult home for homeless [individuals with AIDS] in Waterford." *Id.* at 133. The court held, "the HIV-positive status of the future residents of the Sixth Street house was at least one factor, and probably the primary factor, for the enactment and application of the new zoning law." *Id.* at 134. Furthermore, the court explained, "[d]efendants' actions were blatantly based on the community's unfounded fear of AIDS, their misperceptions of AIDS, and their prejudices against [persons with AIDS], and not on a legitimate zoning interest." *Id.* at 136. When defendants asserted that the facility would result in a potential risk of infection of the village residents, the court stated, "[d]efendants' argument merely repeats the uneducated, discriminatory beliefs that brought this case to the court. Their argument is totally unsupported by the medical evidence." *Id.* at 137. The court enjoined the village from interfering with the facility, thereby effectively enjoining enforcement of the ordinance. *Id.* at 139.

In *Tsombanidis v. City of West Haven*, 129 F. Supp. 2d 136, 139-40, 147 (D. Conn. 2001), the owner and residents of an Oxford House (a provider of housing for persons in recovery from alcohol or substance abuse) brought suit against a city and its fire district, alleging violations of the FHA and ADA. Prompted by neighbors' complaints, the city inspected the property and found various violations of the property maintenance code. *Id.* at 141. Plaintiffs claimed this was a departure from normal procedure. *Id.* at 152. A group of concerned neighbors also met with the mayor, circulated a petition, and attended a city council meeting. *Id.* at 143-44. A fire inspector

was sent to the property and later issued an abatement notice to correct violations. *Id.* at 145.

As to discriminatory intent, the court stated, “even where individual members of government are found not to be biased themselves, liability may still be imposed where discriminatory governmental actions are in response to significant community bias.” *Id.* at 152. The court quoted *Innovative Health Systems, Inc. v. City of White Plains*, 117 F. 3d 37, 49 (2d Cir. 1997): “a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter.” *Tsombanidis*, 129 F. Supp. at 152. Upon the city’s declaration that “representative government requires that even arguably intolerant citizens have the right to have their complaints investigated,” the court agreed but explained that the city’s actions in response to these complaints must be examined and thus cannot be decided by a summary judgment motion. *Id.* at 153. As to the fire district, there was no evidence that community opposition played any role in its enforcement efforts, or even that the fire officials were aware of such opposition. The court granted summary judgment in favor of the fire district regarding intentional discrimination. *Id.* at 154-55.

The Second Circuit affirmed in part and reversed in part in *Tsombanidis v. West Haven Fire Department*, 352 F. 3d 565, 581-82 (2d Cir. 2003). As to discriminatory intent, the court reiterated that plaintiffs offered valid evidence that the city rarely took enforcement action against boarding houses in residential neighborhoods, the city ignored Oxford Houses’ explanatory letters, and one of the property maintenance code officials was dissatisfied with Oxford House. *Id.* at 580. Evidence supported the trial court’s finding that the history of neighborhood hostility and pressure on city officials motivated the city in initiating and continuing its enforcement efforts. *Ibid.*

In *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987, 991-92, 999, 1006 (D. Minn. 2008), residential property owners alleged illegal enforcement of the city’s property maintenance standards against properties leased to low-

income residents. The court rejected a FHA discriminatory treatment claim. The city enforced its housing code by conducting proactive sweeps requested by city officials and responding to citizen complaints, but due to limited resources, housing inspectors had discretion in their application of the rules. *Id.* at 993. Plaintiffs alleged that neighboring properties also had code violations but did not receive enforcement orders. *Id.* at 995. A legislative aide received a call from a resident who was concerned that her neighbors were submitting complaints about her due to her race. *Id.* at 1000. The court found that the resident was concerned about the neighbors, and not about the city targeting her, and that the city took her concerns seriously and sought to resolve the matter. *Ibid.* Although there was testimony of the neighbors making false allegations to the police, the court held, “discriminatory animus on the part of the neighbors is not evidence of discriminatory animus on the part of [the city].” *Id.* at 1004. The Court of Appeals affirmed the District Court’s decision. *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010).

The comments of local officials also led to adverse results in *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 419 (2d Cir. 1995). There, the federal government and private plaintiffs brought two suits against a village and its officers, alleging the village had been incorporated to exclude the Orthodox Jewish community through zoning restrictions on places of worship. The jury in the private plaintiffs’ suit found the village had violated the FHA, but two days later, the district court found against the federal government. *Id.* at 422. The court then corrected what it considered two inconsistent judgments by concluding that the village was entitled to judgment as a matter of law. *Id.* at 423. On appeal, the Second Circuit held the village was liable. *Id.* at 435. First, the court noted “the plethora of statements in the record attributed to . . . leaders who became Village officials, expressing anti-Orthodox Jewish sentiments.” *Id.* at 430. One official said, “the only reason we formed this village is to keep those Jews from Williamsburg out of here.” *Ibid.* The mayor called the Orthodox Jews “foreigners and interlopers,” “ignorant and uneducated,” and “an insult to the people who lived there previously.” *Id.* at 420. Another

official said that the village did not have to pursue particular proceedings with respect to a home synagogue because “there are other ways we can harass them.” *Ibid.* Second, the events cited by the officials as evidencing a need to incorporate as a village, along with the subsequent actions, demonstrated an animosity toward Orthodox Jews. *Id.* at 431. The pre-incorporation zoning was seen as leading to the “grim picture of a Hasidic belt.” *Ibid.* The officials cited traffic and noise problems but only paid attention to those created by the Orthodox Jews. *Ibid.* The officials opposed slight variances for a synagogue’s construction but unanimously allowed a Catholic mausoleum variance. *Ibid.*

In *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead*, 98 F. Supp. 2d 347, 349 (S.D.N.Y. 2000), a non-profit Orthodox Jewish organization and two ultra-Orthodox Jewish residents brought suit against the village and its officials, alleging religious discrimination in zoning enforcement. Village zoning laws included a prohibition of multi-family housing and a requirement of a special permit to have two kitchens in one house, which plaintiffs claimed was discriminatory. *Id.* at 351. Plaintiffs submitted testimony that the mayor made discriminatory comments about the history of intentional discrimination by the village. *Id.* at 355. The court denied defendants’ summary judgment motion, finding that plaintiffs had raised a triable issue of fact as to discriminatory intent. *Id.* at 349.

In *United States v. City of Parma*, 661 F.2d 562, 564-65 (6th Cir. 1981), the U.S. sought to enjoin the city from continuing its actions which had the purpose and effect of maintaining racial segregation. The city refused to enact a fair housing resolution welcoming “all persons of goodwill,” passed four land use ordinances imposing height, parking and voter approval limitations on housing developments, did not apply for federal funds, and rejected proposals for public or low-income housing. *Id.* at 566-67. The district court held that some of the city’s actions “were motivated by a racially discriminatory and exclusionary intent” in order to “maintain the segregated ‘character’ of the City,” and the Sixth Circuit affirmed in part. *Id.* at 568, 579. There was evidence of elected officials’ public

statements that were either overtly racist or found to have racist meanings, open hostility of both the residents and officials regarding low-income housing, and departures from normal practices by city employees in handling a subsidized housing project proposal, including unusually strict adherence to the planning and zoning code, and not accommodating the developer through informal negotiations. *Id.* at 566, 568, 575. There was also “ample testimony that Parma already had a reputation among black residents of the Cleveland area of hostility to racial minorities.” *Id.* at 574.

In *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1572 (E.D. Mo. 1994), recovering alcohol and drug users alleged FHA violations arising from code enforcement. The district court found the city liable based on discriminatory intent, and permanently enjoined the city from prohibiting a recovery facility housing more than eight people. *Id.* at 1584. The city received a complaint about the facility, and thus sent its city inspector to investigate, which led to subsequent inspections and citations, including one for a non-existent violation. *Id.* at 1565-66, 1576. According to a city employee, “the neighbors did not have complaints about specific problems, but ‘concern for the idea that a drug rehab house was in their neighborhood.’” *Id.* at 1566. The decision to cite the facility for a violation of the zoning code was made by the city’s zoning administrator, who testified in a deposition that he “‘wouldn’t want them living next door.’” *Id.* at 1566-67. The court explained, “[i]ntentional discrimination can include actions motivated by stereotypes, unfounded fears, misperceptions, and ‘archaic attitudes’, as well as simple prejudice about people with disabilities.” *Id.* at 1575-76. Intentional discrimination does not require proof of a malicious desire to discriminate, but rather “[i]t is enough that the actions were motivated by or based on consideration of the protected status itself.” *Id.* at 1576.

“The evidence here showed that city officials responded to the presence of the Oxford Houses based on stereotypical fears of recovering addicts and alcoholics, and carried out their enforcement efforts in response to neighborhood and community fears and concerns about “some sort of drug rehab”

house being in the two neighborhoods. In short, the evidence clearly showed that defendant's actions were motivated by consideration of plaintiffs' handicapped status."

Id. at 1576.

The court explained that the city made no attempt to assuage the fears of its residents by explaining the benefits of the Oxford House program or the relevant non-discrimination laws: "[A] decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decision making process." *Id.* at 1576. Also, the city had not prosecuted various religious orders that violated the same ordinance. *Id.* at 1578. The city asserted that no one ever complained about the religious orders, but the court explained that this "supports the argument that defendant enforced the ordinance only against politically unpopular groups like the handicapped plaintiffs here." *Id.* at 1578 & n.17.

The Eighth Circuit reversed in *Oxford House-C v. City of St. Louis*, 77 F. 3d 249, 250-51 (8th Cir. 1996), holding the city acted lawfully. The court explained, "[r]ather than discriminating against Oxford House residents, the City's zoning code favors them on its face. The zoning code allows only three unrelated, nonhandicapped people to reside together in a single family zone, but allows group homes to have up to eight handicapped residents." *Id.* at 251-52. Despite evidence that the eight-person limit would destroy the financial viability of many Oxford Houses, the court concluded that the rule was rational. *Id.* at 252. The court observed that "Oxford House did not show the City ignored zoning violations by nonhandicapped people." *Ibid.* The city never received complaints about the other groups Oxford House alleged were violating the zoning code. *Ibid.* "[W]e believe the City's enforcement actions were lawful regardless of whether some City officials harbor prejudice or unfounded fears about recovering addicts." *Ibid.* These "isolated comments" do not reveal a discriminatory application of the zoning code, especially when the Oxford Houses were "plainly in violation of a valid zoning rule and City officials have a duty to ensure compliance." *Ibid.* The City's inspectors did not

hold policymaking positions, and thus their commentary and actions did not impute to the city as evidence of discriminatory intent. *Ibid.*

b. Practical Tips for Minimizing Exposure Based on Alleged Discriminatory Intent

- Local officials should refrain from affirming or agreeing with discriminatory comments made by members of the public.

Discriminatory comments from the public, which are shown to influence a local agency's decision adverse to a protected group, could form the basis for a successful challenge in court. Comments by members of the public alone, without agreement of the governing body, are unlikely to form the basis of a successful anti-discrimination lawsuit. Nevertheless, discriminatory comments on the record make for bad atmospherics and could taint an otherwise strong defense.

- Local officials should remind members of the public who make discriminatory comments that it is not permissible for government to discriminate based on a person's disabled or otherwise protected status.

This might not always be possible given that multiple concerns are often in play. If local officials feel they are not in a position to issue admonitions in an emotionally charged environment, they should at the very least listen respectfully to everyone without expressly agreeing with anyone.

In a heated setting, it might be advisable for the Mayor or Chair to read a prepared statement at the outset of a public hearing, and before reconvening after each break, remind everyone of the governing law, and that disrespectful comments are inappropriate. This may help avoid one or more particular speakers feeling targeted if the Mayor or Chair reads a statement immediately after a speaker's comments.

- Local officials should refrain from making comments that could be perceived as discriminatory by others.

Discriminatory comments by local officials, depending on their frequency and severity, may lead to liability in an anti-discrimination lawsuit.

On some occasions, attorneys from the U.S. Department of Justice attend City Council or Planning Commission meetings unbeknownst to anyone else present, and City officials do not learn of this until much later. Comments by local officials during those meetings could trigger further investigation by the Department of Justice culminating in a lawsuit brought by the United States.

- Local officials should state the reasons for their decision in non-discriminatory terms.

Language matters. Depending upon context, terms such as “those people” or “you people” or “them” do not read well in a transcript. Avoid demeaning terms such as “addicts” or “drunks” and the like. Courts develop a feel for the backstory based on the terms used. The more neutral and professional the language and tone, the better. Where the evidence is such that the case is a close call, courts might be willing to give the benefit of the doubt to the government when the record reflects good behavior.

- Local officials and government staff members should not align themselves with a group, no matter how well-intentioned that group may be, that opposes housing for disabled persons.

Officials and staff should not attend private meetings of an opposition group.

If officials and staff conduct workshops or seminars in an effort to resolve community differences, they should invite people from all groups to participate, instead of inviting only some of the interested parties.

- If any interested party circulates inaccurate information that appears to be fueling public opposition to a protected group, particularly where the inaccurate information involves the action or inaction of local officials and staff members, the local agency should attempt immediately to provide accurate information.
- If a particular project, or the implementation of a regulation, requires input or action from multiple departments within the local agency, ensure that all departments communicate with each other so that none takes action inconsistent with the others.
- Conform as much as possible to past practice. For example, if applications for use permits in a particular zone usually involve Planning Commission or City Council hearings over a period of a few hours on a single date, but an application involving a protected group involves hearings over multiple days where the same residents opposing a project speak more than once, or where the comments of a large number of residents opposing the project are repetitive, this could be considered evidence of discriminatory intent. Also, if the protected group is required to obtain a discretionary approval, ensure that the application process for that approval is not significantly more onerous than the process for any discretionary approval to which other groups may be eligible for the same purpose.

c. Articulating a legitimate nondiscriminatory reason for the regulation.

Courts view subjective explanations of regulations with skepticism. Objective evidence of asserted reasons leads to better results for the defendant agency. “In examining the defendant’s reason, we view skeptically subjective rationales concerning why he denied housing to members of protected groups. Our reasoning, in part, is that ‘clever men may easily conceal their motivations,’ [citation]. There is less reason to be

wary of subjective explanations, though, where a defendant provides objective evidence indicating that truth lies behind his assertions of nondiscriminatory conduct.” *Soules v. U.S. Dep’t of Housing & Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992).

Concern for the residential character of the neighborhood is a legitimate and nondiscriminatory goal. *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997). “Though [Plaintiff] made an effort to ensure that [the use] would aesthetically blend in with its surrounding neighborhood, [the use] nevertheless required a [use permit] because certain aspects of the [the use] did not meet all of the requirements of the residential zones in which it would have been located.” *Budnick*, 518 F.3d at 1116. *See also Gamble*, 104 F.3d at 305 (“[W]e ... conclude the reason the City advances for its decision, concern for the character of the neighborhood, is legitimate and nondiscriminatory.”). Nonetheless, if a municipality has shown little regard for the character of the neighborhood by previously allowing other uses inconsistent with that asserted character, the court most likely will reject preservation of neighborhood character as a legitimate nondiscriminatory reason.

d. Showing the asserted reason for the regulation is a pretext for discrimination.

In direct evidence cases, courts decide the issue of pretext by examining the same factors that inform whether plaintiff has established at the outset a prima facie case of discriminatory treatment. In several of the cases discussed above, it was the gravity of plaintiff’s evidence, or lack thereof, regarding legislative history, sequence of events, or departure from customary practice, that was outcome determinative on the issue of pretext.

In *Keys Youth Services, Inc. v. City of Olathe*, 248 F.3d 1267, 1269 (10th Cir. 2001), a youth group homes operator brought suit against the city, alleging in relevant part that the denial of a special use permit (SUP) was a violation of the FHA. The district court ruled for Olathe on this claim. *Id.*

at 1269-70. On appeal, Keys argued that Olathe denied the SUP because of the children's disabilities, but Olathe responded that "it denied the permit because the troubled juveniles would pose a legitimate threat to neighborhood safety." *Id.* at 1273. The Tenth Circuit called this a legitimate nondiscriminatory basis for the decision. *Ibid.* Thus, "the sole issue for trial focused on whether Olathe's safety concerns were mere pretext for handicap discrimination." *Ibid.* The district court found this reason was not mere pretext, and the appellate court stated this inquiry was a factual issue. *Id.* at 1273-74. The home was for youths ages 12 to 17 who were abused, neglected, or abandoned, and whose scores were high on a rating scale of juvenile behavioral problems, meaning they were typically antisocial, aggressive, and engaged in violent crimes. *Id.* at 1274. Keys operated another such home that had a break-out in the past, and the juveniles went on a crime spree. *Ibid.* Although Keys showed that additional nighttime staff was hired after the break-out, which had prevented further break-outs, and the majority of police calls did not affect the neighbors, the court stated, "Olathe's fears are not groundless. . . . It is not unreasonable to think that [these juveniles] are capable of causing similar problems in the future." *Id.* at 1274-75. It then affirmed the district court's holding that this reason was not mere pretext. *Id.* at 1275.

IV. Conclusion

A facially neutral zoning law will not survive a legal challenge on the sole basis that it treats everyone the same on its face. Courts routinely look beneath the surface in an attempt to uncover any discriminatory intent. A court will examine any one or more of the multiple factors, discussed above, that inform discriminatory purpose. Government agencies should take care to ask themselves whether a specific action, no matter how well-intentioned, could be perceived as evidence of discrimination. This is often a difficult task. The case law discussed in this paper provides at least some guidance as to when government agencies have crossed the sometimes nebulous boundary between valid action and discrimination.