

THE FAIR HOUSING ACT AND
COMMUNITY RESIDENCES FOR THE DISABLED:
A ZONING CODE AMENDMENT FOR
THE CITY OF PRESCOTT, ARIZONA

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ABSTRACT

Sections of the City of Prescott's Land Development Code addressing community residences for the disabled, specifically group homes and transitional housing, were out of compliance with the Fair Housing Act and were not enforceable. This practicum project focused on bringing the City back in compliance with federal and state requirements for Fair Housing, by providing the necessary research and study, and then moving the proposed Land Development Code text amendments through the public process.

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CHAPTER 1: APPLIED RESEARCH REPORT

INTRODUCTION

The practicum project outlined in this report took place during an internship and subsequent employment with the City of Prescott's Community Development Department, in Arizona. Of the many responsibilities of such a department, one is to maintain the zoning code, in this case the Land Development Code, in a working and enforceable condition. At the time of the internship, however, sections of the City of Prescott's Land Development Code addressing community residences, specifically group homes and transitional housing, were out of compliance with the Fair Housing Act and were not enforceable. This practicum project focused on bringing the City back in compliance with federal and state requirements for Fair Housing, by providing the necessary research and study, and then moving the proposed Land Development Code text amendments through the public process.

This paper will first address the historical and theoretical context surrounding this project, including a literature review of correlated topics. Following is a chronological outline, discussing in detail the events and progress of the project through to its completion. A discussion concludes the report. The appendices contain meeting reports, agendas, and minutes, and also newspaper articles, video from presentations, and other related data.

CONTEXT

The overall purpose of the code amendment was in part to assist the City in avoiding lawsuits similar to those that had occurred in other municipalities, but also to provide guidance and support for locating community residences for the disabled within the City. The disabled population faces unique challenges in finding appropriate and affordable housing, and clarifying the language and requirements in the Land Development Code may help to meet those needs.

The City of Prescott's current Land Development Code (LDC) was adopted in 2003. In March of 2004, new language was adopted (Resolution 3594) pertaining to Transitional Housing and Assisted Living, that defined those categories and incorporated them into the Permitted Use Table (LDC Section 2.3). Later that same year, in 2004, the Arizona Center for Disability Law sent a letter to the City with notification that the new language in the LDC relating to those topics was out of compliance with the Fair Housing Act.

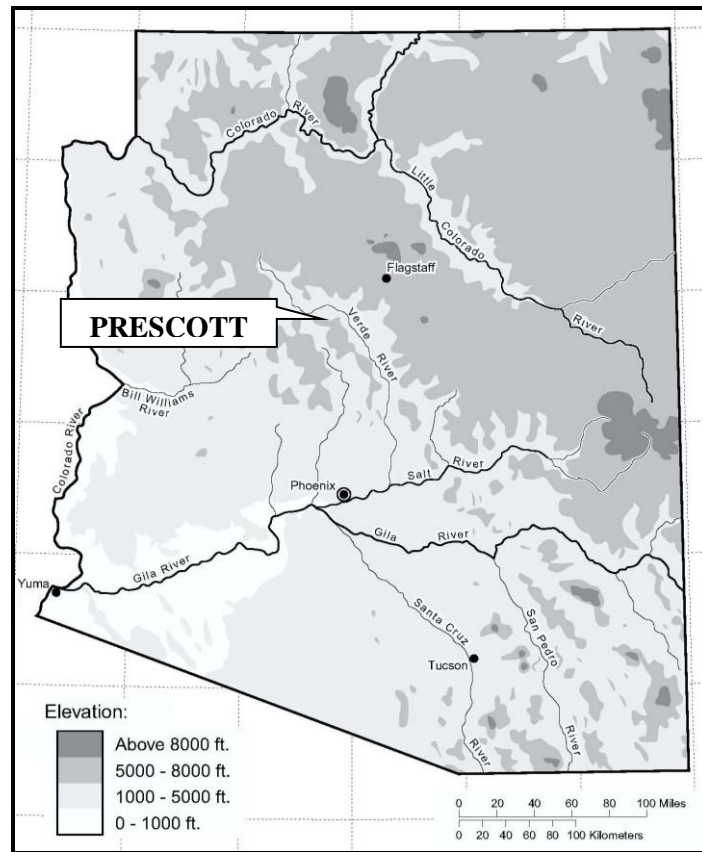
Several years followed in which City staff did not enforce those provisions in the zoning code. By 2008, staff was prepared to confront the outstanding issue, and presented proposed amendments to the Planning and Zoning Commission. During this meeting, however, new information was presented by the legal department that contradicted what had been laid out by the planning staff. It was decided that no further discussion or decisions should take place without further consultation with the legal department and research of the topic.

The current practicum project started where progress was left off in 2008, and began by conducting detailed research closely coordinated with the legal department.

Following research, the project moved through the initial review with the Unified Development Code Committee, public hearings with the Planning and Zoning Commission, and finally through to the City Council, where the amendments were passed on March 22, 2011.

CITY OF PRESCOTT

The City of Prescott is located in north-central Arizona, and is the county seat for Yavapai County. Geographically, it is halfway between Phoenix and Flagstaff, and at an elevation of 5300' it sits vertically between the two cities as well. Surrounded by high desert flora, including Ponderosa Pine forests and an abundance of cacti, all amidst large granite outcroppings, it is a unique small mountain town.



The history of Prescott is also integral to the city's social and economic values. Before the City of Prescott became known as such, it was inhabited by the Yavapai tribe, who had discovered the mild climate and wealth of natural resources in the area many years before the European-Americans arrived (Historic Preservation Master Plan 1998; Prescott Chamber of Commerce 2010). In 1863, President Lincoln signed a bill that separated New Mexico from Arizona, and sent delegates from the Union to the Arizona territory to establish a military fort in Prescott. This was in large part due to its wealth of minerals, but also due to the fact that President Lincoln felt the need to establish a Union-sympathetic fort far from the Confederate supporters who were located in Tucson at the time (Historic Preservation Master Plan 1998).

For the majority of the years from 1864 - 1890, Prescott served as the Territorial Capital of Arizona, before it was permanently moved south to Phoenix. In these early years, Prescott grew substantially around the mining industry and around the military fort, Fort Whipple (Historic Preservation Master Plan 1998). Later, when the mining industry began its permanent boom and bust cycle, ranching also took hold as an important contributor to the city's economics. Throughout the 20th century, ranching and mining became less important to the area's economy, as professional services, retail, and higher education took their place (Arizona Department of Commerce 2008). There are several well-known universities and colleges in the City, including Embry Riddle Aeronautical University, Prescott College, Yavapai College, and an off-campus location of Northern Arizona University. Given the rich history of the area, tourism and travel-associated activities are also emerging as frontrunners in the area's economy (Arizona Department of Commerce 2008, City of Prescott 2011).

Nicknamed “Everybody’s Hometown,” Prescott prides itself in being a welcoming and friendly community, with activities for families, outdoor recreationists, and the elderly (City of Prescott 2011). The original Prescott townsite is now home to a historic downtown and Courthouse square, which holds festivals, fairs, and parades throughout the year. The city is also well known for its Western roots, and is home to the oldest rodeo in the world. Politically, the area is similar to the greater part of the State, and the government and citizens are fairly conservative. The politics are also influenced by the growing retirement community in the City.

As of the 2010 Census, there were 39,843 people living in Prescott. Other than total population, City specific data from the 2010 Census was not available at the time of this report, and 2000 Census data is used. The average age is 48, and approximately 88% of the City listed their race as White, not including the Hispanic and Latino population (8.2% of the total population). Of the occupied, non-vacation homes, about 65% are owner-occupied. Of the total housing units, 6% are for seasonal use, though this is projected to increase.

| | Yavapai County | Arizona State | United States |
|--|-----------------------|----------------------|----------------------|
| Percent of people reporting a disability | 17.1% | 11.6% | 12.0% |
| Percent civilian veterans | 16.8% | 11.0% | 9.5% |
| Percent age 65 and older | 22.0% | 13.0% | 12.4% |

Source: 2000 United States Census and 2009 American Community Survey

As seen in the table above, the demographics that are available specific to this project show that the City of Prescott and Yavapai County have significantly higher than national and state percentages of disabled citizens, veterans, and elderly.

CHAPTER 2: LITERATURE REVIEW, PROCESS, AND STRATEGY

ZONING AND PERMITTING

In the City of Prescott, the zoning code is referred to as the Land Development Code. Throughout the country, there are approximately 20,000 municipalities and counties, each with individual zoning regulations (Cullingworth 2009). However, though each code is individual, they all have a similar function. That function is to be the legally binding document that records the restrictions and regulations of the different zoning districts (Cullingworth 2009).

Traditional zoning in is the separation of an area, typically a city or a county, into zones. In each zone, specific uses are permitted and various restrictions apply. Depending on the size of the city, there may be anywhere from three to over 20 different zoning districts (Cullingworth 2009). For example, a zoning district may be restricted to single-family homes only, or it may be a commercial zone where retail, offices, and light industrial uses are permitted. Additional restrictions for those uses may apply, such as building height, setbacks from the street, and total allowable coverage of the lot.

The zoning code is local and current, and is updated periodically. The codes work in conjunction with a general or comprehensive plan, which is the long term vision and strategic plan for a city or county. In Arizona, for example, it is mandatory that a zoning code be consistent with the general plan (Arizona Revised Statutes 9-462.01), though this consistency does not always function as well as it should. In some instances, a zoning code may be used to exclude the unwanted uses that are acknowledged and planned for in long-term comprehensive planning (Cullingworth 2009).

While zoning codes are local, they are influenced in large part by the United States Constitution. The fifth amendment states that private property cannot be taken for public use without just compensation (U.S. Constitution, Art. 7). The 14th Amendment mandates due process of law, which ensures that all public processes (e.g. a public variance hearing) proceed correctly and fairly (U.S. Constitution, Amend. 14). Additionally, it is interpreted that all regulations must serve a true and legitimate government interest. Finally, the Constitution requires equal protection of the laws, which had a great influence on the Fair Housing Act.

Specific to the focus of this practicum project, the single-family zoning district is one of the most restrictive districts, and is standard throughout the country (Cullingworth 2009, Pollack 1994). However, depending on how each municipality or county defines family, this district will permit more or less varied uses. For example, a city where the definition of family includes nothing beyond those related by blood or marriage is going to have different uses than a city in which a family also includes a certain number of unrelated people living together as a household (Fathy 2009).

Permitting is the legal approval or denial of uses within a zoning district. In the City of Prescott, a use is defined in the Land Development Code as “The purpose for which premises or a building thereon is designed, arranged, or intended, or for which it is or in the future may be actually occupied or maintained” (LDC Section 11.2) For example, a use may be a dwelling unit (e.g. a house), a chemical manufacturing plant, an outdoor storage area, a parking lot, or a farm. It is important to note that while a use may be permitted in one location, it may be denied in another based on its compatibility with the surrounding zoning district.

Following this, uses can be permitted in many different ways: by right or by conditional, special, or temporary use permit. Alternatively there, are also uses such as accessory uses, and there are some uses that are not allowed within municipality boundaries at all. An example of a use permitted by right in a commercial zoning district is a grocery store. Examples of conditional uses and special uses in a commercial zoning district are, respectively, shooting ranges and telecommunications facilities.

Those uses permitted by right are uses that are seen to be consistent with the underlying zoning district. On the other hand, both conditional and special uses are uses that are seen to be generally consistent with the respective zoning district, but may require additional conditions or requirements to be administered before the use is allowed. The extra constraints on the use exist to ensure that the zoning district's overall characteristics are not threatened. Each type of conditional or special use permit has a specific set of criteria upon which the appropriateness of the requested location for that use is judged.

The conditional use permit is used in the permitting of community residences for the disabled, which is discussed in more detail later. In the City of Prescott, a conditional use permit is only authorized if it meets the criteria (or can otherwise be conditioned so that it does) that shows it has no detrimental effects on the surrounding area, that it is consistent with the General Plan, and that it will minimize impacts to infrastructure (LDC Section 9. 3).

It is the Board of Adjustment, one of the City Council appointed boards and commissions, that decides whether a Conditional Use Permit may be approved, approved with conditions, or denied. The Board of Adjustment is also responsible for

administrative appeals and variances. Examples of conditions of approval on a Conditional Use Permit may include increasing open space in a large-scale apartment complex, adding to the parking requirements for a heavy retail use, or extra site improvements.

As a side note, the special use process, in contrast with the conditional use process, is typically more political, as special uses are only approved by the City Council. This is because special uses, unlike conditional uses, may require consideration of the City's objectives and goals, beyond the impact to the zoning district (LDC Section 9.9).

ZONING CODE AMENDMENT PROCESS

An brief overview of the zoning code amendment process is a fundamental component of this report. In the City of Prescott's Land Development Code, this process is outline within the text of the code (LDC Section 9.12). The initiation of code amendments may come from the City Council, the Planning and Zoning Commission, the Community Development Director, or an application filed by an individual. In this case, it was the Community Development Director. Then, the public process begins.

Public notification is the first step, but also an ongoing part of the process. The department achieved this through public notices in the newspaper, information available on the City website, newspaper articles, and a radio show interview. After the initial public notification is the required review by the Unified Development Code Committee, followed by public hearings by the Planning and Zoning Commission. The Planning and Zoning Commission may recommend approval, approval with modifications, or denial of the application to the City Council. Once before the City Council, they also review the

reports and recommendations by the Planning Commission, and then vote to approve or deny the text amendment.

HISTORY OF THE FAIR HOUSING ACT

The Fair Housing Act exists to protect people from housing discrimination. This includes most types of housing, although some of the associated provisions exempt owner-occupied buildings with less than four units, single-family housing sold without a broker, and housing operated by organizations and private clubs.

The Act originated as Title VIII of the Civil Rights Act, signed in by President Johnson in 1968 after the death of Dr. Martin Luther King Jr. (HUD 2011). While the new fair housing regulations had been in the works since the early 1960s, it was not until Dr. Martin Luther King Jr. was assassinated that there was enough consensus in Congress to pass the legislation. This was in part due to the fact that Dr. King had been very involved in the Civil Rights Act, and specifically the Fair Housing Act (HUD 2011).

Another factor in the early era of fair housing was the Vietnam War. The majority of deaths in the war were minority Americans, and the families of these soldiers struggled to find housing due to discrimination. The passing of the Fair Housing Act was supported by senators and congressmen who were able to sympathize with the difficulties felt by those families (HUD 2011).

The original intention of the Fair Housing Act was to protect people from housing discrimination based on their race, religion, national origin, and sex (HUD 2011). This included discrimination relating to the sale, rental, or financing of housing. Some of the first powers granted to the Department of Housing and Urban Development in relation to

the Fair Housing Act were to create a formalized complaint process and to designate the month of April as “Fair Housing Month” (HUD 2011).

The Fair Housing Act was amended in 1988, and those amendments were, and continue to be, very significant (HUD 2011; Lauber 2010). The amendments expanded protection of minority classes to protections against discrimination because of family status and disability status. As a part of the protections for persons with disabilities, HUD created new regulations for providing accessibility through the design and construction of new multifamily and commercial buildings. The amendments also increased HUD’s ability to enforce the federal fair housing laws by expanding the Justice Department’s jurisdiction to bring these cases to court (HUD 2011).

The protected class was greatly expanded with the addition of disability status. Under fair housing, disability includes having a physical or mental disability, having a record of a disability, or having been regarded as having a disability. In addition, those with disabilities were granted extra considerations stipulating that they have a right to reasonable modifications of a dwelling area, rules, policies, or practices if necessary for use of the housing.

One other component of the 1988 amendments was the allowance of housing specifically for persons 55 and older (Pollack 1994; HUD 2011). While typically any type of discrimination on the basis of age or family status is illegal under the Fair Housing Act, there was the consideration that an exemption for the elderly was reasonable. The Housing for Older Persons Act of 1995 expanded on and clarified restrictions for the elderly.

Several other programs and updates related to the Fair Housing Act have occurred in the last 20 years, most of which seek to increase knowledge of fair housing. One of these is the Fair Housing Initiatives Program, focusing on preventing housing discrimination (HUD 2011).

Zoning discrimination, a legal interpretation based on fair housing language, is also a continuing challenge to fair housing advocates, although it has been a recognized issue since the late 1970s. Because the intent of zoning regulations are not always clear, it can be difficult to discern whether or not true discrimination is behind particular land use laws (Hayes 2009). Advocates of the Fair Housing Act argue that similar to other laws in the Constitution, victims of zoning discrimination should only need to show proof of a discriminatory effect (not intent) for it to be deemed illegal (Hayes 2009).

DISABILITIES AND THE FAIR HOUSING ACT

Persons with disabilities, within the meaning of the Fair Housing Act, are individuals with mental or physical impairments which limit major life activities. This includes, but is not necessarily limited to, conditions such as blindness, mental illness or retardation, alcohol and drug addiction, or any mobility impairments. This does not include current users of controlled substances or sex offenders (Dept of Justice and HUD 2004).

Within the Federal Fair Housing Act, there are special provisions protecting persons with disabilities from housing discrimination, beyond those for made for other minority groups. The most important of these is that it is prohibited to refuse to make reasonable accommodations in rules, policies, practices, or services when such

accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling (Dept of Justice and HUD 2004).

As described by the Department of Housing and Urban Development, reasonable accommodation is always decided on a case-by-case basis and there are several factors that come into play when discussing whether or not an accommodation is reasonable (2004). One of these factors is that the accommodation must not impose an undue financial and administrative burden on the housing provider or in a zoning related case, the particular municipality. Another consideration is whether the request would fundamentally alter the operations of a company or the underlying zoning district. And finally, there must be a relationship between the accommodation and the disability. This factor in particular applies more to specific housing requests than zoning alterations (Dept of Justice and HUD 2004; Kane 2011).

A reasonable housing-specific modification, for example, is allowing a tenant to have a service animal in an apartment complex that doesn't typically allow pets (Kane 2011). Or, it may be allowing the tenant to construct a wheelchair accessible entrance to the apartment (Kane 2011). Related to zoning, reasonable accommodations to persons with disabilities is more complex. One example is permitting a group home for 10 persons with disabilities in a zoning district that only allows unrelated groups of up to 8 people.

Additional interpretations of the Fair Housing Act have been made that specifically relate to living arrangements for people with disabilities. Typically, people with disabilities live in a household setting, an institutionalized group quarter, or a non-institutionalized group quarter (Brault 2008). Examples of institutionalized living

arrangements are adult correctional facilities, hospitals, residential schools, and in-patient hospice facilities. Non-institutionalized settings include group homes and community residences, which are the subject of this paper (Brault 2008).

According to the United States Census and the American Community Survey, close to 99% of people with disabilities throughout the country live on their own or in the care of their families. Less than 0.5% of people live in group quarters, more commonly known now as community residences.

NIMBYISM AND LULUS

Community perceptions of human service facilities are often negative (Takahashi 1997; Lauber 2010; Fathy 2009; Cameron 2006). Human service facilities include community residences for the disabled, but also homeless shelters, foster homes for children, and food banks (Takahashi 1997; Cameron 2006). There are several terms used to define and explain this community opposition towards uses such as group homes and halfway houses, most commonly NIMBY (Not In My BackYard) and LULU (Locally Unwanted Land Use) (Lauber 1996). Regardless of the term used, NIMBY encompasses the sentiment that while it is generally understood that people feel uses such as halfway houses are needed in the community, none of the residents of that community actually want that use located next door (Takahashi 1997).

There is research showing that there are varying degrees of acceptance for these human service facilities (Takahashi 1997; Lauber 2010; Fathy 2009; Cameron 2006). For example, while nursing homes are seen as very acceptable across the nation, there is little acceptance of drug treatment centers (Takahashi 1997; Gibson 2005). Furthermore,

research shows that there are varying levels of acceptance for the individuals themselves using these residences. Those with physical handicaps are much more accepted throughout the United States than those with a mental disability, or an addiction to alcohol, for example (Takahashi 1997; Gibson 2005).

Over the last few decades, as large-scale institutions have been shown to have negative effects on the disabled, group homes and halfway houses have become more common (Lauber 1997). Along with increasing public awareness that these types of community residences are an important human service, there is also a growing unease in allowing these residences to locate in single-family neighborhoods. The passing of the Fair Housing Act's Amendment of 1988 has aided some group homes in the legal sense, but the negative perceptions still exist (Lauber 2010; Takahashi 1997).

At least two sides exist surrounding the effects and intent of NIMBYism. The majority of research suggests that NIMBYism is a clear case of "the civic good versus the special interest" (Gibson 2005). In other words, while people understand the need for these human service facilities in the greater sense, they are not interested in hosting the needed facility in their own neighborhood. Additionally, those who are not supportive of having these facilities in their neighborhoods may not value people with disabilities because they feel that they are nonproductive members of society. They may also view disabled citizens as potentially dangerous, depending on their specific impairment, whether or not that is actually the case (Takahashi 1997).

Conversely, newer research suggests that the case of NIMBYism may not be that simple (Gibson 2005). While it is clear that human service facilities and the disabled population face certain stigmas, recent research disagrees that the case against those uses

is so cut and dry. This argument, in summary, is that community opposition to these uses may also represent the greater civic interest, and is not always representative of a selfish interest (Gibson 2005). Furthermore, it is argued that if NIMBYism were in fact true, then society must accept that special interest groups are never representative of the common good, whereas social service experts, planning groups, and government agencies are always acting on rational ground. Gibson writes of the possibility that “NIMBY discourse privilege[s] centralized expertise at the expense of local community voices,” a worrisome concept (2005: 383). The point he makes, however, is that determining which group represents the local good is often very difficult.

While these two opposing viewpoints exist, both sides suggest that human service facilities should assume that NIMBYism exists and that it keeps them from obtaining their goals, in order to garner support for their work (Gibson 2005; Takahashi 1997, Cameron 2006).

There are many suggestions in this field of research that aim to either combat or work with NIMBYism. Some of the recent discussions regarding ways to manage the effects of NIMBYism and suggestions for incorporating human service facilities into the community are applicable to this report.

There is consensus that it is very important to avoid saturation of these types of facilities in a specific neighborhood. Often, when several service facilities exist within a small distance of each other, neighbors complain and feel overburdened with their share of handling societal problems (Takahashi 1997). And while it was once thought that continuous exposure to the specific population might increase acceptance, it has been shown that overexposure may actually spur NIMBYism in a neighborhood (Gibson

2005). More research is needed to sort out what the specific “tipping points” may be for different groups of residents.

If oversaturation can be avoided, there are several mitigation techniques that have shown to be helpful in increasing community support for group homes, halfway houses, and other types of community residences for the disabled. One solution is to make the outward appearance of the facility or home blend in well with the neighborhood’s style. Keeping the units residential in scale if in a single-family neighborhood, and maintaining the landscaping are simple fixes (Cameron 2006). While aesthetics may seem like a small issue, often these types of facilities go unnoticed by neighbors if they appear similar in size, shape, and coloring.

Another technique used to avoid conflicts is for the community residence to try and reach out and connect with the adjacent neighborhood (Gibson 2005). Involving the neighboring families and residents helps to eliminate the perceived prejudices and fears. If this is not possible, another solution is to wait out the opposition, while still moving forward with other mitigation techniques.

A final solution discussed in the research does not involve the residences for the disabled themselves. Instead, city codes may be used to manage the issue using regulation. When used appropriately, transparent regulation can help to disperse community residences by clarifying where they are permitted and what other restrictions may apply (Gibson 2005). Clarification of the requirements also helps to keep these uses out of the public process, which often stirs up more controversy than would otherwise occur.

ZONING CODE COMPLIANCE AND FAIR HOUSING LAW

The question of whether or not a zoning code is in compliance with federal fair housing law is not always easy to answer. It is important to remember that the original purpose of the Fair Housing Act was to protect people from housing discrimination. This includes the ways in which housing is made available to people. Furthermore, in terms of zoning for residences for the disabled, the Fair Housing Act states that land use laws are not allowed to treat persons with disabilities any differently than those without disabilities.

Essential to the writing of any new zoning code language is the unmistakable fact that case law has shown increasing intolerance for community residence zoning ordinances that are overly restrictive in nature (Lauber 2010). This means that the options available for regulating community residences have changed significantly over the last 10 years. For example, where it was once acceptable to require spacing distances between group homes, it is now near impossible to mandate any type of spacing requirements (Lauber 2010; Dept of Justice and HUD 2004).

There have been several instances in which municipalities have been shown to be in violation of the Fair Housing Act in this regard. Locally, one such example occurred in the City of Sedona. The City refused to permit operation of a group home for disabled people in a residential zoning district without a Conditional Use Permit (ACDL 2003). This violated the right of the group home, where residents live as a defined family unit, to locate in a neighborhood with other single family homes. The City of Sedona settled the case in 2003, paying over \$500,000 in damages to the defendant (ACDL 2003).

The case in the City of Sedona is just one example of the ways in which fair housing statutes may be violated by a municipality. Following the given example, this section of the paper applies the Fair Housing Act requirements to common zoning code compliance issues. First, unlawful zoning practices are addressed, explaining the various ways in which zoning codes may potentially be out of compliance with federal fair housing law. Following, there is a discussion of two models for zoning codes that deal with the issue in different ways.

Unlawful zoning and discrimination occurs whenever homes for people with disabilities are treated differently in zoning codes than are other similar types of homes (Fathy 2009). Municipalities have long used unlawful techniques to exclude community residences for the disabled from single-family and neighborhoods.

The definition of family is a crucial component of this issue, and varies greatly across the country. In order to limit who resides in single-family neighborhoods, municipalities must define the term “family.” For example, some cities define family as any number of related people and a limited number (e.g. 4) of unrelated people (Fathy 2009). In situations where groups other than related people are allowed, groups of a similar number of disabled people must also be allowed. Discrimination occurs when residences for the disabled are denied that right.

Another way in which municipalities attempt to inappropriately manage these types of residences is to allow them in single-family districts, but require them to obtain a Conditional or Special Use Permit (Fathy 2009; Lauber 2010). Unless other similar groups are required to obtain Conditional Use Permits, it is unlawful to require that of residences for the disabled. Furthermore, any requirement that unnecessarily forces these

residences into a public process can be viewed as discriminatory because it places them at a disadvantage when subject to the extra scrutiny of an entire community (Hayes 2009).

The legality of separation distances and spacing requirements between residences for the disabled is part of an ongoing debate. Some research shows that clustering of these residences may have an adverse impact on the residents themselves (Lauber 2010). Many argue that spacing distances are beneficial to those residents because otherwise, the clustering takes away from the benefits of locating the homes in a single-family neighborhood. Essentially, researchers argue, the crowding of the homes negatively affects the normalization process and creates a *de facto* social service district, similar to the large-scale institutions which are to be avoided. (Lauber 2010).

Using the previous argument, many jurisdictions put spacing requirements into effect when the Fair Housing Act amendment was first passed. Unfortunately, it has been shown that just as often, spacing requirements were based on the unfounded fears and prejudices of the effects of group homes on existing neighborhoods. For this reason, experts have questioned whether or not distance separations may be used illegally to zone these types of uses out of certain areas. This type of discrimination is clearly a violation of the Fair Housing Act. As the original intent of spacing requirements are unclear, their use has fallen out of popularity in zoning codes and is often successfully challenged in court (Dept of Justice and HUD 2004).

There are several opinions regarding spacing distances worth mentioning. The Department of Justice and Department of Housing notes that

“Density restrictions are generally inconsistent with the FHA. 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. . .

This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.” (2004: 5)

Dr. Daniel Lauber further explains that

“The spacing and licensing requirements . . . will not stand up in court unless the city first has an expert prepare a report that justifies them and presents expert testimony at the public hearing on the amendments. Just about every time a court has thrown out a spacing distance and/or licensing requirement, it's been because the defendant jurisdiction had no study on which to base its requirements. Without this sort of report and expert testimony to provide a rational and factual basis for zoning limitation on community residences for people with disabilities, the limitations will not hold up in court and will expose the city to substantial damages.” (2010: 13)

As mentioned earlier in the paper, it is also unlawful not to offer reasonable accommodations for group housing for people with disabilities. Reasonable accommodation, according to the Department of Justice and the Department of Housing, makes it illegal to refuse modifications and exceptions to policies that may be necessary to afford persons with disabilities an equal opportunity to use a dwelling. An accommodation is reasonable if it does not impose an undue burden or expense on the local government, and if it does not create a fundamental alteration in the zoning district (Dept of Justice and HUD 1999).

Municipalities typically use one of two strategies to ensure compliance with federal fair housing law. These strategies are defined predominantly by the number of restrictions placed on various types of community residences for the disabled. One option is to regulate as little as possible, by allowing residences for the disabled the right to locate wherever they choose, for as many people as desired. The second option is to

choose carefully the regulations that may be applied to every zoning district in a particular municipality.

Cities choosing not to regulate various types of group homes (for people with disabilities or not) may do so by changing the definition of “family” to be as inclusive as possible. The City of Tucson, Arizona is a good example of this. In Tucson’s Land Development Code is the following definition:

Family: Any number of individuals customarily living together as a single household and using common cooking facilities.

By including any number of people, and leaving the discussion of disability entirely out of the picture, all community residences for the disabled must be permitted as a family. Thus, those residences will be permitted outright in any zoning district where families are permitted.

Other communities take a somewhat more regulatory and specific approach. The City of Prescott’s zoning code amendments were modeled on the zoning code developed by Dr. Daniel Lauber for Boulder City, Nevada in 2010. Boulder City’s zoning code represents the most current standards for zoning for community residences for the disabled.

Specifically, Dr. Lauber approached the writing of the ordinance in two steps. First, it was asserted that the City’s definition of a family, which allows for up to five unrelated persons living together, meant that any community residence for the disabled of up to five people must also be permitted as a family. Second, Dr. Lauber applied the reasonable accommodations clause to the City’s zoning practices to allow for larger community residences. Along with the reasonable accommodations, restrictions were also placed on those larger residences, given the functional differences of the various

types. Specific examples of these other restrictions are discussed in the following section, describing the City of Prescott's overall zoning strategy for community residences for the disabled.

THE CITY OF PRESCOTT'S ZONING CODE AMENDMENT STRATEGY

The first step in developing the City of Prescott's zoning strategy for community residences for the disabled was to determine the ways in which the current zoning code was out of compliance with federal fair housing law. After careful research, two unlawful provisions were eliminated or changed, depending on the problem. The first was the implementation of spacing distances, which as explained earlier in this report, are very difficult to enforce and don't always have the intended effect of fairly dispersing residences for the disabled throughout the City. The second was that there were no reasonable accommodations for larger and more transitional community residences to locate in single-family neighborhoods, and that even in the multi-family neighborhoods they were required to obtain Conditional Use Permits.

Following the clarification of the unlawful zoning provisions in the zoning code, new definitions were created that reflected current standards, and some terms were merely modified. Several terms were removed, including *Group Home* and *Transitional Housing*, which carry an undeserved negative stigma and were deemed too specific to apply to the various uses. A complete list of the edited and new terms are included in the Appendix, but the essential definitions that helped to shape the zoning strategy are below:

Community Residence for the Disabled: A residential living arrangement for 9 or more unrelated individuals with disabilities, who operate as the functional equivalent of a family, including such supervision and care by supportive staff as may be necessary to meet the physical, emotional, and social needs of the

residents. The purpose of a Community Residence is to integrate residents into the community and is considered a residential use of property for purposes of all zoning and building codes. There are two categories of Community Residences for the Disabled:

Family Community Residence: Tenancy is typically measured in years and is often permanent in nature.

Transitional Community Residence: Tenancy is typically measured in months, and is transitional in nature.

Disability: Mental or physical impairment which substantially limits on or more major life activities. The term mental or physical impairment may include, but are not necessarily limited to, conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working. Current users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders, are not considered disabled under the Fair Housing Act or federal law, by virtue of that status.

Family (unchanged): a) An individual, or 2 or more persons related by blood, marriage, or adoption, including any live-in domestic help, living together as a single housekeeping unit in a dwelling unit; or 2) A group of not more than 8 persons who need not be related, living together as a single housekeeping unit in a dwelling unit.

The third and final step of the project was to write provisions in the Land Development Code that would appropriately restrict and regulate these uses. These closely mirrored the zoning strategy as modeled by Dr. Lauber in Boulder City, Nevada (2010). As explained throughout the report, essential to any strategy that seeks to manage the zoning of community residences is to understand that land use laws are not allowed to treat people with disabilities any differently than those without disabilities. Community residences are residential uses, not commercial, and the owners and residents of these homes have the same rights as any other property owner or resident in the city.

With this information in mind, the City of Prescott defines a family as a group of up to eight unrelated persons living together as a single housekeeping unit (LDC Section 11.2). Thus, any community residence for the disabled of up to eight disabled persons must be permitted in any zoning district where single-family residences are allowed. Therefore, community residence zoning regulations are really only applicable to community residences of over eight people.

The two types of larger community residences, family and transitional, have different zoning implications. Family community residences function most closely to single-family homes because they are permanent in nature and often have smaller numbers of residents. Transitional community residences function more similarly to multi-family housing because of the temporary tenancy, and the typically larger numbers of residents.

Additionally, licensing requirements may be applied to community residences of greater than eight residents. According to Dr. Lauber, "Licensing and certification are the regulatory vehicles used to assure adequate care and supervision. If there is no governmental or quasi-governmental body that requires licensing or certification for a particular type of community residence, then the heightened scrutiny of a conditional use permit is warranted" (2010: 22) Following this, if a license is required for a use, but is denied to the applicant by the associated state or federal body, then they cannot operate within the City.

Given the research presented in this report, the final zoning strategy presented to and approved by the City Council took a moderate approach to the regulation of community residences for the disabled:

Zoning Code Amendment Strategy

| | Zoning District | |
|---|-----------------|--------------|
| | Single-Family | Multi-Family |
| 1. Community Residences (0 – 8 people) | P | P |
| 2. Family Community Residences (9+ people) – <i>licensed</i> | P | P |
| 3. Transitional Community Residences (9+ people) – <i>licensed</i> | C | P |
| 4. Community Residences (9+ people) – <i>unlicensed</i> | C | C |

P = permitted by right, C = Conditional Use Permit

Referencing the table above, any community residence for the disabled of up to eight people must be permitted in both the single-family and multi-family zoning districts (#1). Reasonable accommodations must be made for larger community residences to locate in otherwise restricted single-family and multi-family residential zoning districts. Those residences that are licensed by an appropriate state or national accrediting body are permitted based on the functional differences between family and transitional. Larger family community residences that are licensed are permitted out right in both single-family and multi-family districts (#2). The larger transitional community residences that have the necessary licensing are permitted in multi-family districts, but require a Conditional Use Permit in single-family districts (#3). Lastly, those community residences (either family or transitional) that house nine or more residents and do not fall under any licensing body are required to obtain Conditional Use Permits in either zoning district (#4).

ZONING CODE AMENDMENT ORDINANCE TO BE INSERTED HERE

CHAPTER 2: CHRONOLOGICAL JOURNAL – PROCESS AND PASSAGE

The internship with the City of Prescott's Community Development Department began in late August 2010. In October 2010, the practicum project was decided on, and work continued through to the end of March 2011, when the zoning code amendment was passed by the City Council.

OCTOBER 2010

Work began on the zoning code amendment in mid October, amidst questions about the viability and the potentially controversial nature of the project itself. When the expected amendments to correct the zoning code language were first introduced several years prior, there were significant concerns regarding fair housing law from the legal department, strong neighborhood reactions, and questions from the Planning and Zoning Commission and the City Council. Based on these concerns, planning staff took the amendments out of the public process, and brought them back to the drawing table. They sat there until I started work again in the fall. Because the original work done by staff was now a bit outdated based on recent case law and other studies, I started with a fresh proposal and goal statement.

The overall goals of the project were 1) to eliminate language in the Land Development Code that was in contradiction to federal fair housing law, and 2) to incorporate current standards for managing residences for the disabled within land use

regulations. Additionally, another function of the amendments were that they would help the City to avoid lawsuits and would help staff provide guidance and support for locating community residences for the disabled within the City.

The schedule for the zoning code amendments was very dependent on the various committees and commissions that were required to approve it: the Unified Development Code Committee, the Planning and Zoning Commission, and finally, the City Council. Research and writing would occur throughout October and November, and then the meetings and presentations would begin. Outreach to the greater community was also going to take a significant role in the process.

Initial research focused on clarifying which sections of the current Land Development Code were out of compliance with federal fair housing law. Significant time was also spent defining federal and state laws on transitional housing and group homes, researching case law addressing similar issues, and looking up model zoning codes on this topic. Regular meetings with the legal department occurred throughout this time to assure that my research was approved by them.

Research into the compliance of the current zoning code took some detective work, and was closely related to the lawsuit in the City of Sedona, discussed previously. The defendants in that case were represented by the Arizona Center for Disability Law. It was that same group, the Center for Disability Law, that notified the City of Prescott that the Land Development Code provisions relating to transitional housing were out of compliance with the Fair Housing Act back in 2004.

As research continued into the original notification letter, the first contact was the Center for Disability Law. They noted that they no longer had staff support for this, and

only assisted the disabled people themselves. The next call was made to the Arizona Department of Housing's Fair Housing Specialist, Joy Johnson, who mentioned that while she only had limited information on the subject, that I should contact Sandra Kane at the Attorney General's office in the Civil Rights Division. My conversation with Ms. Kane directed me to a few new sources of information, which proved to be valuable. We also discussed new case law standards, and her views on what was allowed in zoning codes as related to residences for the disabled. She was not aware of any model codes available on this topic.

The most useful contact made was with a lawyer, Dr. Daniel Lauber. He is a former president of both the American Planning Association and the American Institute of Certified Planners, who specializes in legal services relating to group homes, halfway houses, and community residences under the Fair Housing Act's Amendments of 1988. He has represented governments and worked with planners on to establish zoning for community residences for over 30 years. Throughout this process, we had an exchange of ideas and emails which was used extensively, along with several reports he wrote.

NOVEMBER 2010

In early November, research continued on case law and defining more precisely the requirements of federal fair housing law. The United States Department of Justice, Civil Rights Division was the first source of information that was applied to the project. In a very useful document titled *Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and*

the Fair Housing Act, there are explanations of what is and is not allowed in a zoning code in relation to housing for people with disabilities.

The main point was, as stated previously in this paper, that land use laws are not allowed to treat people with disabilities any less favorably than those without disabilities. Additionally, I learned that disabled people include individuals with sight or hearing impairments, mobility impairments, and mental illness, as well as those suffering from alcoholism and drug addiction. Another interesting fact discovered in this research was that *group home* does not have a legal meaning. Typically it means housing for people with disabilities, but it may also refer to any group of unrelated persons who live together in a dwelling and who may share the rent. Land use law is allowed to regulate this type of housing, as long as it does not discriminate against residents based on disability.

The research taught me more than I had anticipated about the complications and ever-changing problems with revising zoning code amendments related to residences for the disabled. For example, I learned that the term “transitional housing” is not widely used. More commonly today, either “community residence” or “group home” is used. Community residences are generally defined as a group home or care home which serves people with disabilities, and has a certain number (e.g. 4, 6, or 8) of unrelated people living in the home. These residences may be transitional or long term.

Much of my research also centered around the controversy as to whether or not distance separation requirements are allowed. Dr. Lauber supported it in specific cases, along with some of my readings and sources, while recent case law and Ms. Kane recommended against it. Also problematic, it was discovered, there were no model zoning codes related to community residences in Arizona. A possible model code existed

in Boulder City, Nevada, but it would take some work to sort out whether it would be applicable to the situation in Prescott. It was determined that we would need to develop our own definitions based on fair housing language and codes specific to the City of Prescott.

Based on my findings, I was able to fulfill my first goal to define precisely the ways that the City of Prescott's code was out of compliance. The central problems were the use of distance separations between group homes, the requirement for a conditional use permit for transitional housing of all types, and the lack of reasonable accommodations for larger residences for the disabled in single-family zoning districts. This is discussed in more detail in Chapter 1 of the paper.

DECEMBER 2010

Once research was completed, and the sections of city code out of compliance with federal fair housing law were defined, work began on the strategy that would bring the city back in line with federal fair housing mandates. As described in this report, the basic elements of the zoning code amendment included redefining and categorizing the various types of residences for the disabled, writing in provisions that differentiated family and transitional residences by length of tenancy, and incorporating licensing requirements.

After finalizing the research and the zoning strategy, and getting it approved by the Community Development Director, Planning Manager, and the legal department, we worked on a timeline for the meetings and presentations that would be necessary. Meetings with the Unified Development Code Committee (UDC) were the first step. The

UDC is made up of members of the Planning and Zoning Commission, the Board of Adjustment, the City Council, and other selected community stakeholders. This committee is tasked with having the first look at any zoning code amendments. I prepared a 15-page report for the group, and then had the opportunity to present it to them on December 8, 2010 and get their feedback on the project.

The information was fairly well received by the UDC. However, a significant portion of Prescott's population is disabled, and the presence of group homes throughout single-family and multi-family neighborhoods is not discussed anywhere without a few and often controversial questions and references to the perceived disadvantages of locating residences for disabled people in family neighborhoods. Nevertheless, in the UDC meeting, I was able to successfully support some of the more contentious sections of the report. In general, the committee agreed with the proposed changes, and there were no arguments about whether or not we should have to comply with federal laws.

Questions remaining at the end of the discussion related to licensing requirements and the ways in which the elderly population fit into these scenarios. After the meeting, I did additional research and made sure that I was prepared to answer those questions at the following meeting in January.

JANUARY 2011

The second presentation to the Unified Development Code Committee on January 5, 2011 also went well. Questions brought up previously were addressed, and after a long discussion, the committee voted to pass the amendment on to the Planning and Zoning Commission for their review.

The Planning and Zoning Commission reviewed the amendments at three separate meetings, which included an initial study session followed by two public hearings and a voting session. At the study session on January 13, 2011, I presented similar information to them that I had with the UDC, and we had a discussion after my presentation. Overall, it went well, though it was difficult to gauge the reactions of the Commissioners. Several of the commissioners mentioned they would likely and eventually vote to move it forward to Council, but that they did not actually like what was proposed. It is such a contentious issue, and one that cannot easily be resolved through zoning matters. To make matters more complex, choosing to ignore the federal mandates could place the City in a position to be sued.

The commissioners also made some requests for the following Public Hearing at the end of January. They requested participation or attendance from a few owners or managers of group homes and halfway houses, in order to talk with them about their overall operations and specifically, licensing requirements.

The week after the study session, I contacted 10 to 20 residences for the disabled and other types of service providers. Linda Hartmann, Grants Administrator for the City, who administers the Community Development Block Grants, and was an asset in terms of helping make connections with different organizations and agencies. I spoke with several managers of these groups, who agreed to come to the following meetings and be available for questions from the commissioners.

The first public hearing with the Planning and Zoning Commission on January 27, 2011 was preceded by a special Executive Session meeting for the Commissioners. While this is not uncommon for the City Council, this was the first time in several years

that the Planning and Zoning Commission went into Executive Session. Because some of the comments made by the Commissioners at the study session earlier that month had the legal team and Council members concerned, the city attorneys used the session to brief the Commissioners on what was and wasn't appropriate to discuss.

The briefing by the legal department had the effect of quelling some of the more negative and personal opinions that may otherwise have been voiced at the hearing. After the presentation, several members of social service agencies and residences for the disabled from around town gave brief overview of their operations. It was interesting to hear from the various groups, and useful to hear about some of the very positive work they are engaged in. After all the presentations had concluded, there was little discussion from the Commissioners, and the meeting was adjourned.

FEBRUARY 2011

During the few weeks between public hearings, the department set up an interview with the local newspaper, *The Daily Courier*. The goal was to reach out to those who may not have read the notices regarding the Planning and Zoning Commission hearings. It was a bit surprising that the process had gotten this far with such little public input, and the department wanted to increase our outreach efforts before presenting the project to City Council. On the advice of the Community Development Director, Tom Guice, it is usually a good idea to be aware of any objections and to air out any concerns in advance of the Council meetings (as much as is possible). Thus, George Worley, the Planning Manager, and I were interviewed the week before the final public hearing and voting session. The newspaper article made it on to the front page the week of the final

hearing before the Planning and Zoning Commission, but even so, we received no formal public comment.

The final meeting with the Planning and Zoning Commission in February was a joint public hearing and voting session. The Commissioners had heard the information several times now, and so I tried to keep my presentation short, but long enough for those in the audience who may not have heard it before. Again, representatives from some of the associated agencies and organizations were present and made a few comments in support of the zoning code amendments. There was some discussion, but with little real controversy, the Commissioners voted unanimously to recommend approval of the amendments to City Council.

After the approval, a second newspaper article was published, which received garnered more interest than the first. Still, there were no real objections, and most questions I answered were clarifications of what exactly the requirements were from the Fair Housing Act. I also received several inquires from people who were interested in opening up a community residence for the disabled, and wanted to learn more about where they might locate.

MARCH 2011

On March 9, 2011 I participated in a local talk radio show, "Talk of the Town." The purpose of appearing on the show was to again, reach out to those who may not have attended the meetings or read the articles in the newspaper. The radio show host, Kim Kapin, also works as the Public Affairs Director for the City of Prescott, so he allowed me to help write some of the questions that I would be asked. A live radio show was a

great opportunity to discuss the work that had been completed so far, and overall, it went smoothly and was a fun experience.

The March 22, 2011 City Council meeting was a joint public hearing and voting session. The presentation to the Council was different from those given to the Planning and Zoning Commission, as I wanted to make sure the Council had a complete understanding of the amendment background, including the original notification from the Center for Disability Law. One of the Council members was clearly in opposition to the zoning code amendment on the grounds that neighborhoods should not have to accommodate various types of residences for the disabled. This particular Councilman also made it clear that while he was comfortable living next to an assisted living center for the elderly, he would not like to live next to a halfway house, an interesting reflection of some of the earlier research on NIMBYism.

Another Councilman was vocally in support of the zoning code amendments, on the grounds that property owners should have the right to do what they choose with their houses. Additionally, he felt strongly that the City should not support any type of discrimination, especially based on disability or socioeconomic status. Several of the other City Council members had questions, but there was strong opposition only from one. Finally, after more discussion, the zoning code amendment was passed, with all but one Council member voting to approve it.

After the final approval of the amendment, *The Daily Courier* published two more articles. The first was a summary of the City Council meeting, and the second was an editorial written by the newspaper staff. From both, I received many phone calls and spoke with several people in person, who had questions and concerns about what had

been passed. The editorial especially received significant attention from online readers, as it was both a positive and negative review of the amendments. It will be interesting to hear feedback as the code amendments begin to take effect.

DISCUSSION

There are an unlimited number of discussion topics and concluding remarks that came to mind as I compiled the information for this report. The list of associated research topics kept growing as I worked through the process, ranging from the role of a conservative government in social services to the lack of social and economic integration for people with disabilities in a small town. There were so many issues that might have been addressed as a component of the project, but one of the most important conclusions for me was that a zoning code amendment has no way of solving the social issues that it may unknowingly create.

Regulation, however, can at the minimum establish a level playing field for those living throughout a community. That the department was able to establish regulations clearly discouraging discrimination of these types of residences for people with disabilities, in my mind, was the success of the project. Within the City of Prescott, there exists both overt and more discrete prejudice, which may be in part due to the “oversaturation” issue discussed earlier in the report. The city has higher than national and state average numbers of people with disabilities, and it is known among the locals that it is a popular area for recovery centers and also living arrangements for the elderly. These demographics may make the citizens, as well as Council members and Commissioners, more on edge when it comes to discussion of this topic. Again, many of

these issues, unfortunately, can only be partly addressed by a planning and zoning department.

One of the other components of this project that was unforeseen was the lack of public participation, which wasn't for lack of trying on behalf of the Community Development Department. Throughout the process, which lasted six months, there were public notices in the newspaper, airings of the meetings on the local access channel, a radio show interview, and four separate newspaper articles. In retrospect, I think this may be because no one pays attention to anything that the City is working on until it reaches City Council, which is typically the final phase of the project. Also, it may be that the majority of the community didn't see any true controversy in the subject, which may also be a sign of the changing politics of the region.

Overall, Arizona has very low levels of civic engagement. According to the Center for the Future of Arizona, in partnership with the national Gallup Poll, the state ranks 40th in the nation for voter registration and 43rd for voter turnout (2010). Additionally, 37% of residents do not regularly read or talk about the news. Specific to this project, while the lack of public participation may have made the process go more smoothly, it seems that the level of community involvement should have been higher. It may be that as the times are changing, we as planners need to find new ways to reach people, for better or worse.

The experience of writing an amendment to the Land Development Code and taking it through the public process was an incredible learning experience, a definitely a very encouraging one as I start my career in this field. While planning staff only have so much influence in comparison to the elected leaders, there are always opportunities to

guide community growth in a positive direction. The following quote by John Friedman, summarizes the direction that I hope new planners will pursue:

“Planning is that professional practice that specifically seeks to connect forms of knowledge with forms of action in the public domain . . . Though planners should be free to choose, action in the public domain should be justified as that which furthers the cause of human flourishing and diversity throughout the world.”
(1993: 80)

CHAPTER 4 – APPENDICES

(Forthcoming: newspaper articles, meeting agendas and minutes, video from meetings and presentations, any formal community comments, etc.)

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