UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 03-80178-CIV-Middlebrooks/ Johnson

JEFFREY O., *et al.*,

Plaintiff,

vs.

CITY OF BOCA RATON,

Defendant.
_____/

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. BACKGROUND

By this action, Plaintiffs challenge the legality of the City of Boca Raton's ("City") zoning ordinances that separately and in combination ban group housing for people in recovery from alcohol or drug addiction in residential areas of the City. Plaintiffs, individuals in recovery from drug and alcohol addiction living together in sober housing ("Individual Plaintiffs") and providers of housing to people in recovery (together "Boca House"), are protected by the Fair Housing Act. Because one of an addicts' or alcoholics' worst enemies is being alone, they need to live together in sober group homes or apartments during the initial phases of their recovery. [1]

[1] Boca House is part of a continuum of support for people in recovery. While traditional inpatient treatment facilities are critical for detoxification, recovering alcoholics and addicts are most likely to maintain their recovery if they transition from more structured living to more independent living. Group homes ranging from multi-apartment buildings to single family residences are crucial to maximizing recovery. These residential settings, usually in quiet neighborhoods, reduce the temptation to relapse by removing the alcoholics and addicts from triggers such as bars, drinkers, users and areas of drug trafficking. In addition, the social structure of group homes fosters the interdependence that is a large factor in the successful recovery programs of Alcoholics Anonymous and Narcotics Anonymous. See e.g.,Constance Weisner, *The Merging of Alcohol and Drug Treatment: A Policy Review*, 13 J. PUB. HEALTH POL'Y 66, 67 (1992); David Gates & Deborah Beck, *Prevention and Treatment: The Positive Approach to Alcoholism and Drug Dependency*, 24 CLEARINGHOUSE REV. 472, 477 (1990); Herbert Kleber, *Treatment of Drug Dependence: What Works*, 1 INT'L REV. PSYCHIATRY 81, 89 (1989); Margaret Allison, M.A. & Robert L. Hubbard, Ph.D., *Drug Abuse Treatment Process: A Review of the Literature*, 20 INT'L J. ADDICTIONS 1321, 1325-26 (1985). Without supportive and drug-free living environments, the risk of relapse after discharge from a hospital treatment program is heightened. G.Alan Marlatt & Judith Gordon, *Relapse Prevention* 402, 404, 456 (1985).

City ordinance, No. 4649, amended by City ordinance No. 4701 (together "Ordinance 4649"), prohibits housing for persons recovering from drug or alcohol addiction, who agree to drug and alcohol testing, from living in residentially zoned areas of the City.[2] A separate ordinance, City Code Section 28-2, prohibits more than three unrelated persons from living together, regardless of the size of the dwelling or the number of bedrooms. When applied together, these ordinances result in a ban of all sober housing for people that agree to drug and alcohol testing as a condition of their tenancies from living in residentially-zoned areas of the City. At a minimum, they would require Boca House to cease offering sober housing and require approximately 400 residents to seek sober housing outside of the City. When read together, the effect of these ordinances is to deny recovering alcoholics and addicts the housing of their choice within the City. As explained below, each provision creates discriminatory zoning schemes for residential housing and facially violates the Fair Housing Act, 42 U.S.C. §3601 *et seq*. Through Ordinance 4649, the City discriminates against the Plaintiffs and Boca House's residents in the terms, conditions, or privileges in the rental of a dwelling, in violation of 42 U.S.C. 3604(f)(2), by treating recovering persons differently from other residents of the City because of their disability. Through Section 28-2, the City discriminates against these Plaintiffs and Boca House's residents on the basis of disability, in violation of 42 U.S.C. 3604(b), by applying different rules to them in their housing choices than are applied to other residents of the City. Finally, the City refused to make reasonable accommodations to the Plaintiffs, when such accommodations are necessary to affect them the equal opportunity to use and enjoy their dwellings, in violation of 42 U.S.C. 3604(3)(B).

[2] This ordinance was enacted at a City Council meeting at which neighbors expressed their disdain for the plaintiffs and made clear their desire to expel them from the City. See Plaintiff's Statement of Undisputed Facts in Support of Plaintiff's Partial Motion for Summary Judgment (the "Facts") filed contemporaneously herewith.

II. MEMORANDUM OF LAW

A. SUMMARY JUDGMENT STANDARD & SUBSTANTIVE LAW

Summary judgment should be granted when "there is no genuine issue as to any material fact . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). There is no genuine issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co.v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "The mere existence of some factual dispute will not defeat summary judgment, unless the factual dispute is material to an issue affecting the outcome of the case." Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995). "Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Applicable substantive law identifies which facts are material and which are irrelevant. Anderson, 477 U.S. at 248; Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282 (11th Cir. 1999). To defeat a summary judgment motion, the non-movant may not "rest upon the mere allegations or denials" in its pleadings, Fed. R. Civ. P. 56(e), but must demonstrate the existence of facts that could support a jury finding in its favor. Anderson, 477 U.S. at 248-49. Summary judgment should therefore be entered against a party that has failed to produce evidence concerning an element on which it will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 321-22 (1986). The governing substantive law here is the Fair Housing Act and cases decided thereunder. Under the Fair Housing Act and related anti-discrimination statutes, laws that single out individuals with disabilities for regulation are facially discriminatory. Larkin v. Michigan Dept. of Social Servs., 89 F.3d 285, 290 (6th Cir. 1996); Bangerter v. Orem, 46 F.3d 1491, 1500-01 (10th Cir. 1995); T.E.P. v. Leavitt, 840 F. Supp. 110 (D. Utah 1993); Children's Alliance v. City of Bellevue, 950 F.Supp. 1491, 1496 (W.D. Wash. 1997).

Once a plaintiff establishes that a statute or ordinance is facially discriminatory, the burden shifts to the governmental defendant to justify the disparate treatment. ARC of N.J. v. N.J., 950 F.Supp. 637, 643 (1996); Horizon House v. Twp. of Upper Southhampton, 804 F.Supp. 683, 693 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir.1993); Larkin, 89 F.3d at 290; Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43, 47 (6th Cir.1992); Bangerter, 46 F.3d at 1503-04 (rejecting the rational basis framework because "the FHAA specifically makes the disabled a protected class for purposes of a statutory claim-they are the direct object of the statutory protection-even if they are not a protected class for constitutional purposes"). Thus, unless a defendant can produce evidence to justify the facially challenged ordinance, summary judgment should be entered against it. Celotex Corp., 477 U.S. at 321, 322.[3] As set forth below, there are no material issues of disputed fact here, and Plaintiffs are entitled to judgment as a matter of law.

B. ARGUMENT

1. The FHAA

The Fair Housing Amendments Act of 1988 (the "FHAA") establishes that "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. It prohibits discrimination by a public entity against disabled[4] persons, and applies to a municipality's zoning decisions. See City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995); Tsombanidis v. W. Haven Fire Dept., 352 F.3d 565, 572 (2d Cir. 2003); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44 (2d

[3] The McDonnell Douglas[Corp. v. Green, 411 U.S. 792 (1973)] test is inapplicable to Fair Housing Act challenges to a facially discriminatory law or policy. See Bangerter, 46 F.3d at 1501 n.16 ("There is no need to probe for a potentially discriminatory motive circumstantially, or to apply the burden-shifting approach outlined in McDonnell Douglas ... as the statute discriminates on its face by allowing conditions to be imposed on group housing for the handicapped which would not be permitted for non-handicapped group housing."); Reidt v. County of Trempealeau, 975 F.2d 1336, 1341 (7th Cir. 1992) ("The McDonnell Douglas procedure is inapt in a situation involving a facility discriminatory policy....")

[4] The FHAA uses the term "handicap." 42 U.S.C. 3602(h). Plaintiffs will hereinafter use the now preferred term "disability."

Cir.1997); Bangerter, 46 F.3d at 1498 ("the FHAA's prohibitions clearly extend to discriminatory zoning practices"). It is intended to protect the right of individuals to live in the residence of their choice in the community. Marbrunak, 974 F.2d at 45.

Any person "aggrieved" by such a discriminatory practice has a cause of action under the FHAA. See 42 U.S.C. § 3613(a), § 3602(i); Havens Realty Corp. v. Coleman, 455 U.S. 363, 372-73 (1982). The FHAA protects persons who are non-abusing, recovering alcoholics and drug addicts. RECAP v. City of Middletown, 294 F.3d 35, 47-48 (2d Cir. 2002) (finding that the potential clients for a halfway house for recovering alcoholics are disabled under the FHAA because they "are unable to abstain from alcohol abuse without continued care; absent assistance, they cannot adequately care for themselves"); U.S. v. Southern Mgmt. Corp., 955 F.2d 914 (4th Cir. 1992); Samaritan Inns Inc. v. District of Columbia, 114 F.3d 1227 (D.C. Cir. 1997).

The FHAA has "a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals." Bronk v. Ineichen, 54 F.3d 425, 428 (7th Cir.1995). In passing the FHAA, Congress recognized that "[t]he right to be free from housing discrimination is essential to the goal of independent living." H.R.Rep. No. 711, 100th Cong., 2nd Sess., at 17 (1985) ("House Report") at 18. To further this goal, the FHAA represents

> a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

Id. In light of the FHAA's broad mandate, courts accord a "generous construction" to its antidiscrimination prescriptions. City of Edmonds, 514 U.S. at 737 n.11 (citation omitted); Samaritan Inns, 114 F.3d at 1234. Applying the FHAA, "courts have consistently invalidated a wide range of municipal licensing, zoning and other regulatory practices affecting persons with

disabilities." Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1294 (D. Md. 1993) (citations omitted).

The FHAA prohibitions were intended to curb land-use restrictions on communal housing opportunities, sometimes called group homes, for disabled individuals. The FHAA was further intended to prohibit exclusionary zoning practices, such as the City's enactment of the challenged ordinances. See House Report, n.21 in §11D:1 at 24; see also 24 CFR 1(A)(I), Preamble II, 54 Fed. Reg. 3246 (Jan. 23, 1989). In fact, the House Judiciary Committee Report states that the FHAA was intended to apply to "state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps . . . [and] that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." House Report, n.21 at §11D:1 at 24.

Courts have recognized that zoning restrictions on group homes may make housing unavailable to disabled persons in violation of the FHAA based on three legal theories: (1) *Discriminatory intent* (*i.e.*, the restriction facially singles out disabled persons or was motivated by the fact that disabled persons would reside in the housing); (2) *Discriminatory effect* (*i.e.*, the restriction had a disparate impact on disabled persons and was not justified by a substantial governmental interest); and (3) *Failure to reasonably accommodate disabled persons* (*i.e.*, refusal to afford an accommodation necessary to allow disabled persons equal opportunity to use and enjoy a dwelling). See e.g., Smith & Lee Ass., Inc. v. City of Taylor, Mich., 102 F.3d 781, 790 (6th Cir. 1996). Under the first and third theories, Plaintiffs are entitled to summary judgment because the City has made housing, and specifically Boca House, unavailable to disabled individuals, namely recovering addicts and alcoholics, and refused an accommodation.

2. Ordinance 4649

Ordinance 2649 initially provided that:

> Substance Abuse Treatment Facility" shall mean a service provider or facility that is: 1) licensed or required to be licensed pursuant to Section 397.311 (18) Fla. Stat.[5] or 2) used for room and board only and in which treatment and rehabilitation activities are provided at locations other than the primary residential facility, whether or not the facilities used for room and board and for treatment and rehabilitation are operated under the auspices of the same provider. For the purposes of this paragraph (2), the following shall be deemed to satisfy the "treatment and rehabilitation activities" component: (a) service providers or facilities which require tenants to participate in treatment and rehabilitation activities as a term or condition of, or essential component of, the tenancy: or (b) service providers or facilities which facilitate, promote, monitor, or maintain records of, tenant participation in treatment and rehabilitation activities, or perform testing to determine whether tenants are drug and alcohol free, or receive reports of results of such testing.
>
> * * *
>
> Section 28-197. Status of Substance Abuse Treatment Facilities.
>
> Any Substance Abuse Treatment Facility that exists as of the effective date of this ordinance must comply with all provisions and requirements of this ordinance no later than eighteen (18) months after its effective date.
>
> * * *
>
> Section 28-743. Conditional Uses.
>
> (e) Substance Abuse Treatment Facility, provided that such facilities shall not be located within a radius of 1,000 feet of another existing facility.

Ordinance 4649 was amended following the commencement of this lawsuit to be sure it would apply to Boca House:[6]

> Substance Abuse Treatment Facility shall mean a service provider or facility that is: 1) licensed or required to be licensed pursuant to Section 397.311 (18). Fla. Stat. or 2) used for room and board only and in which treatment and rehabilitation activities are provided at locations other than the primary residential facility, whether or not the facilities used for room and board and for treatment and rehabilitation are operated under the auspices of the same provider. For the purposes of this paragraph (2), service providers or facilities which require tenants or occupants to participate in treatment and rehabilitation activities, or perform testing to determine whether tenants or occupants are drug and/or alcohol free, as a term or condition of, or essential component of, the tenancy or occupancy shall

[5] Boca House is not licensed or required to be licensed under Florida Statute Section 397.311.

[6] Ordinance 4649 itself, as amended, makes explicitly clear that it was amended as a direct result of the litigation. Specifically, amended ordinance changed the operative date to the later of 18 months after its effective date or 60 days after the conclusion of this litigation.

> be deemed to satisfy the "treatment and rehabilitation activities" component of the definition contained in this section.

Under the amended Ordinance, because Boca House performs drug testing to determine "whether tenants or occupants are drug and/or alcohol free," it is classified by the City as a Substance Abuse Treatment Facility.[7] For more than 15 years, Boca House has been located and offered sober housing in a residentially zoned area of the City. Because of its new classification under Ordinance 4649, Boca House is subject to the locational requirements, which limit such facilities to the Medical Center or Motel Business zoning districts in the City and prohibits its continued existence in Residential zoning districts. Under Ordinance 4649, any Substance Abuse Treatment Facility, and specifically Boca House, is not permitted to operate in any residential neighborhood in the City and neither the Individual Plaintiffs nor any individual living in a Substance Abuse Treatment Facility is permitted to reside in a residential neighborhood and reside in a sober living facility such as Boca House.

3. Section 28-2

City Code of Ordinances Section 28-2 ("Section 28-2") defines family and restricts the allowable number of persons in each dwelling unit to those comprising a "family":

> 1 person or a group of 2 or more persons living together and interrelated by bonds of consanguinity, marriage or legal adoption, or a group of persons not more than 3 in number who are not so interrelated, occupying the whole or part of a dwelling as a separate housekeeping unit with a single set of culinary facilities. The persons thus constituting a family may also include gratuitous guests and domestic servants. Any person under the age of 18 years whose legal custody has been awarded to the state department of health and rehabilitative services or to a child-placing agency licenses by the department, or who is otherwise considered to be a foster child under the laws of the state, and who is placed in foster care with a family, shall be deemed to be related to a member of the family for the purposes of this chapter. Nothing herein shall be construed to include any roomer or boarder as a member of a family.

[7] Boca House does not, however, provide room and board to its tenants. Boca House is a rental apartment community and not a boarding house.

Under the City's definition of family, an unlimited number of people who are "interrelated by bonds of consanguinity, marriage or legal adoption" may live together. Conversely, more than three recovering addicts, such as those residing at Boca House and Awakenings, may not.

4. Plaintiffs Are Entitled to Partial Judgment under the FHAA for Injuries and Threatened Injuries Caused by the City's Discriminatory Zoning Laws

The undisputed facts establish that: (1) Ordinance 4649 facially discriminates on the basis of disability; (2) Ordinance 4649 was enacted with discriminatory intent or purpose; (3) the City refused to accommodate Plaintiffs' existing use by allowing it a reasonable accommodation with respect to Ordinance 4649 in the form of grandfathering; (4) Section 28-2 discriminates on the basis of disability; (5) the City refused to accommodate Plaintiffs by allowing four unrelated people with disabilities to reside in sober housing; and (6) the City cannot meet its burden of justifying the facial discrimination of the two ordinances. As a direct result of these discriminatory practices, Plaintiffs have suffered and will suffer damages.

a. *Ordinance 4649 facially discriminates on the basis of disability*

Ordinance 4649 discriminates, on its face, against persons with disabilities. A court must find that a statute facially discriminates against the disabled where the statute's language and structure place different burdens upon individuals with disabilities than upon similarly situated individuals without disabilities. See e.g., Bangerter, 46 F.3d at 1500 ("the [challenged] Act and Ordinance single out the disabled and apply different rules to them. Thus the discriminatory intent and purpose of the Act and Ordinance are apparent on their face."); Marbrunak, 974 F.2d at 46-47 (affirming a finding that a zoning ordinance was facially discriminatory because it applied more stringent requirements on homes for the developmentally disabled than it applied to other single-family residences). When considering whether a statute is facially discriminatory, a court need not consider the motives of the drafters of the statute. See Children's Alliance v. City

of Bellevue, 950 F. Supp. 1491, 1495 (W.D. Wash. 1997) ("Differential treatment on the face of an ordinance demonstrates an intent to discriminate; additional evidence of discriminatory animus is not required."); Horizon House, 804 F. Supp. at 693 ("The motives of drafters of a facially discriminating ordinance, whether benign or evil, is [sic] irrelevant to a determination of the lawfulness of the ordinance."); see also Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."). Thus, "a plaintiff makes out a prima facie case of intentional discrimination under the FHAA merely by showing that a protected group has been subjected to explicitly differential – *i.e.* discriminatory – treatment." Bangerter, 46 F.3d at 1501.

Some facially discriminatory laws are easily identifiable because they use the words "handicapped" or "disabled." For example, a law requiring that "group homes for the mentally or physically handicapped" obtain a special permit expressly singles out disabled persons. Id. at 1494, 1500. Other facially discriminatory laws do not use the words "handicapped" or "disabled" but discriminate on their face nonetheless. Community Housing Trust v. Dept. of Consumer and Reg. Affairs, 257 F.Supp.2d 208, 221 (D.D.C. 2003); Children's Alliance v. City of Bellevue, 950 F.Supp. 1491, 1496 (W.D.Wa.1997); Alliance for the Mentally Ill v. City of Naperville, 923 F.Supp. 1057, 1071 (N.D.Ill.1996). For example, while a law that (1) prohibits any new "family care home" from locating within 1000 feet of any existing "family care home" and (2) defines "family care home" as a facility where "permanent care" or "professional supervision" does not use the word "handicap" or "disability," the reach of the law clearly "coincides with the breadth of the definition of 'handicap' under the [FHAA]." Horizon House, 804 F. Supp. at 687-90, 694. For this reason, such a law discriminates on its face against the disabled. Id. That a law "may

incidentally catch within its net some unrelated groups of people without handicaps, such as juveniles or ex-criminal offenders" does not alter this conclusion. Id. (internal citations omitted).

Ordinance 4649 defines "Substance Abuse Treatment Facility" by reference to Florida Statute Section 397.311(18) and encompasses housing that "perform[s] testing to determine whether tenants are drug and alcohol free." By referencing Section 397.311(18), Ordinance 4649 specifically includes providers that offer "substance abuse impairment services" for "clients found to be substance abuse impaired." The definition also includes "[f]acilities that are used for room and board and in which treatment and rehabilitation activities" are provided off-site. Notably, "clients" are defined as "recipients of alcohol or other drug services delivered by a service provider." FLA. STAT. § 397.311(5). Thus, while Ordinance 4649 does not use the words "handicapped" or "disabled," it applies primarily, if not exclusively, to persons in recovery who are disabled, are being treated for a disability, or are regarded as disabled. Its reach, therefore, "coincides with the breadth of the definition of 'handicap' under the [FHAA]." Accordingly, such a law discriminates on its face against the disabled. Id.

The Seventh Circuit followed this approach in finding facial discrimination in McWright v. Alexander, 982 F.2d 222 (7th Cir.1992). The court stated that an employer may not "use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination." Id. at 228. In McWright, the company fired all employees with gray hair and was found to have committed intentional age discrimination:

> the "fit" between age and gray hair is sufficiently close that they would form the same basis for invidious classification. Similarly, discrimination "because of" handicap is frequently directed at an effect or manifestation of a handicap rather than being literally aimed at the handicap itself. Thus, a school's exclusion of a service dog has been held to be discrimination "because of" handicap, and no doubt a policy excluding wheelchairs would be such discrimination, even if the stated purpose of the policy were a benign one.

Id. (internal citation omitted). Although McWright involved the Rehabilitation Act of 1973, Congress intended the FHAA to incorporate "the same definitions and concepts from that well-established law." House Report at 17.

By defining Substance Abuse Treatment Facilities as permitted uses in the Medical Center District and conditional uses in the Motel Business District, Ordinance 4649 shuts out Boca House and Awakenings as "Substance Abuse Treatment Facilities," and their residents, from residentially zoned areas. See Facts at ¶¶ 14-19, 30. On its face, Ordinance 4649 commits the City to the position that "facilities which require tenants . . . to participate in treatment and rehabilitation activities, or perform testing to determine whether tenants . . . are drug and/or alcohol free, as a term or condition of, or essential component of, the tenancy or occupancy . . ." must move out of residential areas of the City.

Ordinance 4649 also requires that Substance Abuse Treatment Facilities not be located within 1000 feet of one another. This spacing requirement further exacerbates the exclusionary requirements of Ordinance 4649, and violates the FHAA. Larkin, 89 F.3d at 289-92; U.S. v. City of Chicago Heights, 161 F.Supp.2d 819, 831-46 (N.D. Ill. 2001); Children's Alliance, 950 F. Supp. at 1495-99; Arc of N.J., 950 F. Supp. at 644-46; Horizon House, 804 F. Supp. at 693-700; see also Oconomowoc Residential Progs. v. City of Milwaukee, 300 F.3d 775, 781-88 (7th Cir. 2002) (granting reasonable accommodation from City's application of its spacing requirement to group home, without striking down the requirement in its entirety).

In Larkin, *supra*, the Sixth Circuit struck down a state's spacing and neighbor-notification requirements that had been used to block an adult foster care facility from operating at a particular residential site. Because these requirements, like the Substance Abuse Treatment Facilities in the City, were explicitly directed at residences for disabled persons, the court held

that they reflected a discriminatory intent and therefore could only be justified if it was "demonstrate[d] that they are 'warranted by the unique specific needs and abilities of those handicapped persons' to whom the regulations apply." Larkin, 89 F.3d at 289-92. Here, sober housing for individuals in recovery is required to be located outside of any residentially zoned areas, thereby removing protected disabled persons away from the general residential population of the City, and requiring Substance Abuse Treatment Facilities to be 1000 feet from each other, violates the FHAA. The City is creating de facto apartheid for these disabled persons.

b. *Even If Ordinance 4649 Did Not Discriminate On Its Face, It Was Enacted With Discriminatory Intent Or Purpose*

Even if Ordinance 4649 did not discriminate on its face, it was deliberately targeted at Boca House and its residents. As set forth more fully below, Ordinance 4649 was amended to include drug testing, a known requirement at Boca House, as an activity that would trigger classification as a Substance Abuse Treatment Facility. Quite simply, the facts are indisputable that Ordinance 4649 was enacted with an intentionally discriminatory purpose. The transcript of the May 29, 2002 City Council meeting and the statements made therein reveal the intent behind Ordinance 4649 and the City Council's motivation for Ordinance 4649. Specifically, City residents, City Council members and even the Mayor stated their desire to expel Boca House and its residents from the City. See Facts at ¶ 20-26.[8]

> Discriminatory intent may be inferred from the totality of the circumstances, including the historical background of the decision; the specific sequence of events leading up to the challenged decision; and contemporary **statements by members of the decision-making body**.

RECAP, 294 F.3d at 49 (internal citations omitted, emphases added). Ordinance 4649 was motivated substantially, if not entirely, by the community and Council's perceptions of the

[8] The Plaintiffs respectfully request that the Court read the transcript, filed by the City, in its entirety, to see the discriminatory intent exhibited not only by hostile residents, but also by the City Council members. (D.E. 135).

residents of Boca House, a protected class of disabled individuals. The only facilities that Ordinance 4649 applies to are those, like Boca House, that rent to recovering addicts. No facts support an alternate view, and summary judgment is appropriate.

c. *Even If Ordinance 4649 Is Valid On Its Face And Was Enacted Without Discriminatory Intent, the City Refused To Accommodate Plaintiffs' Existing Use by Allowing It a Reasonable Accommodation in the Form of Grandfathering*

Discrimination under the FHAA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B). Under the FHAA, demonstration that an accommodation is "necessary" if the desired accommodation will affirmatively enhance a disabled [person's] quality of life by ameliorating the effects of the disability." Oconomowoc, 300 F.3d at 784. Any accommodation requested must be related to the limitation faced by the disabled person or persons. Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 687 (8th Cir.2003) (requiring "a causal connection between the major life activity that is limited and the accommodation sought"). By its nature, a "reasonable" accommodation constitutes "preferential" treatment for persons with disabilities, and that treatment is necessary to achieve the basic equal-opportunity goals created by laws such as the FHAA. See U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

"To prevail on a reasonable accommodation claim, plaintiffs must first provide the governmental entity an opportunity to accommodate them through the entity's established procedures used to adjust the neutral policy in question." Tsombanidis, 352 F.3d at 578. Plaintiffs requested reasonable accommodations from the City. See Facts at ¶ 31. The City did not afford the Plaintiffs any accommodation with respect to Ordinance 4649. Id. at ¶ 32. The housing of the Individual Plaintiff's choice is a sober living facility that fosters a sober,

recovering community within a residential district. Boca House is an apartment complex catering to disabled individuals who are part of the residential community. Without an accommodation, such as, at a minimum, the grandfathering of Boca House in its existing use, the Individual Plaintiffs and Boca House residents will be denied the opportunity to enjoy the housing of their choice in residential neighborhoods. Id. at 578 citing Smith & Lee, 102 F.3d at 795.

Because Ordinance 4649 specifically targets Boca House and its residents, the lack of an accommodation is further reflects the City's discriminatory intent. Ordinance 4649 serves no other purpose than to ghettoize recovering addicts and force Boca House into particular commercial zones, and any accommodation here would obviate the need for Ordinance 4649. Accordingly, the City is unwilling or unable to offer such an accommodation without repealing Ordinance 4649, or amending it to exempt existing uses.

d. *Section 28-2 facially discriminates on the basis of disability*

Section 28-2 limits the number of unrelated people who live together, but exempts certain unrelated, non-disabled persons from its definition of "family," *i.e.* foster children, who need not be disabled, and domestic servants. Specifically, the City defines family and restricts the allowable number of persons in each dwelling unit to those comprising a "family."

The definition is unlawful. First, it allows an unlimited number of people who are "interrelated by bonds of consanguinity, marriage or legal adoption" to live together regardless of health or safety concerns. Second, it exempts certain people from this definition who are non-disabled: foster children and domestic servants. Thus, under the City's definition of family, more than three unrelated domestic servants can live with a family "interrelated by bonds of consanguinity, marriage or legal adoption," but more than three unrelated persons with disabilities cannot live together as a family in a group home.

Central to the sober housing program at Boca House is accountability and companionship to prevent relapse. See Facts at ¶¶ 2, 6, 37. As a result, Boca House typically houses multiple unrelated recovering persons in a two bedroom apartment, and people frequently share a room. See Facts at ¶ 37. This format ensures that no person is or feels alone. Oxford House, Inc. v. Town of Babylon, 819 F.Supp. 1179, 1183 (E.D.N.Y. 1993) ("Recovering alcoholics or drug addicts require a group living arrangement in a residential neighborhood for psychological and emotional support during the recovery process.") For example, a two bedroom apartment at Boca House with two roommates per bedroom[9] may have a total of four unrelated persons, thus violating the City's definition of family. However, "a household with ten siblings, their parents and grandparents, for example could dwell in a house in [the City's] single-family residential zone without offending [the City's family] composition rule." City of Edmonds, 514 U.S. at 737. Nor would a nuclear family of eight or 16 family members related by blood or marriage with five unrelated domestic servants violate the ordinance.

An ordinance which draws a distinction between families and congregate living arrangements among non-related persons with disabilities violates the FHAA because of the burdens placed on the latter but not on the former. See Children's Alliance, 950 F.Supp. at 1496. A number of courts have concluded that municipalities violate the FHAA when they attempt to prevent or restrict persons with disabilities from living in the single family-zoned homes of their

[9] The two-person-per-bedroom arrangement is consistent with HUD's occupancy policy. See Memorandum from HUD General Counsel Frank Keating to all Regional Counsel regarding "Fair Housing Enforcement Policy: Occupancy Cases," (Mar. 20, 1991) (reprinted at Fair Housing-Fair Lending Rptr. ¶5216, 63 Fed. Reg. 70256-57 (Dec. 28, 1998)). "An occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the [FHAA]." 63 Fed. Reg. at 70256. In 1988, Congress endorsed these standards for familial status cases. See 63 Fed. Reg. 70256-57 (Dec. 18, 1998) (HUD Statement of Policy implementing the requirements of § 589 of the Quality Housing and Work Responsibility Act of 1998, Pub. L. 105-276, 112 Stat. 2461 (Oct. 21, 1998)).

choice, even when the number of residents exceeds the number of unrelated people permitted to live together under the applicable zoning ordinances. See, e.g., Town of Babylon, 819 F.Supp. at 1179; Oxford House v. Twp. of Cherry Hill, 799 F.Supp. 450 (D.N.J.1992); Oxford House Evergreen v. City of Plainfield, 769 F.Supp. 1329 (D.N.J.1991); Dr. Gertrude A. Barber Center, Inc. v. Peters Twp., 273 F.Supp.2d 643, 651 (W.D.Pa.2003) (application of family-relationship restriction to group home for four unrelated mentally retarded persons violates the FHAA); Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1578 (E.D. Mo. 1994), *rev'd on other grounds*, 77 F.3d 249 (8th Cir. 1996); U.S. v. City of Taylor, 872 F. Supp. 423 (E.D. Mich. 1995), *aff'd in part, rev'd in part*, 102 F.3d 781 (6th Cir. 1996) (waiver of six-person limit on group home for the elderly to accommodate twelve-person group home). As observed in Tsombanidis:

> O[xford House]-JH will not be able to operate in a single-family zoned district of the City; OH-JH residents, unlike a family with seven related members, will not be able to live in any neighborhood with single-family zoning; and recovering alcoholics and drug addicts will be unable to avail themselves of an Oxford House group home in a residential setting in order to enhance their chances of making a full recovery. As recovering alcoholics and drug addicts, the John Doe plaintiffs need to live in a safe, supportive, and drug-and alcohol-free living environment during their recovery period. Thus, the discriminatory impact is substantial.

Tsombanidis v. City of West Haven, 180 F.Supp.2d 262, 287 (D. Conn. 2001), *aff'd in pertinent part*, 352 F.3d 565 (2d Cir. 2003) (internal citation omitted).

In Oxford House, Inc. v. Town of Babylon, *supra*, a town failed in its attempt to use zoning restrictions to evict a group home for recovering alcoholics and drug addicts. The town's definition of "family" for purposes of maintaining a zone for single-family dwellings (which required a relationship by blood or law and excluded transients) was held to be discriminatory under the FHAA. Town of Babylon, 819 F. Supp. at 1179-83. The court found that because recovering addicts require a group living arrangement in a residential neighborhood for

psychological and emotional support during the recovery process, they are more likely than non-handicapped individuals to live with unrelated individuals. Id. Among other factors favoring Oxford House was their plan to use already-existing housing, as opposed to new structures that arguably would have been more likely to change the neighborhood's character. Id.

The legislative history of the FHAA states that it "would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps." H.R.Rep. 100-711, App. II-14. While state and local governments have the authority to protect safety and health and to regulate the use of land, that authority has been used to restrict the ability of disabled individuals to live in communities by enacting or imposing restrictions on, among other things, congregate living arrangements among non-related persons with disabilities. Id. Since these are not imposed on families and groups of similar size, the requirements discriminate against persons with disabilities. Id. citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

While the FHAA contains this exemption for "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling," the Supreme Court has limited the exemption to those directed at maximum occupancy restrictions capping the total number of people living in a dwelling to prevent overcrowding. City of Edmonds, 514 U.S. at 734-35. Specifically, the Supreme Court in City of Edmonds held that this exemption applied to "maximum occupancy restrictions" that cap the total number of occupants in order to prevent overcrowding of a dwelling (typically based upon the available floor space, or the number or types of rooms), but that it did not apply to "family composition rules" designed to preserve the family character of a neighborhood based on the composition of a household rather than the total number of occupants living quarters can contain. Id. at 733-34; see also

Tsombanidis, 129 F.Supp.2d at 150 n.20. In any event, the City bears the burden of establishing that its family definition falls within the exemption. Fair Housing Advocates Ass'n, Inc. v. City of Richmond Heights, Ohio, 209 F.3d 626 (6th Cir. 2000). The City's definition of family targets only the composition of the house-hold without mention of the number of occupants, based on criteria such as size or floor space, which a dwelling can sustain. Accordingly, the City's definition is not within the exemption and is subject to the FHAA. See Oxford House-C v. City of St. Louis, 77 F.3d at 251.

Further, the ordinance is discriminatory because it imposes conditions on the establishment of group homes for people in recovery housing more than three persons that are not imposed on residences housing an unlimited number of blood- or marriage- related people with five or more unrelated domestic servants who are not disabled. By applying a narrow definition of family, the City has effectively excluded three or more recovering addicts and alcoholics from living together in the residential neighborhoods, and restricted the housing choices of people based on their disabilities. Even the City Manager testified that having six unrelated persons living in a three bedroom apartment would not impose any hardship on the City. See Facts at ¶ 38. The City's limitations and restrictions on its face violate the FHAA.

e. *Even if Section 28-2 is Valid on its Face, the City Refused to Accommodate Plaintiffs by Allowing Four Unrelated People With Disabilities to Reside in Sober Housing*

On February 26, 27 and March 8, 2004, Plaintiffs requested an accommodation from 28-2. See Facts at ¶¶ 39-40. The City did not provide the accommodation. Id. at ¶¶ 41-43.

f. *The City cannot meet its burden of justifying the facial discrimination of the two ordinances*

In Marbrunak, the court explained that a city "may impose standards [on the disabled] which are different from those to which it subjects the general population, so long as that

protection is demonstrated to be warranted by the unique and specific needs and abilities of those handicapped persons." Marbrunak, 974 F.2d at 47. Marbrunak is consistent with the legislative history of the FHAA, which states that "[g]eneralized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion." House Report at 18; see also Potomac Grp. Home Corp. v. Montgomery County, 823 F.Supp. 1285, 1300 (D. Md.1993) (a requirement imposed on handicapped must correlate "to the actual abilities of the persons upon whom it is imposed").

III. CONCLUSION

The record demonstrates that there are no issues of material fact as to the elements of Plaintiffs' claims. The challenged ordinances discriminate on their faces or as applied on the basis of disability. Accordingly, summary judgment in favor of Plaintiffs on these claims is appropriate.

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Respectfully submitted,

/s/ William K. Hill
William K. Hill, P.A.
Melissa Pallett Vásquez
BILZIN SUMBERG BAENA PRICE & AXELROD LLP
200 South Biscayne Boulevard, Suite 2500
Miami, FL 33131
Tel. 305-350-7202
Fax 305-351-2216

COUNSEL FOR REGENCY PROPERTIES OF BOCA RATON, INC. AND AWAKENINGS OF FLORIDA, INC.

and

James K. Green, Esq.
JAMES K. GREEN, P.A.
Suite 1650, Esperante
222 Lakeview Ave.

West Palm Beach, FL 33401
Florida Bar No: 229466
Tel. 561-659-2029
Fax 561-655-1357

Cooperating Attorney for the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via E-Mail (by agreement) this 1st day of December, 2006 on:

Nancy Langworthy, Esq.
United States Department of Justice,
Housing & Civil Enforcement Section
1800 "G" Street, N.W., Suite 7002
Washington, D.C. 20006

Jamie Alan Cole
Matthew H. Mandel
Weiss Serota Helfman
Pastoriza Cole & Boniske, P.A.
200 East Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301

Diana Grub Frieser
City Attorney
City of Boca Raton
201 W. Palmetto Park Road
Boca Raton, FL 33432

By: /s/ William K. Hill
William K. Hill, P.A.