

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

PROJECT B.A.S.I.C. )  
 )  
 v. ) C.A. No. 89-248P  
 )  
 CITY OF PROVIDENCE, et al. )

MEMORANDUM AND ORDER

PETTINE, Senior Judge

The challenge to the decisions and actions taken by the defendants in siting a shelter for homeless persons in the City of Providence is now before this Court. In an Order issued on July 17, 1989, this issue was severed from the other claims of plaintiff, Project B.A.S.I.C., that dealt with the planned demolition of and scattered site plans for public housing; those claims were disposed of in the July Order. Because of the severance, the only defendants on this remaining claim are the City of Providence (City), the Providence Community Action Program (Pro-CAP), Stephen J. O'Rourke in his official capacity as Executive Director of the Housing Authority of the City of Providence, and the Housing Authority of the City of Providence (PHA).

Before severance, Pro-CAP filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Pro-CAP argued that the plaintiff did not have standing to bring this action and failed to state a claim under which relief can be granted; further, the defendant stated that this Court lacked subject matter jurisdiction to hear the claim. Project B.A.S.I.C. objected to this motion. In the

July 17 Order severing this claim, the Court ordered the plaintiff to "submit a memorandum of law [on this issue] on September 15, 1989, which must include specific allegations as to which statutes it believes have been violated. Defendants in this cause of action, the City of Providence and the Providence Community Action Program, should submit any reply memoranda by September 29, 1989." Opinion and Order, Project B.A.S.I.C. v. Jack F. Kemp et al., July 17, 1989, at 34.<sup>1</sup> After time extensions, the memoranda were filed. However, none of the defendants responded to the substance of the plaintiff's memorandum, instead each filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1).<sup>2</sup> The defendants urge that the claims of the plaintiff either are not ripe for adjudication or are moot because of recent actions by the Board of Directors of Pro-CAP.

The Court is prepared to rule on all motions before it. For the reasons set forth below, all motions of the defendants are denied.

I.

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<sup>1</sup> The Order inadvertently failed to name the Providence Housing Authority as one of the defendants in this cause of action. However, the PHA surely knew it was a defendant--it was served with the Complaint and has filed a motion to dismiss the homeless shelter claim. In any event, for the purposes of the motions presently before this Court, there is no prejudice to the PHA because it has not filed an answer to Project B.A.S.I.C.'s supplemental memorandum of law. The PHA has had an opportunity to brief the Court on the motions decided today in which it is directly affected.

<sup>2</sup> These motions are more correctly identified as motions under Fed. R. Civ. P. 12(c) as all pleadings in this case are closed.

to the Hartford Park public housing project. The Mayor admitted that the City and Pro-CAP were using a technicality to get out of the purchase and sale agreement for the Broad Street building. The technicality involved a City zoning ordinance on parking requirements that would not have been met at the Broad Street site.

The plaintiff asserts that the City, Pro-CAP, and the PHA capitulated to racially motivated opposition when the site of the shelter was moved from Broad Street to Hartford Park. The move caused delays in the opening of the shelter and resulted in the loss of grant money that was available for the Broad Street shelter, but is not now available for the Hartford Park site.

The plaintiff claims that the defendants, in allowing racially motivated opposition to play a part in their decisionmaking, have violated federal law. Specifically, the plaintiff claims that the City and the PHA have violated the plaintiff's rights as guaranteed by the Fourteenth Amendment, the Fair Housing Act of 1968, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964. Defendant Pro-CAP is claimed to have violated the Fair Housing Act of 1968. The plaintiff, who is alleging injury, describes itself as "an unincorporated association of tenants and advocates, active in a wide range of housing and other issues affecting the low-income and minority community, both in Providence and throughout the State of Rhode Island. One of its components is the Project B.A.S.I.C. Tenants Union, which focuses particularly on housing issues. Project

B.A.S.I.C. devotes much of its resources to expanding and preserving low income housing and extending the ranges of choices that are available to minority tenants, i.e. opening up areas of the City of Providence and the State of Rhode Island which do not presently have housing opportunities for minority and low income families." Complaint at para. 3. The plaintiff claims that the defendant's actions have injured it by contributing to the lack of affordable housing in Providence and its metropolitan area, by fostering continued racial opposition to low income housing in certain areas, and by impeding the efforts of the plaintiff to make a greater supply and range of choice in affordable housing available.

## II.

The defendants have challenged the Court's subject matter jurisdiction by asserting that the case is either no longer ripe for adjudication or is moot. The challenges arise from actions taken at Pro-CAP's Board of Directors' meeting on October 4, 1989. At that meeting, the board decided that an "Ad Hoc Committee of the Board be appointed for the purpose of reviewing the actions already taken to develop [the homeless shelter] and offer other recommendations." Memorandum in Support of Providence Community Action Program, Inc.'s Motion To Dismiss, attachment (Minutes of Board of Directors Meeting). Each defendant asserts that this means Pro-CAP has agreed to reconsider locations for the shelter, including the original Broad Street site.

Defendants City and Pro-CAP argue that this reconsideration by Pro-CAP's Board of Directors renders the controversy moot as no actual dispute now exists. Although the briefs from the defendants on this point are sparse, their argument appears to rest on the following scenario: because the plaintiff says the decision to build a shelter in Hartford Park as opposed to renovating the Broad Street building is violative of the law, the law is no longer being violated because there is no longer a firm decision about the location of the shelter. This argument has two fatal flaws.

First, the argument assumes that the decision to build at Hartford Park has been rescinded; this Court does not read the minutes of the Board of Directors meeting as saying any such thing. The fact that the board may do something in the future has little force with this Court. This situation is even more tenuous than that in cases where courts have refused to consider a voluntary cessation of challenged actions as moot. In those cases, the courts have reasoned that the case is not moot because the defendant is free to return to his old ways. See United States v. W.T. Grant, 345 U.S. 629 (1953). In this case, the defendant has not even changed from his old ways yet.

Second, the defendants' arguments oversimplify the plaintiff's claims. They ignore the fact that even a definite decision to return to the Broad Street site would not eradicate the effects of the defendants' previous actions. The gravamen of the Complaint is the claimed capitulation to racial pressure and

the damage brought on by the capitulation--these would not be mooted by the defendants' return to their original plan.<sup>4</sup> This Court is further concerned that defendants' recent decision to reconsider the shelter site may have been influenced by this suit. If that is so, a finding that the case is now moot could encourage entities like defendants to disregard discrimination laws when making a decision because that decision, and liability for that decision, can always be set aside if a lawsuit is filed.

This case is also ripe for adjudication. The dispute has crystallized and the legal questions are not hypothetical. The alleged capitulation to racially motivated opposition has taken place. A future decision by the Board of Directors of Pro-CAP to rehabilitate the Broad Street site (or other site acceptable to Project B.A.S.I.C.) will not eviscerate the claimed damage--this was the result of the capitulation. If the plaintiff is able to prove its allegations, even a return to the Broad Street site would not change that fact that the defendants' earlier actions contributed to the lack of affordable housing, fostered continued racial opposition to low income housing, and harmed plaintiff's efforts to make available a greater supply and choice of affordable housing. The legal issue is still whether defendants' actions in altering the site for the shelter were a violation of

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<sup>4</sup> Certainly, some of the remedies requested by the plaintiff would be unnecessary if the plaintiff prevails and the defendant has opened the shelter at the Broad Street site (i.e., an injunction ordering Pro-CAP to rescind its siting decision). Other requested remedies would still be appropriate (i.e., an injunction ordering the defendants to restore forfeited funds).

the law. If the defendants decide to rehabilitate the Broad Street site, they would certainly mitigate any potential damage finding; however, that action would not erase the alleged harm of the first action. That harm is certainly ripe for adjudication.

### III.

Pro-CAP further challenges Project B.A.S.I.C.'s Complaint by arguing that Project B.A.S.I.C. lacks standing and has failed to state a claim upon which relief can be granted.<sup>5</sup> Neither of these challenges can withstand scrutiny.

#### A.

In challenging Project B.A.S.I.C.'s standing to bring this Complaint, Pro-CAP asserts that the Complaint fails to say how its acts resulted in injury to Project B.A.S.I.C. or Project B.A.S.I.C.'s members. It is unnecessary for Project B.A.S.I.C. to assert injury to both itself and to its members; an organization

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<sup>5</sup> Pro-CAP also argues that this Court lacks subject matter jurisdiction over the claim. Pro-CAP asserts that it never acted under color of state law and that it exercised its authority in good faith and under an objectively reasonable belief that its decisions regarding the location of the shelter for homeless persons were lawful. Pro-CAP correctly states that Project B.A.S.I.C. has claimed jurisdiction under 28 U.S.C. §§ 1331 and 1343(3), but then goes on to argue extensively that there can be no jurisdiction because § 1343(3) requires the defendant to have acted under color of state law. Pro-CAP seems to have forgotten about § 1331, which only requires that there be a federal question. Pro-CAP's actions are being challenged under the federal Fair Housing Act; and this Act reaches private as well as public actors. Further, Pro-CAP's assertion of good faith is not a consideration for a motion to dismiss. It is simply an affirmative defense that has nothing to do with the standing doctrine. See Gomez v. Toledo, 446 U.S. 635, 640-41 (1980); Pierson v. Ray, 386 U.S. 547, 557 (1967).

can sue on its own behalf if it can allege the requisite injury. See Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977); Havens Realty Corporation v. Coleman, 455 U.S. 363, 378-79 (1982). Project B.A.S.I.C. has clearly stated an institutional injury in its Complaint at paragraph 9:

The defendants' actions in regard to the shelter... have... contributed, and continue to contribute to the lack of affordable open housing throughout the City of Providence and surrounding metropolitan area.... Further, these same actions have fostered continued racial opposition to low income housing in certain areas, and have directly harmed the efforts of plaintiff to make available a greater supply, and a greater range of choice, in the affordable housing stock.

This asserted injury is linked to other paragraphs in the Complaint that describe the actions of the defendants, actions that the plaintiff claims were influenced by considerations of race and that caused delay in availability of housing and loss of operating funds. See Complaint para. 83, 87, 88. Certainly, if Pro-CAP had gone ahead with the Broad Street rehabilitation, a shelter would have opened sooner and some grant monies for the shelter would not have been lost.

Pro-CAP has further argued that no actual injury has occurred because the shelter for homeless persons is to be constructed at another location. However, the wrongdoing claimed by the plaintiff was not the relocation of to Hartford Park, it was the capitulation to racial pressures when deciding to relocate. The injuries stem from that capitulation. Besides the actual injuries Project B.A.S.I.C. claims (see supra), the Complaint can be read as relying on a more elusive, although as

constitutionally viable, injury. The policy behind the Fair Housing Act, 42 U.S.C. §§ 3601 et seq., is that there be "fair housing throughout the United States." 42 U.S.C. § 3601. Congress intended this Act to put an end to all manner of discrimination in housing, whether it be subtle or blatant. See United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974); United States v. City of Parma, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), aff'd 661 F.2d 562, reh'g denied 669 F.2d 1100, cert. denied 456 U.S. 926, reh'g denied 456 U.S. 1012. By establishing the right to be free from discrimination in housing decisions, the Fair Housing Act creates standing for a plaintiff when this right has been invaded to plaintiff's detriment. See Warth v. Seldin, 422 U.S. 490, 500 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617, n.3 (1973). If Pro-CAP based its decision to abandon the Broad Street site on race, or even partially on race, or even on citizens' fears of "white flight" from the neighborhood, Project B.A.S.I.C. has stated a injury sufficient to withstand constitutional challenge. See United States v. Starrett City Associates, 840 F.2d 1096, 1102 (2d Cir. 1988), cert. denied 109 S.Ct. 376 (the white flight phenomenon cannot justify attempts to maintain integration through inflexible racial quotas); Marable v. H. Walker & Associates, 644 F.2d 390, 395 (5th Cir. 1981) (it is sufficient that race was one significant factor considered by defendant); City of Parma, 494 F. Supp. at 1054 (Fair Housing Act is violated if race was one of the motivating factors behind challenged conduct).

Further, Project B.A.S.I.C.'s injuries are likely to be redressed at least partially by the requested relief. The requested injunction ordering the shelter to be established at the Broad Street site, or some other acceptable location, would free the shelter location from the stigma of racial discrimination. The plaintiff also asks that the defendants be ordered to restore funds lost to the shelter because of the defendants' illegal acts. Restoration of the funds would certainly aid the plaintiff's goal of providing affordable housing to low-income persons.

The three prongs of the constitutional standing test have been satisfied. Project B.A.S.I.C. has alleged that it has suffered a personal injury, that the injury is fairly traceable to Pro-CAP's alleged illegal actions, and that the injury is likely to be redressed by the requested relief. These are the sole standing requirements under the Fair Housing Act. See Havens Realty Corp., 455 U.S. at 372.

B.

Defendant Pro-CAP also asserts that the Complaint has failed to state a claim upon which relief can be granted. Several of the points raised here by Pro-CAP have been discussed and ruled on in the above discussion on standing; those points will not be rehashed.<sup>6</sup> The points that will be discussed are Pro-CAP's claim that the Complaint has not set forth a recognized theory upon

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<sup>6</sup> In particular, Pro-CAP states that Project B.A.S.I.C. alleges no injuries caused by Pro-CAP and that the Complaint does not clearly set forth the grounds on which it is basing its claim.

which relief can be granted and, a closely related point, Pro-CAP's belief that no basis has been shown that establishes that Pro-CAP violated the federal government's policy of fair housing.

This Court concedes that Project B.A.S.I.C.'s Complaint is not a model for clarity and precision. However, once the Complaint material dealing with the demolition of and scattered site plans for public housing is eliminated, the issues surrounding the homeless shelter are revealed in a brighter light. Project B.A.S.I.C. is clearly claiming that Pro-CAP's decision to relocate the shelter from the Broad Street site to Hartford Park violated the Fair Housing Act. See Complaint at para. 1. The reasons behind the plaintiff's claim that this action is illegal are somewhat shrouded. In its "Shelter" section, the Complaint indiscriminately sets forth the damages caused by the defendant's action, evidence that any claimed legitimate reasons for defendant's actions are only a facade, evidence that illegal factors played a role in defendant's actions, and general background information. However, a careful reading of that section (para. 81-91) in conjunction with the "Causes of Action" section (para. 92-107) should have alerted Pro-CAP to Project B.A.S.I.C.'s claim that Pro-CAP's actions were illegal because they were influenced by racial considerations. In three of the eleven paragraphs specifically on the homeless shelter, race is alleged to have played a role in the relocation (para. 83, 88, 91). The actual statement of the cause of action

against Pro-CAP does not mention race specifically,<sup>7</sup> but from the earlier paragraphs of the Complaint, it is clear that the "community and political opposition" Pro-CAP allegedly allowed to influence its action is opposition that stemmed at least in part from racial discrimination.

Pro-CAP challenges the sufficiency of these allegations to establish a violation of the Fair Housing Act. In its memorandum, Project B.A.S.I.C. specifies the section of the Fair Housing Act that it believes Pro-CAP has violated. See Plaintiff's Supplemental Memorandum at 9-11. That section, 42 U.S.C. § 3604(a), makes it unlawful "[t]o refuse to sell or rent after making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." This section has been interpreted as prohibiting all practices that have the effect of making housing more difficult to obtain on prohibited grounds. See City of Parma, 494 F. Supp. at 1053. Project B.A.S.I.C. fits its claims into this broad prohibition by claiming that Pro-CAP's surrender to racially motivated pressure from citizen groups has made housing for the homeless (who are disproportionately minorities)

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<sup>7</sup> The cause of action against Pro-CAP is phrased as follows: Defendant Pro-CAP, by allowing community and political opposition to the prospective residents of its proposed shelter to in part guide its decision to change the shelter's location from Broad Street to Hartford Park, and to delay the opening of the shelter, has violated plaintiff's rights under the Fair Housing Act of 1968, 42 U.S.C. §3601 et seq.

Complaint, para. 107.

unavailable in the Broad Street area and unavailable in general because of the delays the relocation caused. Project B.A.S.I.C. is claiming that this pressure is the prohibited grounds.

It is true that the plaintiff's case rests on a chain of events and the absence of any one event could destroy Project B.A.S.I.C.'s case. Racial discrimination must have played a role in the community opposition to the shelter on Broad Street, and this pressure must have been a motivating force in Pro-CAP's relocation decision. This may also be a difficult case for the plaintiff because the actions and motivations ascribed to the citizens pressuring Pro-CAP are not blatantly heinous. These citizens are not trying to keep their neighborhood lily white, and they have shown that they are willing to accept other shelters in their neighborhood. Compare, e.g., Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), aff'd 109 S.Ct. 276; Resident Advisory Board v. Rizzo, 567 F.2d 126 (3d Cir. 1977), cert. denied 435 U.S. 908; City of Parma, 494 F. Supp. 1049.

However, the Fair Housing Act does not require heinous intention for a finding of liability. It can cover situations in which the defendant's actions are not themselves racially motivated, but simply have a disparate impact on minorities or are inspired by others whose motivations are not free from racial bias. In Rizzo, 564 F.2d at 149 (1977), the court ruled that a prima facie violation of the Fair Housing Act was established when the plaintiff produced evidence that "the urban renewal

activities of the defendants had the result of removing black families from [the renewal area], leaving [the area] as an all-white community."<sup>8</sup> Although in Rizzo there was evidence of discriminatory intent, the Third Circuit did not rest its determination on this intent. It was enough that what the defendants had done had a disproportionate impact on black persons in one area of Philadelphia. In Rizzo and in this case, the plaintiff claims a violation of the Fair Housing Act because housing is made unavailable to minorities by the acts of defendants. Rizzo has other parallels with our case in that the Rizzo defendants changed their decisions about a project that would house a disproportionate number of minority families when strong community opposition arose. In regard to that situation, the Third Circuit wrote: "While this [situation] provides no direct evidence of discriminatory purpose on the City's part, the circumstances of a sudden shift in the City's position from passive acceptance to active opposition, in the face of protests

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<sup>8</sup> The First Circuit has not resolved the issue of whether the Fair Housing Act requires discriminatory intent be present before there is a violation of the Act. Latinos Unidos de Chelsea en Accion v. Secretary of Housing and Urban Development, 799 F.2d 774, 791 (1st Cir. 1986). However, this Court is persuaded by the analyses of other circuits that have accepted discriminatory impact as establishing a violation of the Act. Those circuits have noted the parallels between Title VII (the Equal Employment Opportunities Act) and Title VIII (the Fair Housing Act) and cited the congressional intent that both be construed broadly. Practical concerns--the ease of concealing motivations and the importance for the trial judge of the impact of the defendant's actions--have also dictated the circuits' determinations. See, e.g., Huntington Branch, NAACP, 844 F.2d 926 (2d Cir. 1988); Rizzo, 564 F.2d 126 (3d Cir. 1977); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977); Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1977).

by demonstrators manifesting racial bias, provides some indication of an improper motive or purpose." Id., at 144 (footnote omitted).

Thus, the plaintiff's claim that Pro-CAP gave in to racially motivated pressures when it decided to relocate the shelter does state a recognized theory under the Fair Housing Act. The fact that the shelter is to be established at another site does not relieve Pro-CAP from its legal obligation to make housing decisions free from racial bias.<sup>9</sup> Pro-CAP argues that Congress did not intend that the Fair Housing Act take away its decisionmaking authority. As a general proposition, that is true, but Congress did intend to eliminate any traces of racial discrimination within that decisionmaking authority.

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<sup>9</sup> For the purposes of this motion to dismiss, Project B.A.S.I.C.'s allegation that Pro-CAP is a public actor is taken as true. However, if Pro-CAP's assertion that it is a private entity is accurate, some novel questions of liability may be raised. The Fair Housing Act undoubtedly reaches private persons; but most cases against private persons have dealt with refusals to rent or sell. In this case, Pro-CAP is accused of violating the Act because it chose to locate its shelter--a shelter which will provide residence for a disproportionate number of minorities--in one place rather than another. In the past, suits challenging the location, or lack of location, of housing have been against public entities. However, the issue of whether or not a private entity can be thus sued is not before the Court on this motion to dismiss. The plaintiff asserts that the City is officially involved with Pro-CAP and that Pro-CAP was at all times acting under color of state law. Complaint, para. 9. Further, the plaintiff has alleged that a substantial portion of the funds that Pro-CAP will use to develop the shelter are public funds. That fact certainly weighs in favor of holding Pro-CAP to the standard required of public entities when making location decisions under the Fair Housing Act.

For the reasons set forth above, all motions of defendants are denied. The issue of the siting of the shelter for homeless persons is to be set down for trial on 24-hour notice on or after June 4, 1990.

Enter:

Paulette J. Buba  
Deputy Clerk

By Order:

Raymond J. DeHine  
Senior Judge

April 25, 1990