UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 03-80178-CIV-MIDDLEBROOKS/JOHNSON

JEFFREY O., *et al.*

Plaintiffs,

vs.

CITY OF BOCA RATON,

Defendant.
_____/

UNITED STATES' SUBMISSION ON THE ISSUE OF REMEDIES IN RESPONSE TO THE COURT'S ORDER OF JANUARY 30, 2007

I. BACKGROUND

On January 30, 2007, at the conclusion of the bench trial in this matter, this Court issued an Order asking the parties "to meet to discuss an appropriate remedy . . . in the case and to include the United States Department of Justice in "such discussions." The Court also invited the parties and the United States to submit a joint proposal "on the issue of remedies," or, in the event they were unable to formulate a joint proposal, to submit separate proposals on the issue. Although the parties and the United States met in Boca Raton on February 6, 2007, to explore the potential for filing a joint proposal, they were unable to reach agreement on a joint proposal.

The United States has responsibility for enforcing the Fair Housing Act. In particular, the Attorney General has the authority to commence an action under the Act "[w]henever he has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice" of discrimination prohibited by the Act, or "that any group of persons has been denied any of the rights granted by [the Act] and such denial raises an issue of general public importance." 42 U.S.C. § 3614(a). The United States has a particular interest in the outcome of this case, having filed a related case, *United States v. City of Boca Raton,* Case No. 06-80879-

CIV-HURLEY, on September 20, 2006.[1] The central issue in both cases is whether Boca Raton Ordinance 4649, as amended by Ordinance 4701 ("the Ordinance"), which singles out for regulation "sober housing" for persons in recovery from alcohol and/or drug dependency, facially discriminates against persons with disabilities in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601-3619.[2]

II. THE UNITED STATES' ALLEGATIONS

The Ordinance established the zoning classification, "substance abuse treatment facilities" ("SATFs"), and defines SATFs to include: 1) State-licensed substance abuse treatment facilities, or those required to be licensed by the State, which provide treatment on-site; and 2) unlicensed facilities that provide room and board only, and require treatment off-site, and/or perform alcohol and drug testing on-site. City of Boca Raton Code ("Code"), Sec. 28-2.

The City's zoning code as amended by the Ordinance excludes SATFs from all residential areas of the City and prohibits or imposes conditional use and spacing restrictions on such housing in commercial zones. Under the amendments, the only commercial districts in which SATFs are not prohibited are the Motel-Business (M-B) Districts, where they are subject to conditional use restrictions and may not operate within a 1,000 foot radius of another SATF. Code, Sec. 28-743(e). The only zones in which SATFs are a permitted use are the Medical Center Districts. Code, Sec. 28-922(l).

In our complaint in *United States v. City of Boca Raton,* we allege that the City's zoning regulations as amended by the Ordinance violate the Fair Housing Act by making dwellings unavailable on the basis of disability in violation of 42 U.S.C. § 3604(f)(1) and by imposing different terms, conditions, or privileges in housing on the basis of disability in violation of 42

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[1] A Scheduling Order was issued in the case on February 9, 2007, and the parties have exchanged initial disclosures. Formal discovery has not yet commenced.

[2] The plaintiffs in *Jeffrey O.* also included Equal Protection Clause and Americans with Disabilities Act claims in their complaint.

U.S.C. § 3604(f)(2). Specifically, the United States alleges that the City passed amendments to its zoning code that single out for regulation housing for persons recovering from alcohol and/or drug dependency by excluding such housing, including Boca House and Awakenings, from all residential areas of the City and imposing restrictions on such housing in commercial zones in violation of the Fair Housing Act.

In our complaint, we asked for the following relief: 1) a declaratory judgment that the actions of the City, including its enactment of Ordinances 4649 and 4701, violate the Fair Housing Act; 2) an injunction prohibiting the City from enforcing Ordinances 4649 and 4701; 3) an injunction prohibiting the City from failing to make reasonable accommodations in its policies, practices, rules or services as required by the Fair Housing Act, including accommodations that permit the establishment and operation of housing for persons with disabilities; 4) such action by the City as may be necessary to restore all persons aggrieved by the City's discriminatory housing practices to the position they would have occupied but for such discriminatory conduct; 5) monetary damages for each person aggrieved by the City's discriminatory housing practices, pursuant to 42 U.S.C. § 3614(d)(1)(B); and 6) a civil penalty against the City to vindicate the public interest in an amount authorized by 42 U.S.C. § 3614(d)(1)(C).

III. APPROPRIATE REMEDIES[3]

Under the Fair Housing Act, when the court finds that a discriminatory housing practice has occurred, it may award the plaintiff actual and punitive damages and reasonable attorney's fees and costs, and it may "grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be

[3]In this filing, the United States addresses only the issue of whether the Ordinance should be enjoined in whole or in part, or revised as proposed by the City. We do not address other relief that may be appropriate because we did not participate in or attend the trial.

appropriate)." 42 U.S.C. § 3613(c).[4] The FHA also provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice . . . shall to that extent be invalid." 42 U.S.C. § 3615. *See Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 n15 (10th Cir. 1995)(stating that the law of a state or municipality is expressly preempted by the FHA if it is a discriminatory housing practice under the Act, citing 42 U.S.C. 3615); *Potomac Group Home v. Montgomery County*, 823 F. Supp. 1285, 1299 (D. Md. 1993)(same).

Here, the City's Ordinance established a classification directed at housing for persons with particular disabilities and imposed unique restrictions on that housing. Although the City characterizes the Ordinance as designed only to prevent "commercial/medical uses" in residential districts, Defendant City of Boca Raton's Submission on the Issue of Remedies at 3, the Ordinance in fact is both broader and narrower. It is broader in that it imposes restrictions on SATFs beyond residential zones, and it is narrower in that it applies only to SATFs. By its very terms, therefore, the Ordinance singles out for regulation housing for disabled persons and is discriminatory on its face.

As the court ruled in *Cmty. Hous. Trust v. Department of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208 (D.D.C. 2003):

> [an] ordinance . . . which classifies persons based upon their "common need for treatment, rehabilitation, assistance, or supervision in their daily living," *does, in fact, apply different standards to persons on the basis of their disability.*

Id. at 222 (citing *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)(emphasis added). *See also Larkin v. Michigan Dep't. Social Serv.*, 89 F.3d 285, 289-290

[4]Similarly, under a separate section of the Act governing cases brought by the United States, the court can award monetary damages to aggrieved persons, civil penalties to the government to vindicate the public interest, and "such preventive relief, including a permanent or temporary injunction, restraining order, or other order . . . as is necessary to assure the full enjoyment of the rights granted by [the Act]." 42 U.S.C. § 3614(d).

(6th Cir. 1996) (Michigan statute that prevented licensing of any new foster care facility for mentally retarded adults (AFC) within 1,500 feet of an existing facility and that imposed notice requirements on the state licensing agency and municipalities regarding their proposed sitings was "facially discriminatory"); *Bangerter*, 46 F.3d at 1500 (state law that imposed 24-hour supervision and neighborhood advisory committee requirements on group housing for the mentally-retarded, conditions that were not imposed on other group living arrangements, were facially discriminatory).

The City has attempted to justify the Ordinance by proffering a list of activities at Boca House and Awakenings that it asserts are incompatible with other housing in residential zones,[5] suggesting that the issue to be remedied is the "possible unintended applicability of the Ordinance to purely residential buildings . . . ." City's Submission at 10. The City's proposal that the Court enter a "narrowly tailored injunction" spelling out which activities at a residential SATF are appropriate is unavailing. It is not the Court's role to decide what alternative, if any, the City would adopt if it is not able to enforce the Ordinance. For the reasons discussed below, the Court should enjoin the enforcement of the Ordinance.

First, accepted justifications for laws that facially discriminate against a group protected by the Fair Housing Act as articulated by the courts are limited. *See*, *e.g.*, *Larkin*, 89 F.3d at 290-291 (finding that governmental defendant's justifications for intentionally differential treatment against a class of persons protected by the FHA is limited to a showing that the restriction benefits the protected class or is tailored to particularized concerns about individual residents rather than blanket stereotypes); *Bangerter*, 46 F.3d at 1503 (same); *Community House, Inc. v. City of Boise*, 468 F.3d 1118, 1125 (9th Cir. 2006)(same).[6]

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[5]The City lists 16 activities at Boca House and Awakenings that it considers "commercial/medical in nature and different than activities that normally occur at a regular apartment building." City's Submission at 3. It then relies on eight of these activities as the basis for its proffered remedy. *Id.* at 5-9.

[6]*But see Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991).

Second, because the Ordinance discriminates in restricting the *location* of housing for the disabled and not the *activities* that occur on-site, the City's objections to activities at Boca House and Awakenings have little relevance to the facial invalidity of the Ordinance. *See Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1495 (W.D. Wash. 1997)("a court undertaking a disparate treatment analysis must focus on the specific language used in an ordinance.")

Third, most if not all of the activities the City suggests could be prohibited lawfully are an integral part of the recovery program at Boca House and Awakenings and in other sober living arrangements, and courts have routinely found that persons with disabilities who live in housing at which such activities occur enjoy the protections of the Fair Housing Act. *See, e.g., Hovsons, Inc. v. City of Brick*, 89 F.3d 1096, 1103-1104 (3d Cir. 1996)(finding that the township's denial of a conditional use permit in a predominantly residential zone to the provider of a 210-bed nursing home that practiced "nursing home care" on-site violated the Fair Housing Act). *See also Reg'l Econ. Cmty. Action Program*, 294 F.3d 35, 47 (2d Cir. 2002) (finding that City's denial of special-use permit in residential zone for proposed half way house that provided "supportive counseling" for recovering alcoholics on-site violated the FHA); *Children's Alliance*, 950 F. Supp. at 1497 (exclusion from residential zones of group homes for disabled youths that provided on-site professional staff and allowed less than a 30-day tenancy for some residents violated the FHA).

Fourth, the activities identified by the City do not by their nature distinguish a commercial operation from a residential one. *See Children's Alliance*, 950 F. Supp. at 1499 (finding no evidence that the presence of a resident staff as opposed to a shift staff distinguished a commercial from a residential operation). None of the characteristics cited by the City distinguish sober housing from other housing in significant ways. To the extent the City has legitimate concerns, they are reflected in existing health and safety codes, which the City may enforce in a non-discriminatory manner.

Fifth, the City's characterization of activities at Boca House and Awakenings and other

sober housing as "commercial" cannot be reconciled with the restrictions the Ordinance places on such housing in its commercial zones. As noted above, under the City's amendments to its zoning code, SATFs are excluded from all commercial districts with the exception of Motel-Business (M-B) Districts. Even in the M-B Districts SATF providers are required to apply for conditional use permits with no guarantee they will be granted. Moreover, SATFs are prohibited from operating in the M-B districts within a 1,000-foot radius of an existing SATF. Code, Sec. 28-743(e). By contrast, permitted uses in the Motel-Business Districts include but are not limited to hospitals, orphanages, nursing homes, "institutions for [the] aged, indigent or infirm," private clubs, lodges and fraternities. Code, Sec. 28-742. There is no explanation for the difference in treatment between SATFs and some permitted facilities in the M-B Districts other than an intention to limit the number and location of SATFs in the City.

Sixth, the Ordinance cannot be saved by excising any of its component parts, because each places restrictions on SATFs in violation of the Fair Housing Act. The point is that as long as the Ordinance places blanket restrictions on a particular type of housing for disabled persons, without appropriate justifications, it violates the FHA. *See Horizon House Dev. Serv., Inc. v. Township of Upper Southampton,* 804 F. Supp. 683, 699 (E.D. Pa. 1992)(blanket restrictions on group homes for people with disabilities contravenes mandate of the FHA).

Finally, the City does not request that the Court sever discriminatory features of the Ordinance and leave the remainder in place. Rather, the City requests that the Court in effect craft a new ordinance – *i.e.*, issue an injunction spelling out which activities are allowed at residential buildings such as Boca House and Awakenings, *see* City's Submission at 10. This is not appropriate. The Court's role is not to attempt to revise the City's facially invalid Ordinance to satisfy the City's views on what activities should or should not be allowed at particular residences. Rather, the Court must fashion a remedy that ends discrimination against housing for persons in recovery. Where, as here, the Ordinance targets such housing for more restrictive treatment than comparable housing for non-disabled persons, the Court must remedy the

discrimination by enjoining the operation of the Ordinance. The City would have the choice of leaving the pre-Ordinance rules in place or adopting new ones that do not violate the FHA.

In short, should the Ordinance become effective, Boca House and Awakenings and all other SATFs currently housing persons in recovery within residential areas of the City and in commercial zones other than the Motel-Business Districts, will be forced to cease operations at their current locations or cease operations altogether. SATFs currently housing persons in the Motel-Business zones that have not been issued conditional uses permits will either have to obtain permits, or, if they are unable to do so, cease operations at their current locations. Some or all providers who are successful in obtaining conditional use permits will do so at considerable expense, an expense not imposed on other housing providers. *See, e.g.*, Code Sec. 28-742. Permitted Uses in R-B-1 Motel-Business District. Furthermore, many persons in recovery will be adversely affected.

IV. CONCLUSION

For the reasons set forth above, the United States respectfully suggests that the Court: 1) issue a judgment declaring that the Ordinance is facially discriminatory in violation of the Fair Housing Act; and 2) enjoin the enforcement of the Ordinance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day of February 16, 2007, the United States electronically filed the above "Submission on Remedies" with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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