IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

TURNING POINT FOUNDATION, et al. Plaintiffs, v. JOHN DESTEFANO, JR. et al. Defendants.	)	NO: 3:05-CV-895 (AHN)

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

The United States of America, by its undersigned counsel, hereby submits this Memorandum as amicus curiae in support of the Motion for Summary Judgment (Docket Entry 164) filed by plaintiffs in this action under the Fair Housing Act ("the FHA"). In this Memorandum, we address several legal arguments raised by defendants in their Opposition to the Motion, filed January 11, 2008 (D.E. 177), each of which we believe to be wrong as a matter of law. We express no view as to the merits of the Motion for Summary Judgment.

INTEREST OF THE UNITED STATES

The United States, through litigation by the Attorney General and administrative enforcement by HUD, has important enforcement responsibilities under the FHA. See 42 U.S.C. §§ 3610-3614. In view of the limited resources available to the United States for enforcement of the statute, however, private actions such as the present one play an important role in the implementation of the national policy to provide for fair housing. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972). Accordingly, the United States has a substantial interest in ensuring that such cases are decided in accordance with the Congressional mandate "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

I. BACKGROUND

Because this Memorandum focuses on legal issues rather than the facts in this case, we summarize only briefly the nature of the action. Plaintiff Turning Point Foundation ("TPF") owns two large older homes in the City of New Haven ("City"), which it operates as "recovery homes": residences for men in recovery from alcohol and drug addictions. Such homes typically provide transitional housing for persons who have completed in-patient treatment. Residents, living in a drug- and alcohol-free environment enforced by random testing, provide mutual support and monitoring to assist one another to resist temptations to relapse into drug and alcohol abuse.

Under the City of New Haven's zoning ordinance, as it existed before the onset of this controversy, an unlimited number of persons related by blood, marriage, or adoption, but no more than four unrelated persons, could reside together in the areas where TPF's homes are located. The City sought to close the homes, which it considers to be illegal boarding houses. TPF asserts, for both financial and therapeutic reasons, that 15 people should be permitted to reside in one of the homes, and 16 in the other. It requested the City to allow it to operate on that basis as a "reasonable accommodation" to the zoning ordinance, pursuant to 42 U.S.C. 3604(f)(3)(B) of the FHA, which makes it illegal to refuse to make "reasonable accommodations in rules, policies, practices or services . . . necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling." The City has amended its zoning ordinance to permit up to eight persons to reside in the homes. This was not acceptable to TPF, nor was a compromise offer that would have permitted ten residents in each property. This lawsuit resulted.

II. LEGAL DISCUSSION

TPF has moved for summary judgment, contending that it has shown beyond dispute that the accommodation it seeks is both reasonable and necessary and that the defendants have violated the FHA by refusing to permit it. We express no view as to whether TPF has made the

showing required by Fed. R. Civ. P. 56. However, we submit that defendants' Opposition to the pending Motion for Summary Judgment ("Def. Br.") mischaracterizes the law in significant respects.

First, defendants assert that plaintiffs cannot prove that the persons who reside in the TPF homes are disabled within the meaning of the FHA by testimony to that effect from the homes' director; this argument is contrary to controlling Second Circuit case law. Second, defendants contend that they have complied with the law by expanding the number of persons generally permitted in group homes for the disabled. But the FHA requires evaluation of requests for accommodation on their individual merits, rather than adherence to preconceived limits.

A. **Statutory Background**

Plaintiffs rely on section 3604(f)(3)(B) of the FHA, which provides that prohibited discrimination on the basis of disability includes

> a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . .

Congress intended to define "reasonable accommodation" by reference to the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. See H.R. Rep. No. 711, 100th Cong., 2d Sess. at 17 (1988).[1] It is well-established that the "rules" and "policies" to which an accommodation may be required include municipal land use and zoning laws. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 1779 (1995).

B. **The Court May Infer from the Policies and Purposes of a Recovery Home That its Residents Are Disabled, Without Requiring Evidence Concerning the Histories of Individual Residents**

Defendants argue (Def. Br. at 5-15) that plaintiffs are not entitled to summary judgment because an issue of material fact exists as to whether the residents of the TPF homes suffer from

[1] H.R. Rep. No. 711, issued by the House Judiciary Committee, is the principal item of legislative history on the Fair Housing Amendments Act. There is no Senate report.

a physical or mental impairment which substantially limits one or more major life activities, and thus are "disabled" within the meaning of the FHA. More specifically, defendants acknowledge that the residents are recovering alcoholics or drug addicts, and that they therefore have an "impairment," but contend that there is no evidence that any or all of the residents are substantially limited in a major life activity. We submit that the Court should determine whether the residents suffer such a substantial impairment by looking to the admission policies and rules of the homes. No evidence as to the history and status of specific individual residents is required.

As a starting point for this analysis, we note that Congress undoubtedly contemplated that the amended Act would protect recovering addicts and alcoholics, or it would have had no need to exclude "current, illegal use of or addiction to a controlled substance" from its scope. 42 U.S.C. 3602(h)(3). As the House Committee Report explained,

> individuals who have a record of drug use or addiction but who do not currently use illegal drugs would continue to be protected if they fell under the definition of handicap. The Committee does not intend to exclude individuals who have recovered from an addiction or are participating in a treatment program or a self-help group such as Narcotics Anonymous.

H.R. Rep. No. 711 at 22. The House Report also evidences Congress's intent to protect "congregate living arrangements for persons with handicaps . . .". Id. at 23. In addition, the regulations promulgated by the Department of Housing and Urban Development pursuant to the Act provide that:

> 'Handicap' means * * * drug addiction (other than addiction caused by current, illegal use of a controlled substance) * * *.

24 C.F.R. 100.201(a)(2). This contemporaneous interpretation of the statute by the executive agency charged with writing regulations and enforcing the Act is entitled to deference. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

It would be contrary to the intent of Congress to deny the protections of the Act to persons struggling to escape from addictions by imposing an unreasonable standard of proof in cases like this one. And in fact, the courts have not done so when called upon to apply the Act to programs intended to assist such persons. As defendants acknowledge, there are "a slew of

cases" (Def. Br. at 11) which have extended the Act's coverage to group homes of various kinds based on the admissions policies and procedures of the homes at issue.[2]

In our view, the Second Circuit's decision in Regional Economic Community Action Program, Inc. v. City of Middletown, 294 F.3d 35 (2d Cir.), cert. denied, 537 U.S. 813 (2002) ("RECAP"), controls the disposition of this issue. Plaintiff there, as here, wished to operate a residential program for homeless recovering alcoholics and addicts. While the Second Circuit acknowledged that "mere status as an alcoholic or substance abuser" does not meet the statutory definition of disability, the Court went on to hold that the intended residents of the program (whose individual identities could not have been determined) were disabled because of their need to reside in the RECAP program:

> We therefore conclude, as did the United States District Court for the District of New Jersey on a similar issue, that RECAP's clients' "addictions substantially limit their ability to live independently and to live with their families"; that they are "entitled thereby to the protections of [the FHA, ADA, and the Rehabilitation Act]"; and that their "inability to live independently constitutes a substantial limitation on their ability to 'care for themselves.'" United States v. Borough of Audubon, 797 F.Supp. 353, 359 (D.N.J.1991), aff'd, 968 F.2d 14 (3d Cir.1992). Because the inability to live independently without suffering a relapse – a baseline prerequisite for admittance to the RECAP facility – limits the major life activity of "caring for one's self," an activity that is "necessarily [an] important part[ ] of most people's lives," [Toyota Motor Mfg., Kentucky, Inc. v.] Williams, 534 U.S.

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[2] Defendants also seek to distinguish the cases cited by defendants other than RECAP (Def. Br. 12). Defendants are correct that the facts found by the court in each of these cases differ, e.g., compare United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992) with MX Group, Inc. v. City of Covington, 293 F.3d 326 (6th Cir. 2002), and several of the cases cited (Def. Br. 12) conclude without extended discussion that the residents of the recovery homes at issue would be disabled. New Life Outreach Ministry, Inc. v. Polk County, 20007 WL 2330854 at *4 (M.D. Fla. 2007); New Hope Fellowship v. City of Omaha, 2005 WL 3508407 at *1 (D. Neb. 2005); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1182 (D.N.J. 1993). However, it is clear from the context that each of the courts concluded that the residents would be disabled on the basis of testimony by the homes' operators that their rules would insure that only persons in need of support to maintain abstinence would live there.

By contrast, defendants have not cited a single Fair Housing Act case, and we know of none, in which a court has held that such residents are not protected. The cases that they cite which found that plaintiffs were not disabled (Def. Br. at 6-7) involved alleged employment discrimination against individuals. In such a situation, it is obviously necessary to examine the individual characteristics of the plaintiff.

> at 201, 122 S.Ct. at 693, the residents of the proposed halfway houses would have met the second part of the statutory definition of a disability.

294 F.3d at 47. Significantly, the Court did not require RECAP to present evidence of each intended resident's need for its program, but inferred that need based on the fact that state regulations and RECAP's own policies ensured that only individuals who were unable to maintain abstinence in an independent living situation could live at the facility. Id.

Defendants seek to distinguish RECAP on the grounds that the state regulations and private policies in that case differ from those that govern plaintiffs. We express no view as to whether plaintiffs have shown that TPF's policies and procedures are such that the Court can conclude that TPF's residents lack the ability to maintain abstinence on their own. As a matter of law, however, we urge the Court to follow RECAP, 294 F.3d at 47-48, and hold that a recovery house may show through its policies and procedures that its residents need to live there to maintain sobriety, and that this "inability to live independently without suffering a relapse" substantially limits the major life activity of "caring for one's self."

C. The Fair Housing Act Requires That Requests for Accommodations Pursuant to 42 U.S.C 3604 (f)(3)(B) Be Assessed on Their Individual Merits

Defendants make several related arguments that plaintiffs have not shown that the accommodations they requested are necessary (Def. Br. at 15-25) and reasonable (Id. at 25-35), as required by the statute. These arguments share the common premise that the City of New Haven, having amended its zoning ordinance to grant blanket permission for group homes for persons with disabilities to house as many as eight unrelated persons, has no further obligation to make reasonable accommodations for such homes.

This fundamentally misinterprets the statute. The essence of the obligation to make reasonable accommodations is that each request for an accommodation must be assessed on its individual merits, on a case-by-case basis. The overwhelming weight of authority is that reasonable accommodations under the Act are to be considered based on the individual factual

circumstances present in each case. See, e.g., Giebeler v. M & B Assocs., 343 F.3d 1143, 1156 (9th Cir. 2003) ("circumstances may make it reasonable for certain defendants to make accommodations even where such accommodations are not reasonable in most cases"); Wisconsin Community Services, Inc. v. City of Milwaukee, 465 F.3d 737, 753 (7th Cir. 2006) (en banc); Dadian v. Village of Wilmette, 269 F.3d 831, 838 (7th Cir. 2001) (whether a requested accommodation is reasonable is factually determined by an inquiry balancing the cost to the defendant and the benefit to the plaintiff); Hovson's, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); United States v. California Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1418 (9th Cir. 1994); Developmental Services of Nebraska v. City of Lincoln, 504 F. Supp. 2d 714, 723 (D. Neb. 2007); Advocacy Center for Persons with Disabilities, Inc. v. Woodlands Estates Ass'n, Inc., 192 F. Supp. 2d 1344 (M.D. Fla. 2002).

Defendants rely primarily on Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597 (4th Cir. 1997). Plaintiff in that case sought and was refused permission to expand a personal care home for eight elderly persons with disabilities to house fifteen residents. In affirming an order granting summary judgment for Howard County, the Fourth Circuit relied on two kinds of evidence about other personal care homes in the County. First, the defendant introduced evidence that other such homes were able to operate successfully with eight residents. 124 F.3d at 805. Second, the evidence showed that some of these homes had vacancies. Ibid. The Fourth Circuit panel agreed with the district court that these facts demonstrated that Bryant Woods's proposed expansion was not necessary. Defendants contend (Def. Br. at 17-18, 19-20) that they have made comparable showings here.

We submit that this Court should reject that generalized analysis, as did the Court in ReMed Recovery Care Centers v. Township of Willistown, 36 F.Supp.2d 676 (E.D. Pa. 1999):

> This court rejects the Bryant Woods approach under which the fact that other similar homes operate without a variance for additional residents negates necessity, without any consideration of the needs of a particular care-provider or of individuals' desire to reside in a particular group home. See Bryant Woods, 124 F.3d at 605. The fact that other homes in and around Willistown operate with only five residents is not conclusive on the question of necessity.

36 F. Supp. 2d at 686.

The whole premise of reasonable accommodation is that one size may not fit all. TPF seeks accommodation to house recovering addicts in two particular properties, both of which are asserted to be larger than a typical single-family house. As the Second Circuit noted in Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 571 (2d Cir. 2003), some degree of crowding, and consequent lack of privacy, is central to the success of a recovery home.[3] Similarly, defendants' suggested reliance on vacancies at other group homes would eliminate the individualized assessment of TPF's requested accommodations, and substitute a de facto "certificate of need" requirement, such as applies to nursing homes in Connecticut.[4] In the absence of any comprehensive system of regulation, there is no way to be sure that any particular recovery house is actually providing an environment conducive to continued recovery. Defendants' argument would deprive recovering addicts of the ability to choose the best-run house, and thus preclude competition from driving out those homes that may not be living up to their stated objective. As with their other arguments, treating all recovery homes as fungible negates the emphasis which the FHA places on individual choice. See ReMed, 36 F. Supp. 2d at 686 ("The Manor Lane home is designed for a different type of resident with different needs.").

As noted above, defendants combine these arguments with the assertion (Def. Br. at 27-30) that when the City amended its zoning ordinance to allow up to eight disabled people to live together in a residential area, it made a reasonable accommodation and (implicitly) relieved itself of any potential obligation to allow TPF to have more than eight residents in its homes. As with the arguments based on Bryant Woods, this claim ignores the essence of the accommodation

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[3] This factor was not a consideration in the cases relied on by defendants, Bryant Woods and Lapid-Laurel, L.L.C. v. Zoning Board of Adjustment of the Township of Scotch Plains, 248 F.3d 442 (3d Cir. 2002). Plaintiffs in those cases sought to house elderly persons, so there was no therapeutic reason why lack of privacy was desirable. The Bryant Woods court itself noted the absence of any therapeutic rationale for the requested expansion. 124 F.3d at 605.

[4] Connecticut generally does not license new nursing homes unless the applicant can show that there is a need for services that cannot be met in existing facilities. See C.G.S.A. § 17b-352 et seq.

requirement, which is to allow reasonable exceptions even to rules that are reasonable in themselves. This obligation was well summarized in Majors v. Housing Authority of DeKalb County, 652 F.2d 454 (5th Cir. 1981), in which the plaintiff requested an accommodation to the Authority's "no pet" rule for her support animal[5]:

> Even if the "no pet" rule is itself eminently reasonable, nothing in the record rebuts the reasonable inference that the Authority could easily make a limited exception for that narrow group of persons . . . whose handicap requires . . . the companionship of a dog.

652 F.2d at 458; accord Giebeler v. M & B Assocs., 343 F.3d 1143, 1156 (9th Cir. 2003) (FHA required landlord to modify otherwise reasonable policy of not accepting cosigners on leases, where circumstance showed accepting mother as cosigner would be reliable guarantee of payment).

Defendants' final argument in this vein (Def. Br. at 32-35) is that their refusal to permit TPF to house the number of residents it seeks is justified, not because of the impact of this accommodation, but because of the potential effect of granting **future** applicants a similar increase in density. Yet again, this argument is fundamentally at odds with, and would nullify if accepted, the individualized nature of the obligation to make reasonable accommodations. For that reason, it has been soundly rejected by the courts, most notably in United States v. City of Chicago Heights, 161 F. Supp. 2d 819 (N.D. Ill. 2001):

> [T]he only "precedent" set by this case is that the City must do what is required of it under the FHAA, including granting special use permits when such an action is reasonable. Whether future special use permits are reasonable and necessary will depend on the individual particular factual circumstances of the request. See, e.g., Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3rd Cir. 1996) ("The reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination."). Morever, strict adherence to a rule on the basis that otherwise the "foot will be in the door" to other group homes is not a sufficient basis upon which to deny a permit.

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[5] Majors was decided under the Rehabilitation Act, which Congress intended to serve as the model for interpretation of section 3604(f)(3)(B). See section II.A, supra.

161 F. Supp. 2d at 839; accord United States v. Village of Marshall, 787 F. Supp. 872, 879 (W.D. Wis. 1991); see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431-32 (2006) (Religious Freedom Restoration Act case; government could not deny religious accommodation because of "slippery-slope concerns that could be invoked in response to any RFRA claim for an exception"). Accordingly, this Court should assess the requested accommodations in this case on their own merits.

CONCLUSION

In ruling on plaintiffs' motion for summary judgment, this Court should determine on the record presented whether there are any issues of material fact as to whether the residents of TPF's homes are "disabled" and whether the accommodations that plaintiffs sought were necessary and reasonable within the meaning of the Fair Housing Act. In making its determination, the Court should apply the framework of analysis set out in this brief.

Respectfully submitted,

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