UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATHER FLANAGAN'S BOYS HOME Plaintiff, v. THE DISTRICT OF COLUMBIA, Defendant.	)	***Consolidated cases***: Civil Action No. 01-1732 (JR) Judge James Robertson
UNITED STATES Plaintiff, v. THE DISTRICT OF COLUMBIA, Defendant.	)	Civil Action No. 04-0619 (JR)

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND CIVIL PENALTIES

I. INTRODUCTION

The District of Columbia ("the District") zoning code contains 10 provisions that impose burdensome requirements on housing for persons with disabilities when that housing is classified as a Community Based Residential Facility ("CBRF"). Nine of those regulations apply spacing, occupancy and special exception requirements to Youth Residential Care Homes ("YRCHs") in high-density residential and commercial zones. The tenth regulation requires a certificate of occupancy for CBRFs for six or fewer persons with disabilities in all zones. The United States contends that these 10 provisions violate the Fair Housing Act ("FHA" or "Act"), 42 U.S.C. §§ 3601 - 3619.

The District relied upon spacing, occupancy and special exception requirements in the challenged regulations to deny or delay permits sought by Father Flanagan's Boys & Girls Home ("Boys Town") to build and occupy housing for children with disabilities in a commercial zone. The District also failed to grant Boys Town's requests for reasonable accommodations from these provisions. The United States contends that these actions violate the FHA.

This motion seeks to resolve these non-jury claims, pursuant to Fed.R.Civ.P. 52 and 58.[1] The Court should enter judgment for the United States, enjoin enforcement of the challenged portions of the zoning regulations against housing intended for persons with disabilities, order appropriate affirmative injunctive relief and award a civil penalty.

II. PROCEDURAL BACKGROUND

The United States' claim that the District violated the FHA by engaging in intentional discrimination on the basis of disability against Boys Town was tried to a jury from November 27 through December 8, 2006. On December 8, the Court declared a mistrial after the jury reported it was unable to reach a verdict. Trial Tr. at 7 (Dec. 8, 2006). During the trial, the Court determined that the United States' claim that the District violated the FHA by denying Boys Town's reasonable accommodation requests would be decided by the Court. Trial Tr. at 82 (Dec. 5, 2006). Before trial, the Court determined that the United States' claim that 10 District zoning regulations discriminate on the basis of disability in violation of the FHA would

[1] The United States incorporates herein the evidence attached to its previous pleadings in this case. These pleadings include the United States' Memorandum in Support of its Motion for Partial Summary Judgment (filed 10/11/06, Docket Nos.184-189) and Reply Memorandum (filed 11/16/06, Docket No. 208), the United States' Memorandum in Support of its Opposition to the District's Motion for Summary Judgment (filed 9/22/06, Docket No.169), the United States' Opposition to the District's Motion for Judgment as a Matter of Law (filed 2/2/07, Docket No. 241). The United States also proffers additional evidence with this motion. Where the United States refers to an exhibit that was not introduced at trial, it will be identified as "U.S. Ex. ___" and will be attached to this memorandum.

be decided by the Court. Pretrial Conf. Tr. at 7 (Oct. 20, 2006).

Following the mistrial, the District filed a Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50(b). Docket No. 230. The Court denied this motion and set a new trial on the intentional discrimination claims for September 17, 2007. Docket No. 250. On May 15, 2007, in an in-chambers meeting, the Court gave the United States leave to file a motion, by June 30, 2007, seeking judgment and relief regarding its non-jury claims.

III. THE DISTRICT'S ZONING REGULATIONS VIOLATE THE FAIR HOUSING ACT

There are 10 zoning code provisions that establish discriminatory special exception, spacing, occupancy limit, and certificate of occupancy requirements for certain CBRFs[2] intended for persons with disabilities in violation of the FHA. See United States' Memorandum in Support of its Motion for Partial Summary Judgment at 28-40 and Reply at 1-7.

The provisions at issue are:

In the R-5 (high-density residential) zones for YRCHs:

(1) **11 DCMR § 350.4(f)**: imposing occupancy cap and spacing requirements;

(2) **11 DCMR § 358**: imposing special exception requirement and generally applicable occupancy caps and spacing requirements;

[2] The District's zoning regulations define a CBRF in relevant part as "a residential facility for persons *who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living*," 11 DCMR § 199.1 (emphasis added); Testimony of Feola, Trial Tr. at 29-30 (Nov. 28, 2006, p.m. session). Subcategories of CBRFs for persons with disabilities include: (1) youth residential care homes ("YRCHs"), which are facilities "providing safe, hygienic, sheltered living arrangements for one (1) or more individuals less than eighteen (18) years of age, not related by blood, adoption, or marriage to the operator of the facility, who are ambulatory and able to perform the activities of daily living with minimal assistance;" (2) community residence facilities licensed pursuant to the Health Care Facilities and Community Residence Facilities Regulations; and (3) health care facilities licensed as a skilled care facility or intermediate nursing care facility. 11 DCMR § 199.1.

In the CR (mixed-use commercial/residential) zones for YRCHs:

(3) **11 DCMR § 601.2(b)**: imposing occupancy cap and spacing requirements;

(4) **11 DCMR § 616.1(a)**: imposing special exception requirement and generally applicable occupancy caps and spacing requirements

In the C-1 (commerical) zones for YRCHs:

(5) **11 DCMR § 701.2**: excepting CBRFs from provision allowing other matter of right uses from R-5 zones as matter of right uses in C-1 zones;

(6) **11 DCMR § 701.3**: imposing occupancy cap and spacing requirements;

(7) **11 DCMR § 711.1(a)**: imposing special exception requirement and generally applicable occupancy cap and spacing requirements;

In the C-2 (commercial) zones for YRCHs:

(8) **11 DCMR § 721.5**: imposing occupancy cap and spacing requirements;

(9) **11 DCMR § 732.1(a)**: imposing special exception requirement and generally applicable occupancy cap and spacing requirements;

In all zones for CBRFs:

(10) **11 DCMR § 3203.1**: requirement that a CBRF housing six or fewer persons with disabilities must obtain a certificate of occupancy but permitting similarly situated housing for six unrelated persons not deemed a CBRF without a certificate of occupancy.

The District argues that 11 DCMR § 330.5(i), a provision of the R-4 zoning regulations, exempts housing for persons with disabilities from the spacing, occupancy and special exception

requirements of the first nine zoning code provisions listed above, in the R-5, CR, C-1 and C-2 zones. See District's Opposition to United States' Motion for Partial Summary Judgment at 6-7 (filed 11/3/06, Docket No. 206). But the evidence shows that Section 330.5(i) has not served that function. Instead, the District imposed spacing, occupancy and special exception requirements on Boys Town's proposed YRCHs in a C-2 zone until faced with the prospect of the United States filing this lawsuit. Even then, the District continued to apply these requirements with regard to Boys Town's proposed short-term shelter. In addition, the District has continued to enforce the discriminatory certificate of occupancy requirement on housing for six or fewer persons with disabilities, four years after a federal court found the requirement discriminatory on its face.

A. <u>As enforced by the District, Section 330.5(i) does not "save" the District's challenged zoning provisions in the R-5, CR, C-1 or C-2 zones</u>.

The District argues that Section 330.5(i), a provision located in the *R-4 zoning section* of the regulations, exempts housing for persons with disabilities from the operation of the special exception requirements, occupancy cap and spacing requirements in the R-5, CR, C-1 and C-2 zones, and thereby "saves" the challenged zoning requirements listed as numbers 1 - 9 above.[3] <u>See</u>, <u>e.g.</u>, Pltfs. Tr. Ex. 212. There is, however, an alternative reading of the District's zoning regulations regarding the C-1 and C-2 zones. One of the provisions we challenge, 11 DCMR § 701.2, provides that in the C-1 zones, CBRFs are excepted from the general rule that any matter of right use permitted in R-5 zones is also permitted in the C-1 zones as a matter of right.

[3] The District also has argued that the nine challenged zoning requirements comply with the FHA on their face because some YRCHs could be for persons without disabilities. This argument ignores the fact that the United States challenges these requirements only as they apply to housing for youth with disabilities, like the Boys Town project.

Because Section 330.5(i) applies *only* to CBRFs, it would presumably fall within this exception. This exception also appears to carry over to the C-2 zones through 11 DCMR § 721.1.

In any event, the District's failure to implement or utilize Section 330.5(i) during more than two years of Boys Town's efforts to obtain building permits – despite multiple opportunities to do so – undermines the argument that Section 330.5(i) saves the discriminatory zoning requirements. Indeed, the District has never offered competent evidence of any other example of Section 330.5(i) operating to exempt a YRCH intended as housing for persons with disabilities from one of the challenged provisions.[4]

1. The District agreed to remove the restrictions placed upon housing for people with disabilities in multi-family zones.

In 1997, the District entered into a Stipulated Agreement averting a proposed lawsuit by the United States. The United States was prepared

> to allege, *and the District of Columbia [did] ... not dispute*, that the District of Columbia's zoning regulations and practices that are applicable to housing in areas zoned for multi-family housing include classifications based on disability which *on their face and as applied* violate the Fair Housing Act. These zoning regulations and practices place restrictions upon housing for persons with disabilities when such housing is considered a "Community Based Residential Facility" ("CBRF"), even though no such restrictions are placed on housing for an

[4] In recent responses to the United States' Second Set of Interrogatories, the District for the first time makes the unsupported contention that on February 10, 2000 it applied Section 330.5(i) to an organization called "Community Partnership" at 317 H St., N.W. Ex. 1, District's Amended Responses to the United States' Second Set of Interrogatories and Accompanying Document Request to No. 3(c). However, the District produced no competent evidence to verify this application stating only "[r]elevant documents may include an application letter referencing accompanying attachments." Id. In fact, the District refused to provide any documentation with respect to this application when the United States requested it. Ex. 2, 6/25/07 e-mail from Leah Taylor to Jennifer Cass. The United States has since learned that "Community Partnership" houses homeless women at this location. Thus, even if Section 330.5(i) was applied to Community Partnership, the District still has not produced any evidence that it applied Section 330.5(i) to save the nine challenged provisions as applied to YRCHs for children with disabilities. Ex. 1, District's Amended Responses to the United States' Second Set of Interrogatories and Accompanying Document Request to No. 3.

> equal number of non-disabled persons. The zoning regulations and restrictions applicable to housing for persons with disabilities but not to housing for non-disabled persons include: (1) a requirement that a special exception be obtained from the Board of Zoning Adjustment, (2) restrictions that prohibit housing for persons with handicaps from being located within five hundred feet or within the same square of other similar housing, and (3) an absolute cap on the number of persons allowed in certain housing for persons with handicaps.

U.S. Ex. 3 at 1 & 2 (emphasis added).

The Stipulated Agreement specifically required the District to enact a zoning code provision stating that a CBRF is a matter of right use in an R-4 District where "the Zoning Administrator has determined that . . . [a] community-based residential facility, which otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 district, is intended and operated as housing for persons with handicaps." Id. at 5. The reference to an R-4 District was intended to allow the amendment to reach all less restrictive zones "[b]ecause, under the District of Columbia's zoning regulations, uses that are permitted as of right in a R-4 zone are permitted as a matter of right in R-5 and all other less restrictive zones, this proposed amendment will allow CBRFs which are intended and operated as housing for persons with handicaps to be permitted as a matter of right in R-5 and all other less restrictive zones as well as R-4 zones." Id. at 4-5. The District amended Section 330.5(i) in response. Nonetheless, the evidence shows that the District failed to take any steps to ensure that zoning officials were aware of the new provision, knew how to properly apply it or were, in fact, applying or enforcing it.[5] U.S. Ex. 4, Declaration of Phil Feola ¶ 9; see discussion,

[5] To the extent Section 330.5(i) has been interpreted by District officials, it appears to be viewed as a type of reasonable accommodation for CBRFs for persons with disabilities "incorporate[d]" into the District's zoning regulations. See Pltfs. Tr. Ex. 216 at 2, (District's September 18, 2003 Letter granting Boys Town's reasonable accommodation request under Section 330.5(i)). Mr. Bello testified that under Section 330.5(i), zoning administrator's discretion could include requesting a reasonable accommodation under Section 330.5(i). U.S. Ex. 5, Bello Dep. 11-13 (Jan. 27, 2006).

infra, at 42-46; U.S. Ex. 1, District's Amended Responses to the United States' Second Set of Interrogatories and Accompanying Document Request to No. 1 (June 27, 2007) ("District's Responses to Interrog. No. __") (no specific FHA training given until May 2005, under provision of the Settlement Agreement in Community Housing Trust case).

Since the regulation was enacted in 1999, District zoning officials have received little to no training with respect to any of the Fair Housing Act implications of the District's zoning laws. See discussion, infra, at 42-46. Indeed, the evidence shows that only one District zoning official from 2000-2004, Olutoye Bello, who served on and off as Zoning Administrator from approximately November 2001 to June 2005, gave any indication that he was even aware of the existence of Section 330.5(i). And even Mr. Bello misunderstood the "matter of right" nature of Section 330.5(i), testifying at deposition that Section 330.5(i) leaves the determination "about the intention of the facility and how it is supposed to operate" to the "discretion" of the "zoning administrator as opposed to the reasonable accommodation process." U.S. Ex. 5, Bello Dep. 154-155 (Jan. 27, 2006). No procedures were ever established by the District to ensure that the zoning administrator knew about the operation of Section 330.5(i). See discussion, infra at 38-41; U.S. Ex. 1, District's Responses to Interrog. No. 2 (June 27, 2007). In fact, eight years after the enactment of Section 330.5(i), the District has provided only one other example of a situation in which it applied this section, aside from the Boys Town case, and in that instance there is no competent evidence that the housing at issue was intended for persons with disabilities. U.S. Ex. 1, District's Responses to Interrog. No. 3 (c) (June 27, 2007).

2. The District failed to apply Section 330.5(i) to Boys Town's permit applications for two years.

During 2001 and 2002, Boys Town made two reasonable accommodation requests for the four long-term homes (YRCHs), each of which gave the District the opportunity to apply Section

330.5(i).[6] Instead, the District chose to deny or ignore these requests on unsubstantiated grounds See discussion infra at 20-31. Pltfs. Trial Exs. 192 & 196.

First, despite Boys Town's efforts to present evidence of the children's disabilities during the 2001-2002 BZA appeal,[7] the BZA refused to hear such evidence and failed to apply Section 330.5(i). Testimony of Phil Feola, Trial Tr. at 82-85 (Nov. 28, 2006, a.m. session); Pltfs. Tr. Ex. 164, Board of Zoning Adjustment ("BZA") Opinion No. 16791 p. 15-25, 38. Instead, it applied the occupancy, spacing and special exception restrictions of 11 DCMR § 732.1(a) (one of the challenged zoning regulations) to Boys Town. Id. at 25. Second, DCRA did not apply Section 330.5(i) to Boys Town's October 2002 reasonable accommodation request for the four long-term homes on Potomac Avenue, denying the request for unsubstantiated reasons. The undisputed evidence demonstrates that, only under threat of a lawsuit by the United States, did the District finally decide in September of 2003 to apply Section 330.5(i) to Boys Town's request for

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[6] Karen Edwards' June 24, 2003 letter to Boys Town which suggests an application under Section 330.5(i), as well as the District's September 2003 approval of building permits for the four homes under Section 330.5(i), make clear the District's position that building permits can be granted under Section 330.5(i) even when an applicant has applied for a reasonable accommodation instead. See Pltfs. Tr. Ex. 212 at 2, 4 & Tr. Ex. 216 at 2, 3.

[7] On September 12, 2001, ANC 6B and SCSD, representing community opponents, filed an appeal with the BZA challenging the September 6, 2001 DCRA decision issuing matter of right building permits to Boys Town. Pltfs. Tr. Ex. 164, BZA Opinion No. 16791 p. 1. In its presentation before the BZA, Boys Town attempted to argue, in part, that the community opposition to these group homes was based on discriminatory animus and attempted to submit evidence that the housing was intended as housing for persons with disabilities. U.S. Ex. A Feola Decl. ¶¶ 6 & 7, attached to United States' Opposition to District's Motion for Summary Judgment; Pltfs. Tr. Ex.138 (Response Brief of Father Flanagan's Boys Town). The BZA, however, refused to consider any evidence of the disabilities of children who would be served by the Boys Town homes or evidence of the requirements of the Fair Housing Act, finding it "irrelevant, since there is no evidence that Girls and Boys Town has as [sic] sought 'reasonable accommodation' under District of Columbia regulations implementing the Fair Housing Act." Pltfs. Tr. Ex. 164, BZA Opinion 16791 p. 38. On June 21, 2002, nine months after the BZA appeal was filed, the BZA upheld the community opponents' appeal and revoked the four building permits. Id. at 27.

reconsideration of its reasonable accommodation request regarding the four long-term homes.

Boys Town contacted the United States Justice Department to request an investigation under the FHA of the District's actions regarding Boys Town's plans for its Potomac Avenue property. Testimony of Feola, Trial Tr. at 9-10 (Nov. 28, 2006, p.m. session). On February 11, 2003, the United States wrote a letter to the District's Office of Corporation Counsel stating that it was prepared to file a complaint in federal court based on its investigation of the District's land use and regulation enforcement practices. U.S. Ex. 6.[8] The United States informed the District that its investigation revealed that the District had engaged in discriminatory treatment of Boys Town on the basis of disability in connection with its building permit applications at Potomac Avenue and that the District's land use regulations contained classifications on the basis of disability which violate the federal FHA. Id. The United States indicated that it would withhold filing the complaint for a short period of time to attempt a negotiated resolution of the matter. Id. On May 7, June 4, and June 11, 2003, the United States sent follow-up letters regarding these issues, with discussion that focused to a large extent on efforts to avoid potential litigation by addressing the District's failure to grant permits for the four long-term homes at the Potomac Avenue site. U.S. Exs. 7, 8 & 9 (respectively).

[8] This letter, together with subsequent letters from the Department of Justice to the District on May 7, June 4, and June 11, 2003 (U.S. Exs. 7, 8 & 9, respectively) ("the DOJ letters") are admissible under Fed.R.Ev. 408, because they are offered not to prove liability or to show the invalidity or amount of a claim, but to explain the sequence of events which led to District's September 2003 approval of Boys Town's reasonable accommodation requests. See MCI Commc'n Corp. v. Am. Tel. and Tel. Co., 708 F.2d 1081, 1152 (7th Cir. 1983) (finding that evidence from compromise negotiations is admissible to "assist the trier of fact in understanding the case"). The DOJ letters also dispute the District's factual contention that it was simply following normal procedures under Section 330.5(i) in granting Boys Town's reasonable accommodation request in September 2003. See Bd. of Trs. of Knox County Hosp. v. Shalala, 135 F.3d 493, 501 (7th Cir. 1998) (affirming admission of evidence offered to dispute the other party's factual contention).

On June 24, 2003, Karen Edwards, legal counsel for DCRA, wrote Boys Town a letter specifically referencing Boys Town's complaint "lodged . . .with the Civil Rights Division of the United States Department of Justice. . ."[9] Pltfs. Tr. Ex. 212 at 1. The letter stated that "if applications are submitted with appropriate supporting material,". . . "they will be reviewed and processed under Section 330.5(i)."[10] Pltfs. Ex. 212 at 4 (emphasis added). Boys Town renewed its request for a reasonable accommodation on July 10, 2003, attaching an affidavit from Dr. Michael Handwerk regarding the prospective residents' disabilities.[11] Pltfs. Tr. Ex. 213. In September 2003, the District finally granted Boys Town's reasonable accommodation request under Section 330.5(i). Pltfs. Tr. Ex. 216. Indeed, the September 18, 2003 decision is an odd hybrid, granting a reasonable accommodation pursuant to 14 DCMR § 111 (from the occupancy, spacing and special exception requirements) and then declaring the four homes to be matter of right uses pursuant to Section 330.5(i). Pltfs. Ex. 216; Testimony of Feola, Trial Tr. at 22-24 (Nov. 28, 2006 p.m. session).

Thus, the District applied Section 330.5(i) to Boys Town's four long-term homes only after it was informed that the Justice Department would file suit unless immediate action was

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[9] David Clark, Director of the DCRA at the time, testified in deposition that he distinctly remembers this letter because it was "unusual" for DCRA counsel to "take[] on responsibility for writing a letter" like this. U.S. Ex. 15 Deposition of David Clark, 191 (June 14, 2002).

[10] The District has argued that Boys Town should have applied prior to June 2003 under 11 DCMR § 330.5(i) for a matter-of-right use as a CBRF rather than applying for a reasonable accommodation under the procedures set out in 14 DCMR §§ 111 et seq. However, the BZA's May 2002 decision specifically determined that Section 732.1 applied to the four long-term homes, and made no mention of Section 330.5(i). Pltfs. Tr. Ex. 164; U.S. Ex. 4, Feola Decl. ¶ ¶ 6, 7 & 9. Thus, Boys Town's submission to DCRA of a request for a reasonable accommodation from Section 732 was a reasonable approach. Id. at ¶ 11 .

[11] See discussion, infra at 24-25, regarding the details of this affidavit.

taken by the District to remedy the FHA violations.[12]

3. The District refused to grant Boys Town's Section 330.5(i) application for the short-term shelter.

On May 1, 2002, Boys Town submitted to DCRA a permit application for a short-term shelter for 7-15 youth under Section 330.5(i). Pltfs. Tr. Ex. 161. At trial, Martin Sullivan, one of Boys Town's land use attorneys, testified that Boys Town submitted the application under Section 330.5(i) on the advice of Zoning Administrator Toye Bello[13] and attached an affidavit from Dr. Michael Handwerk which specifically concluded that the majority of the prospective children at the Potomac Avenue site would have disabilities. Testimony of Sullivan, Trial Tr. at 172-175 (Nov. 29, 2006); Pltfs. Ex. 159 & 161. Almost a year later in April 2003, Boys Town still had not received a building permit for the short-term shelter. Testimony of Sullivan, Trial Tr. at 179 (Nov. 29, 2006). Mr. Sullivan then had a conversation with Grant Moy, DCRA counsel, in which Mr. Moy confirmed that the application for the short-term shelter was still on hold because of "the litigation" (referring to Boys Town's current lawsuit against the District).

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[12] A November 19, 2003 article in the Washington Post entitled "D.C. to Allow Boys Town's Youth Home, Capitol Hill Residents Decry City's Decision" stated: "A recent threat by the U.S. Department of Justice to file a lawsuit alleging that the city was in violation of the federal Fair Housing Act also factored in the decision, consumer office spokeswoman Gwen Davis said yesterday." U.S. Ex. 10. Ms. Davis testified during her deposition that while she did not remember specifically making this statement, she does remember speaking with a reporter about Boys Town. U.S. Ex. 11, Davis Dep. 89-90 (July 14, 2005). Ms. Davis stated that her normal procedure before talking to the press would have been to speak to either the manager and/or general counsel at DCRA "about what the situation was and what the appropriate statement would be." Id. at 90-91. There was no reason, she confirmed, to believe that she did not follow her normal procedure in this instance. Id.

[13] Even though Mr. Bello did not have extensive training in the FHA or fully understand how to enforce Section 330.5(i), as zoning administrator for approximately four years (2001-2005), he appears to be the only District zoning official who had any knowledge regarding Section 330.5(i).

Id. at 177-79 (Nov. 29, 2006); Pltfs. Trial Ex. 208. Two months after that, in the June 24, 2003 letter to Boys Town, Karen Edwards, also DCRA counsel, assured Boys Town that the application was "expected to be approved shortly." Pltfs. Tr. Ex. 212 at 2; Testimony of Feola, Trial Tr. at 18 (Nov. 28, 2006, p.m. session).

On November 12, 2003, nearly six months later and *18 months* after Boys Town submitted the Section 330.5(i) application (Pltfs. Tr. Ex. 224), Denzil Noble, the District's BLRA Administrator, failed to apply Section 330.5(i). Instead, he determined that the short-term shelter was subject to the 500-foot spacing requirement under 11 DCMR § 721.5. Id. Testimony of Feola, Trial Tr. at 32-35 (Nov. 28, 2006, p.m. session); Testimony of Sullivan, Trial Tr. at 174 (Nov. 29, 2006); Pltfs. Trial Exs. 161 & 224. The District applied the spacing requirement to the short-term shelter despite the "matter-of-right" language of Section 330.5(i) and despite the fact that two months earlier the District had granted Boys Town's request for building permits for the four long-term homes, based on an affidavit confirming the disability status of the residents similar to that submitted for the short-term shelter. Pltfs. Tr. Exs. 161 & 216; Testimony of Feola, Trial Tr. at 34-35 (Nov. 28, 2006, p.m. session); U.S. Ex. 4, Feola Decl. ¶¶ 8 & 9.

Shortly thereafter, the District again refused to grant Boys Town's Section 330.5(i) application for the short-term shelter. Mr. Sullivan testified at trial that he called Mr. Noble about three weeks after the November 12 letter applying the spacing requirement to the short-term shelter, and had a "candid" conversation with him. Testimony of Martin Sullivan, Trial Tr. at 180-181 (Nov. 29, 2006). Mr. Sullivan stated that during this conversation, Denzil Noble "stated clearly that the latest delay [for the short term shelter] was attributable to the 'furor' in the community," adding: "Don't you read the papers?" Id. at 179-182. Mr. Sullivan recorded

this conversation in a contemporaneous memorandum to the file. Id. at 180-181. Mr. Sullivan also stated that Mr. Noble gave two reasons at that time for the "hold" on the short-term application under Section 330.5(i):

> One reason he gave was that DCRA did not want to issue the permit at a time when the community was so excited because this issuance would excite them even more. The second reason was that the City (he implied Corporation Counsel, David Clark, the Mayor's Office) needed time to come up with some type of official response to Opper-Weiner and the "community" before they would allow another permit to be issued.
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> I asked if we would have the permit in a week, he said no. I asked if we would have it in a month, he said maybe. I protested, stating that this was the exact situation that the Fair Housing Act was supposed to address: community pressure stopping government from following the law. *He said that the decision was out of his hands, but stated clearly that nothing would be approved for 1399 Pennsylvania Avenue [the short term shelter] at this time because of the community reaction to the reasonable accommodation approval.*

U.S. Ex. 12, Decl. by Martin P. Sullivan at ¶ 8 (emphasis added).

Thus, contrary to the District's arguments, Section 330.5(i) was used to grant Boys Town permits only in September 2003, more than two years after Boys Town began the permitting process for the four long-term homes and only after the United States threatened to sue. Moreover, Boys Town's application under Section 330.5(i) for the short-term shelter – clearly a matter of right use – was never granted. U.S. Ex. 4, Feola Decl. ¶ 9; Testimony of Karen Burditt, Trial Tr. at 132 (Nov. 29, 2006).

B. The District has continued to enforce its discriminatory certificate of occupancy requirements for CBRFs of six or fewer people.

The District's certificate of occupancy requirement in 11 DCMR § 3203.1 for households of six unrelated individuals discriminates against persons with disabilities.[14] This provision

[14] The United States does not challenge the District's certificate of occupancy requirement as applied to Boys Town's proposed development at the Potomac Avenue site, because each of the four long-term homes would have housed a total of eight unrelated individuals (six children plus their caretakers). See United States Memorandum in Support of

violates the FHA because, as more fully set out in the United States' Memorandum in Support of its Motion for Partial Summary Judgment at 37-38, a dwelling housing six unrelated individuals ordinarily constitutes a "family" and does not require a certificate of occupancy, (11 DCMR § 199.1 (2000); 11 DCMR § 3203.1), but if the home is classified as a CBRF housing no more than six unrelated individuals with disabilities, a certificate of occupancy is required. Over four years ago, Judge Kennedy in Comty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs, 257 F. Supp. 2d 208, 224 (D.D.C. 2003), determined that this provision violates the FHA on its face.

Despite the decision in Community Housing Trust, and the District's apparent concession in that case that the certificate of occupancy requirement is one of the hurdles that persons with disabilities "must clear . . . under the D.C. zoning scheme because of their disability," id. at 223, n. 18,[15] District zoning officials inexplicably have continued to enforce the certificate of occupancy requirement with respect to CBRFs for six or fewer persons with disabilities even *after* the Community Housing Trust decision. As U.S. Exhibit 13 (Declaration of Elba Bermudez, Paralegal Specialist for Housing and Civil Enforcement Section, U.S. Department of Justice) and the attached documents demonstrate, the District required at least 33 such CBRFs to obtain certificates of occupancy between April 2003 and February 23, 2005.[16] This continuing

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its Motion for Partial Summary Judgment at 41.

[15] During his deposition in the Community Housing Trust litigation, Olutoye Bello, Acting Zoning Administrator, admitted that the District's certificate of occupancy regulations treat a home differently if the people occupying it have disabilities that require them to have treatment, assistance or supervision on site "to the extent that that arrangement qualifies them as a CBRF." U.S. Ex. 14, Bello Dep. 17-19 (March 18, 2002).

[16] The District did not produce in discovery information or documents with respect to CBRFs or other homes for six or fewer residents with disabilities which applied for, but were denied, certificates of occupancy. See U.S. Ex. 13. Thus, the total number of such homes or CBRFs subject to the certificate of occupancy requirement over the years may well be higher.

violation is particularly troubling because, during the course of the Community Housing Trust litigation, the District made repeated assurances in correspondence, written discovery and pleadings to the court that it "will soon change its regulations" to eliminate this requirement. Comty. Hous. Trust, 257 F. Supp.2d at 219, fn. 15; see also U.S. Ex. 17, District's 3/8/02 Answer to Plaintiff's First Set of Interrogatory No. 8 in the Community Housing Trust case & U.S. Ex. 19 (12/2/02 letter from D.C. Zoning Administrator to plaintiff in Community Housing Trust referring to "pending revision of Title 11 of the District's Municipal Regulations" with respect to certificates of occupancy). These changes never happened. See U.S. Ex. 1, District's Responses to Interrog. No. 12 (June 27, 2007). Thus, the District continues to enforce its certificate of occupancy provision for CBRFs for six or fewer residents with disabilities in violation of the Fair Housing Act. See Comty. Hous. Trust, 257 F. Supp. 2d at 223.

IV. THE DISTRICT VIOLATED THE FHA BY DENYING BOYS TOWN'S REQUESTS FOR A REASONABLE ACCOMMODATION

Boys Town requested a reasonable accommodation from the spacing, occupancy and special exception requirements of Section 732.1(a) (one of the challenged zoning regulations) regarding the four long-term homes. In June 2002, the BZA refused even to consider the request. Later that year, in November 2002, the DCRA denied the request. Only in September 2003, after the District was threatened with a lawsuit by the United States, did the District grant the reasonable accommodation. The District violated the FHA by denying Boys Town's reasonable accommodation requests for the four long-term homes.[17] The FHA makes it unlawful for any person or entity to refuse "to make reasonable accommodation in rules, policies,

[17] The Court determined during trial that these claims would be decided by the Court, not the jury. Trial Tr. at 62, 124-25 & 127 (Dec. 5, 2006). The Court stated its view that the United States would be entitled to equitable relief on its reasonable accommodation claims if it proved those claims in the next phase of the case, regardless of any verdict by the jury on the intentional discrimination claims. Id. at 128.

practices, or services, when such accommodations may be necessary to afford . . . person[s with disabilities] equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204; see also Tsombanidis v. West Haven Fire Dept., 352 F.3d 565, 578 (2d Cir. 2003). Thus, a reasonable accommodation may mean waiving some generally applicable rule to minimize its burden on the handicapped individual. United States v. Cal. Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1417-18 (9th Cir. 1994); see also Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 333 (2d Cir. 1995); Bangeter v. Orem City Corp., 46 F.3d 1491, 1501-02 (10th Cir. 1995) (quoting Oxford House, Inc. v. Twp. of Cherry Hill, 799 F.Supp. 450, 462 n. 25 (D.N.J. 1992)); accord, Hubbard v. Samson Mgmt. Corp., 994 F.Supp. 187, 189 (S.D.N.Y. 1998).

Under the FHA, the requirement of "reasonable accommodation" means that "feasible, practical modifications" must be made, but "extreme infeasible modifications are not required." Preamble I, 53 Fed. Reg. 45003 - 04 (Nov. 7, 1988 (quoting remarks of Rep. Owens, 134 Cong. Rec. H4923 (1988)). "An accommodation is reasonable when it imposes no 'fundamental alteration in the nature of a program' or 'undue financial and administrative burdens.'" Giebeler v. M & B Assocs., 343 F.3d 1143, 1157 (9th Cir. 2003); Tsombanidis, 352 F.3d at 578; Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains, 284 F.3d 442, 462 (3d Cir. 2002) (quoting Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir.1996)); Groner v. Golden Gate Gardens Apts., 250 F.3d 1039, 1044 (6th Cir. 2001) (quoting Smith & Lee Assocs., Inc., v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996)); Bryant Woods Inn, Inc. v. Howard County, Md., 124 F.3d 597, 604 (4th Cir. 1997) (quoting Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979)); Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995).

While the federal courts in the District of Columbia have not directly addressed what a plaintiff must allege in order to state a discrimination claim under the FHA for failure to make a

reasonable accommodation, other courts have found the following standards relevant to this inquiry: (1) the plaintiff suffers from a handicap as defined in § 3602(h); (2) the defendant knew or should reasonably be expected to have known of this handicap; (3) accommodation of the handicap "may be necessary" to afford the plaintiff an equal opportunity to use and enjoy the housing involved; and (4) the defendant refused to make such an accommodation. See McGary v. City of Portland, 386 F.3d 1259, 1262 (9th Cir. 2004); Tsombanidis, 352 F.3d at 579 (2d Cir. 2003); Lapid-Laurel, 284 F.3d at 457 (3d Cir. 2002); Groner, 250 F.3d at 1044; Keys Youth Servs., Inc. v. City of Olathe, KS, 248 F.3d 1267, 1275 (10th Cir. 2001); Radecki v. Joura, 114 F.3d 115, 117 (8th Cir. 1997); Bryant Woods Inn, Inc., 124 F.3d at 604 (4th Cir. 1997); Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 896 (7th Cir. 1996); Bentley v. Peace & Quiet Realty 2 LLC, 367 F. Supp. 2d 341, 345 (E.D.N.Y. 2005); N.D. Fair Hous. Council, Inc. v. Allen, 319 F. Supp. 2d 972, 980 (D.N.D. 2004); Adam v. Linn-Benton Hous. Auth., 147 F. Supp. 2d 1044, 1047 (D.Or. 2001). In this case, the United States has proven all four standards.

A. The District's reasonable accommodation regulations.

In the 1997 Stipulated Agreement, the District acknowledged that it had, until recently, "failed to provide a mechanism by which providers of housing for persons with disabilities may obtain an exemption from the District of Columbia zoning restrictions under the reasonable accommodation mandate of the Fair Housing Act. 42 U.S.C. § 3604(f)(3)." U.S. Ex. 3 at 2. As a result, the District agreed to create a mechanism, including "guidelines, criteria, and time frames," to ensure that eligible persons may request and obtain, if appropriate, a reasonable accommodation. Id. at 3. The District's proposed specific procedures for requesting and obtaining a reasonable accommodation to the zoning regulations were attached to the Stipulated Agreement and were subsequently enacted as 14 DCMR § 111 in November 1998. See 45 DCR

8057.

These regulations require requests for reasonable accommodation to be submitted to the Director of the DCRA in writing. The request must provide, among other things: a description of the requested accommodation and specific regulation or regulations from which accommodation is sought, and a reason that the requested accommodation may be necessary for the person or persons with a handicap to use and enjoy the dwelling. 14 DCMR §111.4(d) & (e).

The Director of the DCRA or his/her designee is responsible for making a written determination regarding the request. 14 DCMR § 111.6 & 111.9. If the Director does not issue such a decision within 45 days after receiving a written request for a reasonable accommodation, the request shall be deemed granted. 14 DCMR §§ 111.9 & 111.12. The Director may consider the following criteria when deciding whether a request for a reasonable accommodation is reasonable: whether the requested accommodation would require a fundamental alteration of a legitimate District policy, and whether the requested accommodation would impose undue financial or administrative burdens on the District government. 14 DCMR §111.10. In order to reach a decision, the regulations provide that the Director "may request further information from the applicant consistent with the Act, specifying in detail the information required." 14 DCMR §111.7.[18] The Director's decision on a reasonable accommodation request is final and cannot be appealed to the BZA. 14 DCMR § 111.13.

B. <u>The District's denials of Boys Town's reasonable accommodation requests</u>.

Despite these reasonable accommodation regulations, the District unlawfully rejected Boys Town's requests for a reasonable accommodation at its Potomac Avenue properties. In

[18] In the event that additional information is requested by the Director pursuant to 14 DCMR § 111.7, the running of the 45 day period is tolled until the applicant responds to the request.

2002, when Boys Town attempted to present evidence of the children's disabilities during the BZA appeals process, the BZA refused to hear such evidence. Instead, the District authority charged with interpreting and enforcing the zoning regulations applied the occupancy, spacing and special exception restrictions of 11 DCMR § 732.1(a). Similarly, in November 2002, the District denied Boys Town's renewed request for a reasonable accommodation, even though it was made on the District's "application form," carefully laid out the reasons why the accommodation was "reasonable" and "necessary," and attached an affidavit from a clinical psychologist confirming that the majority of children served by Boys Town has disabilities as required by the FHA and the District's reasonable accommodation regulations. Pltfs. Tr. Exs. 192 & 216.

1. The BZA effectively denied Boys Town's reasonable accommodation request.

In the fall of 2001, attorneys for Boys Town argued to the BZA that many of the children who were to reside in Boys Town's homes would have disabilities and that applying Section 732.1 (one of the zoning provisions challenged under Count II of the United States' complaint) to this scenario would violate both the FHA and the 1997 Stipulated Agreement. Testimony of Feola, Trial Tr. at 77-79 & 84-85 (Nov. 28, 2006, a.m. session); Pltfs. Trial Exs. 138 & 164, Opinion 16791 p. 23-25. Boys Town's legal memorandum to the BZA referenced the Fair Housing Act five separate times and specifically asked for a reasonable accommodation. Pltfs. Trial Ex. 138 at 1- 2, 7 n. 3, 9, 12 & 14. It also attached the 1997 Stipulated Agreement for the BZA's review. Pltfs. Tr. Ex. 138. Despite this presentation, the BZA "ordered such testimony and arguments [about the Fair Housing Act] suppressed as irrelevant, since there is no evidence that Girls and Boys Town has as [sic] sought 'reasonable accommodation' under District of Columbia regulations implementing the Fair Housing Act" and ordered "the stipulated

agreement between the United States and the District of Columbia regarding Fair Housing Act requirements, stricken from the record as irrelevant." Pltfs. Trial Ex. 164, BZA Opinion 16791 p. 38.

The District has not disputed these facts, but instead has argued that reasonable accommodation requests can only be made to the DCRA, not to the BZA, and that the BZA did not have authority to grant the reasonable accommodation. If the District is correct, however, then its regulations create a Catch-22. There was no reason for Boys Town to address the children's disabilities in its 2001 permit applications to the DCRA because on their face the four YRCHs, for six children each, were "matter of right" uses under 11 DCMR § 201.1(n)(1) in all residential, mixed use and commercial zones. U.S. Ex. 4, Feola Decl. ¶ 5; Pltfs. Trial Ex. 138 at 12. Not until the BZA determined that the four individual homes were to be considered one "facility" and treated as one YRCH serving 24 youths, and thus applied Section 732.1, did the issue of whether the children had disabilities become relevant. Testimony of Feola, Trial Tr. at 83-85, 95-97 (Nov. 28, a.m. session) & at 79-80 (p.m. session); U.S. Ex. 4, Feola Decl. ¶¶ 5 & 6. As the United States previously has argued, the BZA is a final administrative decision maker, passing on the question of how the District zoning regulations will be applied to particular circumstances, and the District must answer for those final decisions. See Bannum, Inc. v. D.C. Bd. of Zoning Adjustment, 894 A.2d 423, 431 (D.C. 2006) (quoting Murray v. D.C. Bd. of Zoning Adjustment, 572 A.2d 1055, 1058 (D.C. 1990), "It is the Board, not the Zoning Administrator, which has final administrative responsibility to interpret the zoning regulations."). See United States Motion in Limine Regarding the BZA, filed 11/21/06, Docket No. 217. Thus, precisely at the time that the BZA, acting as the final administrative decision

maker on behalf of the District,[19] had the responsibility for applying the requirements of the FHA and the 1997 Stipulated Agreement to Boys Town's four long-term homes, it rejected both as "irrelevant."[20]

Under the FHA, a violation occurs when a reasonable accommodation is first denied, irrespective of the remedies granted in subsequent proceedings. Bryant Woods Inn Inc., 124 F.3d at 602. "This denial can be both actual or constructive, as an indeterminate delay has the same effect as an outright denial." Groome Resources Ltd., L.L.C. v. Parrish of Jefferson, 234 F.3d 192, 199 (5th Cir. 2000).

2. DCRA violated the Fair Housing Act by denying Boys Town's October 2002 request for a reasonable accommodation.

After the BZA's June 2002 decision, Boys Town submitted a request to DCRA for a reasonable accommodation from Section 732.1's special exception requirement. Pltfs. Tr. Ex. 192; Testimony of Feola, Trial Tr. at 92-98 (Nov. 28, 2006, a.m. session). Boys Town

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[19] The District has previously argued that it is not liable for actions of the BZA, but the Court has rejected this argument. Trial Transcript (November 27, 2006) 110-114. The BZA is an entity that stands in the shoes of the District and is defended by the Office of the D.C. Attorney General. E.g., George Washington Univ. v. D.C. Bd. of Zoning Adjustment, 831 A.2d 921, 927 n.4 (D.C. 2003)("[a]lthough the respondent in this case is the BZA, which is represented by the Office of Corporation Counsel, we refer to its legal contentions . . . as having been made by 'the District.'"). Even when the BZA is acting in a quasi-judicial capacity, it is still an administrative arm of the District, and its determinations are subject to examination by federal courts for compliance with federal laws. See Fonville v. District of Columbia, 448 F. Supp. 2d 21, 25-26 (D.D.C. 2006) (decision by District administrative agency does not preclude federal court from determining whether a police officer was an "at will" employee in a claim under 42 U.S.C. § 1983 where question not fully litigated).

[20] When the BZA hears appeals, it acts as a forum for appeals from the administrative determinations of "any other administrative officer or body [of the District] in carrying out or enforcement of any [zoning] regulation" and has "*all the powers of the officer or body from whom the appeal is taken*" and DC ST § 6-641.07(g). Even if the District were correct that the BZA could not grant a reasonable accommodation, acting in its appellate capacity, the BZA could have presumably remanded the case for a decision on the reasonable accommodation request or applied Section 330.5(i), as argued supra at 20-22; U.S. Ex. 4, Feola Decl. ¶ 7.

specifically made the request pursuant to the District's reasonable accommodation regulations, 14 DCMR § 111, and the Fair Housing Act, 42 U.S.C. § 3604. Pltfs. Tr. Ex. 192.

The FHA required that the District approve Boys Town's request for a reasonable accommodation for the four long-term homes on Potomac Avenue. Boys Town's October 2002 application for an accommodation explained in detail why it was "reasonable" and "necessary to afford . . . [the children Boys Town serves] equal opportunity to use and enjoy a dwelling" as required by 42 U.S.C. § 3604(f)(3)(B). Testimony of Feola, Trial Tr. at 96-97 (Nov. 28, 2006 a.m.); Pltfs. Tr. Ex. 192. Boys Town's application stated that the accommodation requested was reasonable because "[t]he proposed use is not inconsistent with the zone plan and would not be an alteration of policy because this use is arguably permitted as a matter-of-right . . . and the impact of the proposed homes on the surrounding neighborhood would be much less than the other matter-of-right uses permitted in this commercial [C-2] zone." Id. at Bates No. 5828. Boys Town stated that, among other things, the accommodation was "necessary" because "[t]he District has a desperate need for youth residential care homes, foster parents, and organizations such as Girls & Boys Town" and Boys Town after "an exhaustive three-year search" "located only the subject site as being feasible for the construction of these homes and the care of the prospective handicapped residents. Id. at Bates No. 5829. Girls & Boys Town's search for suitable real estate was lengthy and thorough, yet in the end yielded only the current site." Id. at Bates Nos. 5828 -5829. This evidence is uncontroverted. The request was also accompanied by an affidavit from Dr. Michael Handwerk, Director of Clinical Services, Research and Internship Training at the long term facilities at Boys Town, Nebraska, addressing the disabilities of the prospective children at the Pennsylvania Avenue site and a copy of the 1997 Stipulated Agreement. Pltfs. Trial Ex. 192; Testimony of Feola, Trial Tr. at 97-98 (Nov. 28, 2006, a.m.

session).

On November 22, 2002, DCRA denied Boys Town's request for a reasonable accommodation ("the November Decision"). Pltfs. Tr. Ex. 196. In "The Law" section of the decision DCRA Director, David Clark, referenced only two legal cites. The first is "Title 11 of the District's Municipal Regulations," which the decision states "contains the zoning regulations of the District of Columbia, which were promulgated to encourage stability of land and land values within the District. (D.C. Official Code § 6-641.02 (2001)." Id. at 2. The second cite is to the definition of "handicap" under the FHA. Id. Nowhere in this section of the November Decision is there a reference to the reasonable accommodation requirement under the FHA, nor to the District's reasonable accommodation regulations. Id.

In the November Decision, DCRA Director Clark gave three bases for denying the request: (1) "Father Flanagan's did not describe any condition or impairment that meets the definition of handicapped as defined in the Fair Housing Act," id. at 2; (2) the Director of DCRA "does not have the authority to grant a waiver from compliance with the zoning regulations" of the District, id. at 3; and (3) granting the reasonable accommodation "would require a fundamental alteration of legitimate zoning policies" of the District. Id. The District's reasons for denying Boys Town's October 2002 reasonable accommodation request are inadequate and unsubstantiated.

(a) The District had ample evidence to demonstrate that children who were to live in the four long-term homes would have disabilities.

Boys Town submitted sufficient information in support of its reasonable accommodation request to establish that the children it planned to house would have disabilities. Boys Town submitted a detailed affidavit from Dr. Michael Handwerk, Boys Town's Director of Clinical Services, dated January 9, 2002, which stated that virtually all of the populations of children

served by Girls & Boys Town at its long-term residential facilities throughout the United States were abused, neglected and abandoned children, including those who would be served at Pennsylvania Avenue (or Potomac Avenue) in the District. See Handwerk Affidavit attached to Pltfs. Ex. 192. Dr. Handwerk's affidavit described a study he had conducted of the children at the long term facilities in Nebraska in which he determined that a majority of them had disabilities. Id. He concluded that "reliable predictions about the mental and emotional health and functioning abilities of the children to be served in the long-term facilities at *Pennsylvania Avenue* can be made by considering the data concerning the mental and emotional health and functioning abilities of the children in the long-term facilities in Boys Town Nebraska." Id. at ¶ 9 (emphasis added). Thus, the affidavit did "describe [a] condition or impairment that meets the definition of handicapped." Id.; U.S. Ex. 4, Feola Decl. ¶ 10.

The District has argued that the affidavit was inadequate because a final paragraph summing up Dr. Handwerk's conclusions stated inadvertently that a majority of the children at the long term facilities at the "Sargent Road property," rather than those at Pennsylvania Avenue, would have disabilities. See District's Memorandum in Support of Its Motion for Summary Judgment at 27-29 (filed 9/1/06, Docket No. 149); Pltfs. Ex. 212 at 3. However, this excuse ignores the context of the January 9, 2002 affidavit, which clearly indicates that Dr. Handwerk is opining on the children to be served at Potomac Avenue. Ex. 192 attaching Handwerk Affidavit at ¶ 9. Indeed, DCRA Director Clark testified during his deposition that one could infer that the conclusion was about the *Pennsylvania Avenue* children from the context of the affidavit. U.S. Ex. 15, Deposition of David Clark 167-170 (June 14, 2006). Nonetheless, the District used this obvious error as a basis to deny the reasonable accommodation request.[21]

[21] This posture clearly runs counter to the District's policy "to facilitate housing for the handicapped and to comply fully with the spirit and letter of the Fair Housing Act." 14 DCMR

In addition, there is evidence that District officials in fact knew of the disabilities of many children served by Boys Town at the time they were considering Boys Town's applications concerning the Potomac Avenue site. As early as 1998, the District's Children and Family Services Agency ("CFSA") entered into contracts with Boys Town reciting – on the very first page – that the children to be served have "a broad range of characteristics such as emotional problems, behavioral problems, psychological problems and educational deficiencies." See Ex. B2 CFSA Contract No. 8KFT16, attached to United States' Opposition to the District's Motion for Summary Judgment; Testimony of Ernestine Jones, Trial Tr. at 29 (Dec. 1, 2006). Subsequent contracts between Boys Town and the District similarly made clear the disabilities of the District children Boys Town serves. Pltfs. Tr. Ex. 7, Contract #8KGC12, Pltfs. Tr. Ex. 8, Contract # 8KGE08, & Pltfs. Tr. Ex. 17, Contract # 9KGC12.

Moreover, as DCRA Director David Clark acknowledged in deposition, neither the District's reasonable accommodation regulations nor its reasonable accommodation request form require (or indeed ask) an applicant to identify or describe any handicapping conditions or disabilities in a reasonable accommodation request.[22] U.S. Ex 15, Clark Dep. 161 (June 14, 2006); see also Testimony of Feola, Trial Tr. at 12 (Nov. 28, 2006, p.m. session). The regulations also give no guidance as to what kind of information or documentation is required of

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§ 111.1 and the 7th Circuit's holding in Jankowski, 91 F.3d at 893 that if a provider is "skeptical of a tenant's alleged disability or the [provider's]...ability to provide an accommodation, it is incumbent upon the [provider] . . . to request documentation or open a dialogue."

[22] In fact, the application form does not even directly ask whether the applicant(s) or resident(s) has a disability. Pltfs. Trial Ex. 192 (see application attached to Boys Town's 10/11/02 reasonable accommodation request); see also Testimony of Feola, Trial Tr. at 99 (a.m. session) (testifying that the form does not ask "anything about the status of the population to be housed").

an applicant regarding the disabilities of the residents.[23] 14 DCMR § 111. There is no requirement, for example, that a clinical doctor, like Dr. Handwerk, submit an affidavit listing the diagnoses of the children. Id. Thus, at the time the District handed down its November Decision, it had ample information from Boys Town to support the conclusion that children who were going to reside in the Potomac Avenue homes had disabilities.[24]

In any event, the District itself eventually recognized that Boys Town planned to house children with disabilities nine months later. It did so based on essentially the same information it had in 2002. On July 10, 2003, Boys Town re-submitted to DCRA a request for a reasonable accommodation, in light of the District's notification several weeks earlier of the error in the Handwerk affidavit. See discussion supra at 24-25; Testimony of Feola, Trial Tr. 16, 18-19 (Nov. 28, p.m. session). Pltfs. Tr. Exs. 216 & 212. Boys Town stated it was seeking reconsideration of the November 22, 2002 denial of its first such request and submitted "additional supporting materials" regarding the disabilities of the children to be served at the Potomac Avenue properties. Testimony of Feola, Trial Tr. at 16, 18-19 (Nov. 28, 2006, p.m. session); Pltfs. Tr. Ex. 216 (Re-submitted Request for Reasonable Accommodation.) The "additional supporting materials" – all of which were already within the District's possession in November 2002 – were: (1) a page from Contract #8KGC12 between Boys Town and the

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[23] Mr. Feola decided to submit the Handwerk affidavit with the October 2002 reasonable accommodation request because in a previous denial of Boys Town's request for a reasonable accommodation for the short-term shelter on Potomac Avenue, DCRA Director Clark explained that the request provided "no substantive documentation" of a "record of physical and/or mental impairment or being regarded as having such an impairment." Plts. Tr. Ex. 117; U.S. Ex. 4, Feola Decl. ¶ 10.

[24] If the District really had questions about the affidavit, it could have notified Boys Town in its November Decision of the specific issue and asked for clarification. Such notification would have complied with 14 DCMR §111.7, noted above, which provides that the DCRA Director can request further information from an applicant if necessary to reach a decision.

District's CFSA, dated April 1, 1998 (Testimony of Feola at 19 (Nov. 28 p.m. session)); and (2) an affidavit from Dr. Michael Handwerk dated January 30, 2002, which had previously been submitted by Boys Town to the District in Father Flanagan's Boys Home v. D.C., (D.D.C, No. 01-1732).[25] Id. at 19-21. The January 30, 2002 affidavit was substantially similar to the January 9, 2002 affidavit submitted with Boys Town's October 2002 reasonable accommodation request, except that it corrected the mistaken reference to Sargent Road, stating that a majority of the children who were to live at the Pennsylvania Avenue homes would have disabilities. Pltfs. Ex. 213 (see revised Handwerk affidavit attached thereto); Testimony of Feola, Trial Tr. 21 (Nov. 29, 2006 p.m. session).

On September 18, 2003, DCRA granted the reasonable accommodation request, stating that the "new" affidavit "now satisfies the procedural requirements" of the District's reasonable accommodation regulations and finding that the CBRFs at the Potomac Avenue site were "intended to be operated as housing for persons with handicaps." Pltfs. Tr. Ex. 216 at 2. That decision was never reversed or overturned by the District.[26] U.S. Ex. 4, Feola Decl. ¶ 14.

(b) Under District zoning law, the DCRA Director has authority to grant a reasonable accommodation.

Under the District's zoning regulations, "[t]he Director, or his or her designee, or other officer as the Director may assign or delegate, may conduct an appropriate inquiry into the

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[25] This was done by electronic notice on February 8, 2002 (see Docket No. 38).

[26] The fact that the children intended to be served at the Potomac Avenue property would have had disabilities has subsequently been confirmed by (1) the District's Answer in the affirmative to the United States Complaint which alleges that "the proposed residents of the four homes and short-term residence are persons with disabilities within the meaning of 42 U.S.C. § 3602(h)," see Docket Nos. 1 & 6; and (2) the evidence produced at trial, primarily through the testimony of Dr. Daniel Daly that the children Boys Town serves have disabilities. See discussion in United States' Memorandum in Support of its Opposition to District's Motion for Judgment as a Matter of Law at 5-7.

request for reasonable accommodation may: (a) Grant the request; (b) Grant the request subject to specified conditions; or (c) Deny the request." 14 DCMR §§ 111.6. Thus, District law specifically gives the Director of DCRA the final authority to grant a request for a reasonable accommodation under the FHA. Id. The Director may assign or delegate this authority to another District official, but the regulations make clear that it is the Director, in the first instance, who has such authority. Id.

Although the Director of the DCRA stated in the November decision that the "authority" to grant reasonable accommodation requests is vested with the Zoning Commission and the BZA (Pltfs. Tr. Ex. 196 at 2 & 3), it is noteworthy that in two District letters subsequently addressing Boys Town's reasonable accommodation request for the four long-term homes at Potomac Avenue – Karen Edwards' June 2003 letter to Boys Town and the September 2003 Decision finally approving the request for the four homes – the issue of the DCRA Director lacking authority to grant a reasonable accommodation was never raised again. Both documents refer only to the mistaken reference in the Handwerk affidavit. Pltfs. Tr. Exs. 212 & 216.

Thus, the excuse that the DCRA Director could not grant a reasonable accommodation is contrary to the District's zoning regulations and does not provide a valid basis for denial. Moreover, it left Boys Town in a Catch-22 as DCRA took the position that the BZA had the authority and responsibility for granting Boys Town's reasonable accommodation request while the BZA had determined that the FHA was irrelevant and would not address the reasonable accommodation request made before it.

(c) Granting Boys Town a reasonable accommodation to build the four long-term homes would not fundamentally alter zoning policies against "undue concentration of population and overcrowding of land."

The District's contention that granting Boys Town's reasonable accommodation request

"would require a fundamental alteration of legitimate zoning policies of the District of Columbia" (Pltfs. Tr. Ex. 196 at 3), lacks merit. The "legitimate policies" identified in the November Decision were those of "preventing undue concentration of population and overcrowding of land, and of promoting such distribution of population and of uses of land as would tend to further economy and efficiency in the supply of public services." Id. at 2. In addition, the letter also contained references to the District's zoning code provisions, which the letter stated "were promulgated to encourage the stability of land and land values within the District." Id. at 2.

The November Decision failed to explain, as required by 14 DCMR §111.11, how housing for a total of 24 children would create an "undue concentration of population" or "overcrowding" on two acres of land in a commercial district in which boarding houses, hotels, restaurants, liquor stores, bars, college and university uses, auditoriums, movie theaters, and department stores could be built as a matter of right. 11 DCMR. §§ 701 & 721. Indeed, no explanation was proffered at trial. In fact, not only did the District apparently express no concerns about "overcrowding" or "undue concentration of population" at the Potomac Avenue site for the project currently under construction – 247 condominiums, retail and office space, including a national grocery chain – on December 7, 2004, the City Council passed the "Jenkins Row Economic Development Act" exempting the project from various sales and real property taxes and providing other economic incentives for the developer. DC ST § 47-4603; see also Testimony of Opper-Weiner, Trial Tr. at 81 & 103 (Nov. 30, 2006). Nor did the November Decision indicate how the construction on "blighted" land of four large 5,800 square foot single-family brick homes, which won honorable mention in the Masonry Institute Design Awards, could destabilize land values. U.S. Ex. 4, Feola Decl. ¶¶ 4, 5 & 13. At trial, the District's own

real estate expert, Richard Parley, testified that in October 2004, the Potomac Avenue property, with 24 residential units, was being used in a "low-intensity manner." Trial Tr. at 119:22-24 (Dec. 4, 2006). The District simply did not identify a legitimate zoning policy that would warrant denying a reasonable accommodation. Indeed, as with the DCRA Director's "lack of authority" to grant a reasonable accommodation request, this justification for denial was never raised again in either Karen Edwards' June 2003 letter to Boys Town or the September 2003 Decision finally approving the request. Pltfs. Tr. Exs. 212 & 216.

Thus, both the BZA's June 2002 determination that the FHA was irrelevant, when presented with a reasonable accommodation request, as well as the DCRA's November 2002 outright denial of Boys Town's subsequent October 2002 request violated the Act. See Bryant Woods Inn, Inc., 124 F.3d at 602; Groome Resources Ltd., 234 F.3d at 199. The four homes for which a reasonable accommodation was sought were fully built and ready for occupancy, with minimum alterations, by January 2003. U.S. Ex. 4, Feola Decl. ¶ 1. The delay of over 14 months to secure a reasonable accommodation to open homes for children with disabilities in the District was, in this instance, a denial that violates the FHA. See Groome, 234 F.3d at 199 (finding that a reasonable accommodation application pending 127 days without action undermin[ed] the anti-discriminatory purpose of the FHA.")

V. THE COURT SHOULD GRANT AFFIRMATIVE RELIEF

A. The Court has broad discretion to fashion injunctive and declaratory relief for violations of the FHA.

The Fair Housing Act expressly grants this Court the authority to award broad injunctive relief in this case:

> [The court] may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this title as is necessary to assure the full enjoyment of the rights granted by this title.

42 U.S.C. § 3614(d)(1)(A). The FHA also authorizes courts to award declaratory relief. See United States v. Hunter, 459 F.2d 205, 219 n.19 (4th Cir. 1972). The Supreme Court has ruled that a defendant can avoid injunctive relief only if it can demonstrate that "'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one." United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953) (Clayton Act), quoting United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945).

In an FHA case, "[i]njunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." HUD v. Blackwell, 908 F.2d 864, 874 (11th Cir. 1990) (quoting Marable v. Walker, 704 F.2d 1219, 1221 (11th Cir. 1983)). In this case, the Court should exercise its discretion to issue both declaratory and strong injunctive relief. See Nat'l Min. Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (Clean Water Act).

B. The Court should issue a declaratory judgment, general preventive injunction, and order specific affirmative relief to ensure that the District complies with the FHA.

1. The Court should issue a declaratory judgment.

The Court should issue a judgment declaring: 1) the certificate of occupancy requirement to be invalid as applied to housing for six or fewer persons intended as housing for persons with disabilities; 2) the nine challenged provisions of the District zoning regulations[27] to be invalid as applied to YRCHs intended as housing for persons with disabilities; and 3) that the District of Columbia violated the FHA by denying Boys Town's reasonable accommodation requests. 42

[27] 11 DCMR §§ 350.4(f), 358, 601.2, 616.1, 701.2, 701.3, 711.1, 721.5, 732.1 & 3203.1.

U.S.C. § 3615. In United States v. City of Parma, the court said, "[t]hough invalidation of an ordinance is a strong remedy, it is not beyond the power of a court where necessary to correct a violation." United States v. City of Parma, Ohio, 661 F.2d 562, 578 (6th Cir. 1981). Indeed, declaratory relief is the method by which 42 U.S.C. § 3615 is enforced to invalidate state and local laws that conflict with the FHA. "This provision is not self-executing, and would require legal action against the offending state or political subdivision for its enforcement." Id. at 572. In this case, the evidence shows that the District refused to grant Boys Town's reasonable accommodation requests and has applied several of the ten challenged regulations to housing intended for persons with disabilities in violation of 42 U.S.C. 3604(f)(1) and (f)(2); thus, the appropriate remedy includes a declaration by this Court pursuant to 42 U.S.C. § 3615 that the challenged actions and regulations violate the FHA.

2. General preventive injunctive relief is necessary and appropriate.

The Court should enter a general injunction prohibiting the District from, inter alia, (1) adopting, maintaining, or enforcing zoning or land use laws, regulations, policies, procedures or practices that discriminate on the basis of disability in violation of the Act; (2) implementing or administering zoning laws and procedures in such a manner as to discriminate on the basis of disability in violation of the Act; and (3) refusing to make reasonable accommodations in the application of rules, policies, practices or services when such accommodations may be necessary to afford a person or persons with disabilities an equal opportunity to use and enjoy a dwelling.[28]

An injunction issues "to prevent future violations" and is appropriate where there "exists some cognizable danger of recurrent violation." W.T. Grant Co., 345 U.S. at 633; see also S.E.C. v. Washington Inv. Network, 475 F.3d 392, 407 (D.C. Cir. 2007) (upholding entry of

[28] Such an injunction would, of course, encompass within its protection Boys Town as well as any other zoning applicants seeking housing intended for persons with disabilities.

injunction upon district court's finding "a reasonable likelihood of future violations." In this case, despite assurances to the courts in Community Housing Trust that it would address zoning regulations that discriminate against persons with disabilities, the District has failed to do so. See Cmty. Hsg. Trust, 257 F. Supp. 2d at 216; District's Answers to Interrogatories (June 21, 2007) at #12 ("no actual changes have been enacted as it relates to the District's certificate of occupancy requirement."). Moreover, the District previously entered into a Settlement Agreement with the United States in 1997, but the changes made to the District's zoning regulations have not been fully implemented and enforced. See discussion, supra, at 68. Another court in this District recently ruled that "past conduct gives rise to an inference of reasonable expectation of continued violations" for purposes of determining injunctive relief. S.E.C. v. Levine, 2007 WL 1378462, *22 (D.D.C.) (Securities Exchange Act), citing S.E.C. v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100 (2d Cir. 1972). This inference is especially apt given the District's failure to live up to past assurances that it would comply with the FHA.

3. Specific affirmative injunctive relief is required to ensure compliance with the FHA.

The Court should enter an order that:

(1) enjoins enforcement of 11 DCMR § 3203.1 against CBRFs intended to house six or fewer persons with disabilities;

(2) (a) enjoins enforcement of the portions of the nine challenged zoning regulations imposing occupancy, spacing, and special exception requirements on YRCHs for persons with disabilities;[29] (b) requires procedures for implementing 11 DCMR § 330.5(i), similar to the existing reasonable accommodation procedures, and also specifying what showing is required to demonstrate that housing is "intended for persons with handicaps" under Section 330.5(i); (c)

[29] 11 DCMR §§ 350.4(f), 358, 601.2, 616.1, 701.2, 701.3, 711.1, 721.5 & 732.1.

requires a procedure specifying what showing of handicap is required to qualify for a reasonable accommodation; (d) provides that the United States should review and the Court approve the procedures adopted pursuant to this provision for compliance with the FHA prior to their implementation;

(3) requires the District to promptly provide training on the requirements of the Court's order and the FHA to all current and new officials and employees with authority for zoning decisions;

(4) requires the District to designate promptly a qualified Fair Housing Act Compliance Officer to oversee implementation of Section 330.5(i) and reasonable accommodations and coordinate compliance with this order;

(5) requires the District to provide periodic reports to the United States detailing its compliance with the Order for a period of five years;

(6) requires the District to compile and retain for inspection by the United States records of compliance with the Court's order and of the Defendant's actions on zoning requests involving housing intended for persons with disabilities; and

(7) retains jurisdiction over compliance with the Order for a period of five years.

The proposed relief is similar to that obtained in other cases brought by the United States under the FHA. For example, the affirmative injunctive relief ordered in United States v. West Peachtree Tenth Corp., 437 F.2d 221, 228-31 (5th Cir. 1971), included: (1) the adoption of objective criteria for processing and approving rental applications; (2) notification of black applicants of the defendants' nondiscriminatory policies; (3) posting of a notice of the nondiscrimination policy, and inclusion of "equal opportunity" language in all advertising and brochures; (4) training of employees; and (5) recordkeeping and reporting requirements,

including the filing of compliance reports at three-month intervals. Courts have held West Peachtree's affirmative relief order to be a model. See United States v. Jamestown Center-in-the-Grove Apts., 557 F.2d 1079, 1080 (5th Cir. 1977) (referring to West Peachtree as "a model"); United States v. Reddoch, 467 F.2d 897, 899 (5th Cir. 1972) (affirming injunctive order because it was "modelled" on West Peachtree); United States v. Hunter, 459 F.2d 205, 214 (4th Cir. 1972); United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972); United States v. Youritan Constr. Co., 370 F. Supp. 643, 651 (N.D. Cal. 1973); United States v. Pelzer Realty Co. Inc., 537 F.2d 841, 844 (5th Cir. 1976) (affirming district court's entry of injunction against discrimination on the basis of race as remedy for discrimination against blacks).

Similarly, in United States v. City of Parma, the district court formulated a comprehensive remedial plan for that municipality which included an injunction similar to the one sought by the United States in the present case. The injunction, which was upheld on appeal: (1) declared an offending ordinance invalid; (2) required a fair housing educational program for city officials; (3) required the City to develop a plan for meeting the need for low-cost housing; (4) required an advertising campaign by the City promoting its inclusiveness; and (5) required the formation of a fair housing committee within city government. City of Parma, 661 F.2d at 576-78. See also United States v. Hous. Auth. of Chickasaw, 504 F. Supp. at 733-35 (citing West Peachtree, and ordering, inter alia, public notices, advertising, employee training, recordkeeping, and six-month reporting requirements).

(a) The Certificate of Occupancy Requirement

The Court should enjoin the District from enforcing the certificate of occupancy requirement against CBRFs for six or fewer persons intended to house persons with disabilities.

Despite Judge Kennedy's ruling in Community Housing Trust, the District has continued to apply 11 DCMR § 3203.1 to housing for six or fewer persons intended for persons with disabilities. See U.S. Ex. 13 (List of 33 CBRFs for six or fewer persons with disabilities for which the District continued to apply its certificate of occupancy requirement). During the Community Housing Trust litigation, the District reversed its decision to require a certificate of occupancy for Zeke's House (the specific group home at issue), 257 F. Supp. 2d at 218-19, and stated in discovery that the Mayor "commit[ted] to convene a Task Force to examine all oversight authority of all defendants [sic] agencies regarding group homes in general and specifically to review the impact of the zoning regulations on group homes." U.S. Ex. 17, District's 3/8/02 Answer to Plaintiff's First Set of Interrogatory No. 8 in the Community Housing Trust case; see also U.S. Ex. 18 (District's 10/9/01 Notice of Infraction Dismissal Request to Community Housing Trust explaining that notice of infraction with respect to operating Zeke's House without a certificate of occupancy is being dismissed because the "Mayor is forming a Task Force to examine and clarify the law and regulation which informed the basis of violation and subsequent infraction") & U.S. Ex. 19 (12/2/02 letter from D.C. Zoning Administrator to plaintiff in Community Housing Trust referring to "pending revision of Title 11 of the District's Municipal Regulations" with respect to certificates of occupancy). However, this Task Force was short-lived and never resulted in any revision of the certificate of occupancy provision which Community Housing Trust declared invalid and which is now subject again to challenge by the United States. District's Answers to the United States' Second Set of Interrogatories #12 (June 21, 2007). The April 2003 statement by the court in Community Housing Trust that the District has "not altered Title 11, and [it] ha[s] made no firm promise to do so," 257 F. Supp. 2d at 219, is still true today.

Therefore, it is an appropriate remedy in this case to specifically enjoin the District from enforcing the certificate of occupancy requirement in 11 DCMR § 3203.1 against housing for six or fewer persons with disabilities. See City of Parma, 661 F.2d at 578; United States v. City of Black Jack, Mo., 508 F.2d 1179, 1188 (8th Cir. 1974) (remanded "with instructions to the district court to enter a permanent injunction upon receipt of this Court's order, enjoining the enforcement of the [challenged] ordinance").

(b) The Nine Challenged Spacing, Occupancy and Special Exception Regulations.

The District should also be enjoined from enforcing the discriminatory portions of the nine challenged regulations, 11 DCMR §§ 350.4(f), 358, 601.2, 616.1, 701.2, 701.3, 711.1, 721.5 & 732.1, which impose occupancy, spacing and special exception requirements on YRCHs intended as housing for persons with disabilities in the R-5, CR, C-1 and C-2 zones, unless and until the District amends its zoning regulations to comply with the FHA, and develops adequate procedures for implementing Section 330.5(i) in an effective, non-discriminatory way. If, as the District argues, a broad exemption for housing for persons with disabilities is the *intent* (even though it has not been the *effect*) of the existing Section 330.5(i), the remedy to the regulations should be relatively simple: the District should add language to each of the challenged provisions that clearly and unambiguously incorporates the exemption of Section 330.5(i). Until that time, the District should be enjoined from enforcing the challenged regulations.

(c) Procedures for Implementing Section 330.5(i) and Reasonable Accommodation.

The experiences of Boys Town, Zeke's House and Samaritan Inns, demonstrate that the District has repeatedly failed to implement clear, consistent standards for the zoning provisions governing housing for people with disabilities. To give just a few examples:

- Few, if any, District officials – from the members of the BZA to the employees and officials of the DCRA – expressed any awareness of the existence of Section 330.5(i) during the times Boys Town was attempting to obtain permits. See U.S. Ex. 4, Feola Decl. ¶ 9; discussion, infra, at 42-46.
- Boys Town's attorney Phil Feola, a real estate lawyer with 27 years of experience in land use and zoning in the District, testified that he chose to submit a reasonable accommodation request rather than a request under Section 330.5(i) for the four long-term homes because there were defined procedures for making the reasonable accommodation request and a specific time frame (45 days) within which the District had to make a determination about the request (or it would be automatically granted (14 DCMR §111.12)). Indeed, at the time Mr. Feola submitted Boys Town's reasonable accommodation request in October 2002, a Section 330.5(i) application for the short term shelter had been lingering with DCRA for over five months with no determination in sight. U.S. Ex. 4, Feola Decl. ¶ 11.
- There was confusion at the highest levels regarding responsibility for the reasonable accommodation determination under 14 DCMR § 111, as the BZA refused to hear Boys Town's evidence regarding the FHA and its need for a reasonable accommodation while just months later the DCRA director refused to grant the same reasonable accommodation request, claiming that only the BZA and Zoning Commission had such authority. See discussion, supra at 9-10 & 22-24.
- District officials conflated Boys Town's request for a reasonable accommodation with a Section 330.5(i) exemption in the September 2003 letter allowing Boys Town's four homes to move forward. This confusion had real, negative consequences, as it allowed

opponents of Boys Town's project to appeal the September 2003 determination in two different fora – both to the BZA (Section 330.5(i) exemption) and to the District of Columbia Superior Court (reasonable accommodation). Testimony of Feola, Trial Tr. at 24 & 25 (p.m. session).

Less comprehensive remedies from past cases challenging the District's application of its zoning code to people with disabilities, including the 1997 Stipulated Agreement resolving potential litigation with the United States, have failed to remedy continuing violations or to ensure the District's compliance with the FHA. For example, the District met the requirements of the 1997 Stipulated Agreement in a technical way, amending the specifically designated regulations, but it took no apparent steps to ensure the successful implementation of the remedial measures outlined by the Agreement. In order to ensure that the remedial measures achieve effective compliance this time, the Court should require the District to develop written procedures that implement section 330.5(i) as an effective exemption for housing for persons with disabilities in R-5, CR, C-1 and C-2 zones and that provide a clear standard for applicants to demonstrate proof of disability. The District should be required to submit its proposed procedures to the United States within 30 days of entry of the order and the proposal should be subject to approval by the Court. See West Peachtree, 437 F.2d at 230 (ordering defendants to develop objective standards and provide plaintiff United States with opportunity to review and object).

i. 11 DCMR 330.5(i)

The Court should direct the District to develop procedures that provide clear standards for seeking and obtaining exemption under Section 330.5(i) from the discriminatory occupancy, spacing and special exception requirements in R-5, CR, C-1 and C-2 zones. The procedures

should include provisions to: designate the persons or officials with authority to grant exemptions; specify the information that must be supplied by the applicants, including any proof of disability (as discussed below) and provide for confidentiality as appropriate; establish procedures for conducting any inquiry into the exemption application; establish specific time frames within which action by the District is required; establish consequences for the District's failure to respond in a timely manner to Section 330.5(i) exemption requests; and require a written explanation for each decision rendered on applications for exemption under Section 330.5(i). The Court should likewise ensure that the procedures prohibit consideration of potential biases of community opponents during consideration of an application for housing for persons with disabilities.

ii. Proof of Disability

The Court should direct the District to develop procedures specifying what showing regarding the disabilities of residents or prospective residents will be required to qualify an applicant for a reasonable accommodation under 14 DCMR § 111 or an exemption under 11 DCMR § 330.5(i). The experiences of Boys Town in seeking both reasonable accommodations and exemption under Section 330.5(i) illustrate that this lack of any specific standard for such a showing leaves open the field for decisions by District officials that violate the FHA. See discussion, supra, at 20-31.[30]

The existing reasonable accommodation regulations do not require – or even mention – a showing by the requestor to establish a disability. Yet the District denied Boys Town's reasonable accommodation application based in part on the asserted failure to adequately show

[30] In Community Housing Trust, the District specifically refused to concede that the mentally disabled residents of Zeke's House would be "handicapped" as defined by the FHA; the court determined that the mental disabilities of the Zeke's House residents did qualify them for the protection of the FHA for persons with disabilities. 257 F. Supp. 2d at 221.

disability. In deposition testimony for this case, former DCRA Director David Clark, who signed the decision denying that request, testified that he had no opinion as to what might constitute adequate proof of disability for purposes of a reasonable accommodation request. U.S. Ex.16, Clark Dep. 330 (June 22, 2006). He also indicated that he was uncertain if the FHA required an affidavit or some professional opinion in order for a reasonable accommodation to be granted. Id. at 332-333. Thus, the District's lack of clear procedures regarding a showing of disability subjects the applicants for a reasonable accommodation to the continuing potential for error and inequity. Clear procedures on which zoning applicants may rely are needed to articulate the standards of acceptable proof for demonstrating a qualifying disability for purposes of a reasonable accommodation or for an exemption under Section 330.5(i). Cf. 24 C.F.R. § 100.202(c) (describing permissible inquiries regarding disability of prospective tenants in non-zoning context); Joint Statement of the Department Of Housing and Urban Development And the Department Of Justice, Reasonable Accommodations under the Fair Housing Act (Annotated) (May 17, 2004). U.S. Ex. 20.

(d) Training Requirements

The Court should order that the District provide training within 120 days of the date of the order with regard to the requirements of the FHA to all officials and employees with responsibilities for zoning, permitting and certificate of occupancy matters. See Chickasaw, 504 F.Supp at 734; City of Parma, 661 F.2d at 577. In City of Parma, the Sixth Circuit said it could see "no objection to requiring an educational program to acquaint those officials and employees of the City who are responsible for carrying out the terms of the remedial order of their obligations thereunder." 661 F.2d at 577.

The District has failed to provide officials and employees with adequate training

regarding the FHA, its own reasonable accommodation regulations and its Section 330.5(i) provision. Indeed several key District zoning officials testified that they had received no fair housing training. Former Zoning Administrator Olutoye Bello, (October 2004 - May 2005), testified in a 2002 deposition in the Community Housing Trust case (five years after the Stipulated Agreement with the United States) that he was not aware of any persons in the zoning administration office, including himself, that had training in fair housing laws and that there was no typical way that his office dealt with fair housing issues nor typical people to consult when a FHA issue arose. U.S. Ex. 14, Bello Dep. 14-15 (March 18, 2002).[31] Michael Johnson, who preceded Mr. Bello, testified during his deposition in the same case that he was familiar with the requirements of the FHA "kind of through osmosis." U.S. Ex. 21, Johnson Dep. 160 (March 1, 2002). Another former zoning administrator, Robert Kelly, testified at deposition that he received no training on the FHA while employed by the District (Dep. 110 (April 24, 2006)), nor any training with respect to permit review process. Id. at 55. David Clark, the DCRA Director during the time that Boys Town submitted its reasonable accommodation requests and its Section 330.5(i) exemption application that were denied, confirmed in deposition that he had

[31] During Mr. Bello's January 27, 2006 deposition testimony in this case, he reported that following the Community Housing Trust settlement some District zoning officials attended a fair housing training course in May 2005 "which translated into at least the staff not summarily declining an application without checking with the [zoning] administrator, particularly where an application in the case involved persons with disabilities. However, Mr. Bello testified that the then-DCRA Director, while scheduled to attend, "didn't make it." U.S. Ex. 5, Bello Dep. 125-130. While this May 2005 training is the only specific training for zoning officials identified by the District, the District has also generally asserted that District officials are "instructed on the requirements of the Federal Fair Housing Act by the office of General Counsel for the Department of Mental Health" and that the DC Office of Human Rights' Fair Housing Program conducts "monthly and yearly instruction . . . on the FHA for the public and all District agencies" but that "the District does not have further information on what zoning officials attended the [May 2005] training or further information on what other formal and informal training zoning officials may have received." U.S. Ex.1, District's Responses to Interrog. No. 1 (June 27, 2007).

received no training or education from the District with regard to the FHA. Dep. 330 (June 22, 2006).[32] Loraine Bennett, the former Director of the Development Ambassador Program at DCRA, testified during trial that she had received no training in the Fair Housing Act. Testimony of Bennett, Trial Tr. at 30 (December 5, 2006).

Thus, training on the Court's Order and its requirements, and the Fair Housing Act, should be mandated for all District officials and employees with responsibility for administering and enforcing the zoning regulations. These should include, but not be limited to, members of the Board of Zoning Adjustment, members of the Zoning Commission, the Fair Housing Act Compliance Officer designated pursuant to the Court's order, and the Director, Zoning Administrator and all other employees of the Department of Consumer and Regulatory Affairs with authority to make recommendations or decisions on zoning matters. The District should also be required throughout the term of the order to provide training for new officials and employees with responsibilities for zoning decisions in the requirements of the FHA, this Order and in the reasonable accommodation process to ensure a continuing understanding of the rights of persons with disabilities under the FHA.

(e) Fair Housing Act Compliance Officer

The District also should be required to designate, within 60 days of entry of the order, a full-time Fair Housing Act Compliance Officer with a background in fair housing within the DCRA to: coordinate training of officials and employees; oversee the development and implementation of procedures required by the judgment in this case; serve as a liaison to assist both District officials and applicants to navigate the zoning process for housing intended for

[32] Referring to the R-1 through R-5 zones, Mr. Clark also testified that "I'm not enough of a zoning expert to tell you what the R whatever means." Ex. 15, Clark Dep. 49 (June 14, 2006)

persons with disabilities; review the handling of requests for reasonable accommodation and exemptions under Section 330.5(i); review zoning proposals affecting persons with disabilities; coordinate the District's compliance with the reporting and recordkeeping provisions of the Court's order; and assist the District in avoiding future violations of the FHA. In City of Parma, the court "strongly endorse[d] the requirement that a fair housing committee be established within city government" as a major component of the remedial plan. 661 F.2d at 577. The court noted that the formation of such a committee presented the "best hope" for the future resolution of the issues identified in the City of Parma litigation. Id. In this case, a Fair Housing Act compliance officer for the District could serve similar functions to those envisioned for the committee in the City of Parma order, heading off future violations and coordinating the District's response to Fair Housing Act issues.

District officials' failure to take responsibility for their obligations under the FHA and the zoning regulations concerning housing intended for persons with disabilities is remarkable. As noted above, former DCRA Director David Clark's letter denying Boys Town's reasonable accommodation request indicated that he did not have authority to grant a reasonable accommodation, despite the express language of 14 DCMR § 111 designating the Director of the DCRA as the decisionmaker on requests for reasonable accommodation. Pltfs. Tr. Ex. 196. When Mr. Clark was asked at deposition about the specific provisions of the District's reasonable accommodation regulations, he stated that he was not aware that they were promulgated pursuant to the 1997 Stipulated Agreement and, in fact, had never heard of or seen a copy of the 1997 Agreement until that day's deposition (even though a copy of the Stipulated Agreement was attached to Boys Town's 2002 reasonable accommodation application). U.S. Ex. 15, Clark Dep. 145-146 (June 14, 2006). Mr. Clark further testified that when faced with

such a request, he would turn to the zoning administrator "who is the person on staff best qualified" to make a decision "based upon their knowledge of zoning law. And once that person makes a determination, then the decision would be issued by the director." Id. at 151-152 (June 14, 2006) & 257-258 (June 22, 2006).[33] With respect to the November Decision, Mr. Clark claims that the decision was not written "solely by him or even primarily by him." Id. at 173-174 (June 14, 2006). He recalled that Robert Kelly who was the zoning administrator at the time, was certainly involved in the decision. Id. at 154-155. Mr. Clark did not read "page by page" through the reasonable accommodation request. Id. at 158. When Robert Kelly, the Zoning Administrator, was asked about his role in the November 2002 reasonable accommodation denial, he testified at deposition that while he may have helped gather some information (e.g., the definition of the FHA) for the District's response to Boys Town's October 2002 reasonable accommodation request (Kelly Dep. 123 (April 12, 2006), he did not participate in the determination to deny the request (id. at 124), did not consult with DCRA Director Clark when Mr. Clark was making the determination (id.), and did not see the denial letter before it was sent to Boys Town. Id. at 125. Even so, the denial cover letter from David Clark to Boys Town stated: "If you have any questions, or if we can be of further assistance, please contact Robert W. Kelly, Zoning Administrator." Pltfs. Tr. Ex. 196. When asked whether Mr. Clark provided him with any information or material that would have assisted him in responding to Boys Town's questions or requests for assistance regarding the November Decision, Mr. Kelly could not remember any. Kelly Dep. 120-121 (April 12, 2006).

Designating a Fair Housing Act Compliance Officer would prevent this "passing the

[33] According to Mr. Clark: " I'm not an expert on matter-of-right use. I'm not an expert on zoning. I came to the office as a business manager and as the person to manage it. So I'm not qualified nor am I going to make any legal decisions." Id. at 280 (June 22, 2006).

buck" by District officials on FHA disability issues. Finally, as discussed above, both DCRA and the BZA failed to apply Section 330.5(i), and the BZA refused to consider whether Boys Town's proposal was housing intended for persons with disabilities, but instead dismissed the issue as irrelevant to their consideration of Boys Town's request. Pltfs. Trial Ex. 164, BZA Opinion 16791 p. 38. Requiring the District to designate a knowledgeable official able to serve as a resource for applicants seeking permits for housing for persons with disabilities as a resource for District officials, and as a resource for District officials, should help to ensure proper District implementation of the procedures required to comply with the FHA.

(f) Periodic Reporting and Recordkeeping

The Court should also require the District to provide the United States with semi-annual reports that set forth its compliance efforts beginning 180 days after entry of the order. Such a reporting schedule will help to ensure that the milestones for compliance are met and that the parties may work together to overcome obstacles to compliance as they arise. The Court also should direct the District to organize and maintain records of all permit applications and zoning actions with regard to housing for persons with disabilities, including but not limited to, all requests for reasonable accommodation or exemption under Section 330.5(i). The District has not kept adequate records regarding these matters in the past. U.S. Ex. 23, District's Answers to United States' First Set of Interrogatories No. 14 (March 18, 2005) & U.S. Ex. 24, District's Answers to United States' First Requests for Production of Documents No. 13 (March 18, 2005); U.S. Ex. 3, 1997 Stipulated Agreement at 7-8; U.S. Ex. 25, Declaration of Michael Stickley (summarizing United States' efforts to identify District zoning records related to building permits, certificates of occupancy, reasonable accommodation requests and Section 330.5(i) exemption requests, if any, for the CBRFs identified by the District during discovery).

(g) Jurisdiction

For both consent decrees and litigated judgments under the FHA, courts typically retain jurisdiction for a number of years to ensure compliance. Most such orders have durations of between one and five years, with their length being affected by factors such as the nature and seriousness of the violation, and whether the lawsuit involved a single incident or a pattern of conduct. United States v. DiMucci, 879 F.2d 1488, 1493 (7th Cir. 1989) (record keeping and reporting requirements for three years); West Peachtree Tenth Corp., 437 F.2d at 231 (record keeping and reporting requirements for two years). In this case, due to the continuing and repeated nature of violations by District officials, the Court's continuing jurisdiction for five years is necessary to ensure compliance with the order.

VI. CIVIL PENALTIES

A. Civil Penalties are Appropriate in this Case.

This Court should award the United States a civil penalty of $110,000 for the District's continuing violations of the Fair Housing Act. The FHA provides that civil penalties can be awarded for actions brought under Section 3614. 42 U.S.C. § 3614(d)(1)(C) (the court "may, to vindicate the public interest, assess a civil penalty against the respondent: (i)in an amount not exceeding $50,000, for a first violation; and (ii) in an amount not exceeding $100,000, for any subsequent violation").[34] Courts have held that municipalities are subject to civil penalties under the FHA. See Smith & Lee Assoc., Inc. v. City of Taylor, 13 F.3d 920, 932-33 (6th Cir. 1993) (holding that the district court could award a civil penalty, but remanding for determination of

[34] The Attorney General may adjust this maximum statutory penalty upward to account for inflation, in accordance with the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (codified as amended at 28 U.S.C. 2461 (Supp. II 1996)). Pursuant to this procedure, the limits for the civil penalties are now set at $55,000 and $110,000. See 28 C.F.R. § 85.3(b)(3) (2001).

liability); see also United States v. Borough of Audubon, 797 F. Supp. 353, 363 (D.N.J. 1991) (awarding a civil penalty of $10,000 against municipal defendant for intentional violations of the FHA).

The District of Columbia has repeatedly violated the rights of persons with disabilities protected under the Fair Housing Act; failed to correct the provisions of its zoning regulations that violate (or allow the violation of) the Fair Housing Act; and failed to take appropriate steps to ensure that District officials complied with the FHA. First, in the 1997 Stipulated Agreement, the District did not dispute that it had in place discriminatory zoning regulations and that it had previously had no mechanism for obtaining a reasonable accommodation from zoning regulations, despite the reasonable accommodation requirements added to the FHA nine years earlier. Second, in the Community Housing Trust case, the Court found that the District's certificate of occupancy requirements for CBRFs of six or fewer persons with disabilities violated the FHA. Yet despite these repeated and explicit notices and findings of regulations and practices that ran afoul of the FHA's requirements, the District failed to take the steps necessary to avoid the violations in this case. Under these circumstances, a civil penalty of $110,000 for these "subsequent violations" of the FHA is clearly justified. See HUD v. Gruzdaitis, Fair Housing–Fair Lending ¶ 25,137 at pp. 26,136-38 (HUD ALJ 1998) (assessing a $25,000 penalty against the defendant for FHA racial discrimination, where defendant had committed previous FHA violation); see also Reich v. D.M. Sabia Co., 90 F.3d 854, 860 (3d Cir. 1996) (OSHA) ("enhanced liability for a second or subsequent violation of the same or similar regulation or standard is appropriate because once an employer has been found to have violated the Act, it is reasonable to expect that extra precautions will be taken to prevent a 'repeated' violation.").

VII. CONCLUSION

For the foregoing reasons, the Court should grant the United States' Motion for Injunctive Relief and Civil Penalties, declaring the challenged portions of the ten zoning regulations invalid, ordering full injunctive and declaratory relief and awarding a civil penalty to the United States of $110,000.

Respectfully Submitted,

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