UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JEFFREY O., et al.,

Plaintiffs,

v.

CITY OF BOCA RATON,

Defendant.
_____/

CASE NO. 03-80178-CIV-Middlebrooks

Magistrate Judge Johnson

**CITY OF BOCA RATON'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (AND IN FAVOR OF CITY'S CROSS-MOTION)**

Defendant, the City of Boca Raton (the "City"), submits the following memorandum in opposition to the Plaintiffs' Motion for Partial Summary Judgment [DE 140], including Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment ("Plaintiffs' Memorandum") [DE 141] filed by the Plaintiffs, Bobby Hoover, Todd Conroy, Doug Byers, and Matthew Wolf (collectively, the "Individual Plaintiffs"), Regency Properties of Boca Raton, Inc. ("Boca House") and Awakenings of Florida, Inc. ("Awakenings")(Boca House and Awakenings will be collectively referred to as the "Corporate Plaintiffs"), and in support of the City's Cross-Motion for Summary Judgment, and states:

## I. OVERVIEW

The Plaintiffs' Motion for Partial Summary Judgment (the "Motion") is wholly reliant upon three premises: (1) that the individual plaintiffs (and the other participants in the Corporate Plaintiffs' recovery program) are "disabled" and "handicapped," (2) that the City's Zoning Code bans recovering substance abusers from living in all residentially zoned area of the City, and (3) that the Corporate Plaintiffs' facilities are similar to apartment buildings and should be treated the same. Each of these premises is fundamentally flawed.

First, the Individual Plaintiffs (and all of the participants in the recovery program) concededly are not substantially impaired in any major life activities – they all testified that they can do anything that any other person can do. Thus, they do not meet the definition of "handicapped" and "disabled."

Second, the City's Zoning Code allows recovering substance abusers to live anywhere in the City that they would like – they can live in any single family home or apartment that they choose. If they desire to live in a sober or more structured environment, they can do that as well. Up to three unrelated persons per unit may live in any home or apartment unit (so long as there is no treatment or drug testing), or they can live in a licensed "community residential home" with up to six people in single family neighborhoods and fourteen people in multi-family neighborhoods. "Community residential homes" may have more than three unrelated persons per unit, provide treatment and drug test. If persons desire to live in a very large substance abuse treatment facility, that is available as well, provided it is located in the appropriate medical or RB-1 zoning districts (which have compatible uses).

Third, the for-profit, Corporate Plaintiffs' facilities are substantially different than standard apartment buildings because, in addition to housing, they also provide the participants with a "unique recovery program," consisting of, among other things: on-site individual therapy sessions (from "affiliated" therapists paid through the Corporate Plaintiffs), on-site morning meetings and life skills meetings (organized and run by staff and/or independent contractors paid by the Corporate Plaintiffs), on-site AA/NA meetings, mandatory drug testing, mandatory medication storage by staff, a three-phase progression program, strict curfews, a ban on overnight guests, mandatory daily room inspections by staff, a money retention program, immediate discharge and forfeiture of deposit and last week's rent for using drugs or alcohol (notwithstanding Florida's landlord-tenant law), as well as many other strict rules. If these facilities were simply furnishing housing to recovering substance abusers, they would be treated the same as "apartment buildings" and would be allowed in multifamily zoned districts. The "unique recovery program," however, differentiates these facilities from normal apartment buildings. Thus, the City may treat these different uses differently, not because it is discriminating against anyone, but merely because the facilities are not "similarly situated" to standard apartment buildings.

For these and the other reasons set forth below, the Plaintiffs' Motion for Partial Summary Judgment should be denied, and the City's Cross-Motion for Partial Summary Judgment should be granted.

## II. BACKGROUND

This case concerns unlicensed[1] mega-sober houses operated by the Corporate Plaintiffs in the City's multi-family residential districts. These facilities are not residential in nature – instead, they are medical and commercial operations that warehouse and institutionalize, rather than mainstream, recovering addicts.[2] The City's Zoning Code, consistent with the purpose of all zoning codes, seeks to group compatible uses and segregate incompatible uses. Accordingly, operations of these non-residential facilities (so long as they continue to be medical and commercial in nature) are only permitted in appropriate zoning categories.

### A. The City's Zoning Code Provides Substantial Housing Opportunities to Recovering Substance Abusers

Contrary to Plaintiffs' characterization, the City's Zoning Code provides substantial housing opportunities for recovering addicts to live in the City.[3] The City's Code does not

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[1] In 2002, the Corporate Plaintiffs exchanged various letters with the Department of Children & Families as to whether they were required to be licensed. DCF ultimately stated that Boca House and Awakenings did not need to be licensed, based only on the representations that were made to it that the Corporate Plaintiffs had no involvement with scheduling and payment for individual therapy, that no referrals were made, that attendance at Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA") meetings was voluntary, that on-site meetings were facilitated by residents rather than staff, and that phases of treatment would not be used. *See* Part I, at ¶5, City's "Statement of Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment (and in Favor of Cross-Motion)" (to be cited as "City's Facts, Part __, ¶__"). These representations are not true. *See,* City's Facts, Part II, at ¶¶ 1-21, and citations therein.

[2] This is contrary to the salutary purpose of the Fair Housing Amendments Act ("FHAA") is to ensure that the disabled are not excluded from the American mainstream in housing opportunities. *See, e.g., Lapid-Laurel, L.L.C. v. Township of Scotch Plains*, 284 F.3d 442 (3rd 2002); *Smith & Lee Associates, Inc. v. City of Taylor*, 102 F.3d 781 (6th Cir. 1996); *Bangerter v. Orem City Corp*., 46 F.3d 1491 (10th Cir. 1995).

[3] The ordinance herein, Ordinance No. 4649, and as amended by Ordinance No. 4701 (attached as Exhibits "1" and "2")("Ordinance No. 4649") is modeled on State legislation designed to support recovering addicts and enhance the availability of positive housing environments conducive to their recovery. *See*, Florida Statutes § 397.311. Additionally, the definition of "family" in Section 28-2 of the City's Zoning Code ("City Code"), of which the Plaintiffs also complain, is superseded in its application to disabled persons by the housing opportunities available through "community residential homes," whereby unrelated residents of licensed homes in groups of up to 14 persons are deemed to be the equivalent of a "family" for zoning purposes. *See*, Section 28-1304, City Code, attached hereto as Exhibit "3." These provisions, also modeled on State legislation, are designed to support the "mainstreaming" of disabled persons into residential communities. *See*, § 419.001, Florida Statutes.

prohibit recovering substance abusers from living in any residential district that they desire or in any single family home or apartment. If they desire to live in a sober environment, they can do that as well. Up to three unrelated persons per unit may live in any home or apartment unit (so long as there is no treatment or drug testing). The owner of an apartment building may operate an apartment building in a multi-family district that is rented only to recovering substance abusers – so long as it is limited to residential uses (no treatment, drug testing, mandatory meetings, etc.). If they desire to live in a more structured environment, that is also available. Recovering substance abusers can choose to live in a licensed "community residential home"[4] with up to six people in single family neighborhoods and fourteen people in multi-family neighborhoods. "Community residential homes" may have more than three unrelated persons, may provide treatment and may drug test. This, effectively, gives recovering substance abusers more options than the general population (who would not be able to have more than 3 unrelated people per unit and could not have treatment or drug testing in residential neighborhoods). Finally, if a recovering substance abuser desires to live in a very large substance abuse treatment facility, that option is available as well, provided it is located in the appropriate medical or RB-1 zoning districts (which have compatible uses).

"Substance abuse treatment facilities" are subject to the same fundamental zoning principles that are imposed on other facilities: large scale, commercial/medical uses are not permitted uses in any of the City's residential districts. Pursuant to Ordinance No. 4649, if a facility provides both housing *and* a recovery program, the City classifies these uses as commercial and medical, rather than residential. *See* Ex. "1" and "2." Accordingly, they may be located in a medical district (MC) or in a commercial district (Motel-Business R-B-1), where they exist with other facilities sharing these same characteristics.[5]

**B. The Fair Housing Amendments Act Did Not Abolish Local Zoning Codes**

The FHAA is a "clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *ARC of New Jersey, Inc. v. State of New Jersey*, 950 F. Supp. 637, 642 (3d Cir. 1996), *citing Helen L. v. DiDario*, 46 F.3d

[4] "In addition, Community Residential Homes are defined in and regulated by Section 28-1304, City Code and Section 419.001, Florida Statutes, and therefore are not Substance Abuse Treatment Facilities." *See* Ordinance No. 4649.

[5] *See* Sections 28-743 (R-B-1); 28-922 (MC), City Code, attached as Exhibits "4" and "5."

325, 333 n. 14 (3d Cir.) (quoting H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988)). "In enacting the FHAA, Congress clearly did not contemplate abandoning the deference that courts have traditionally shown to … local zoning codes" nor to give the disabled "carte blanche to determine where and how they would live regardless of zoning ordinances to the contrary." *Bryant Woods Inn, Inc. v. Howard County, Maryland*, 124 F.3d 597 (4th Cir. 1997). As the United States Supreme Court in *City of Edmonds v. Oxford House, Inc*., 514 U.S. 725, 115 S.Ct. 1776 (1995) has stated:

> Land-use restrictions designate "districts in which only compatibles uses are allowed and incompatible uses are excluded." [Citations omitted.] These restrictions typically categorize uses as single-family residential, multiple-family residential, commercial or industrial. [Citations omitted.] Land use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard. *Village of Euclid v. Ambler Realty Co*., 272 U.S.365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926). [6]

This case involves compatible and incompatible uses, not discrimination against disabled, recovering addicts.

The FHAA should not be cast "in the unlikely role of an engine for the destruction of zoning. Zoning may be good or bad, but the FHAA is not the charter of its abolition." *Hemisphere Building Company, Inc. v. Village of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999). In order for zoning to discriminate against the handicapped, it must hurt handicapped people "*by reason of their handicap*, not by virtue of what they have in common with other people…." *Hemisphere*, 171 F.3d at 440 (emphasis by italics in original). This interplay between traditional zoning functions and the FHAA is evident in the terms of the FHAA itself. The FHAA declares it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such a dwelling, because of a handicap…." 42 U.S.C. §3604(f)(2). *See Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170, 178 (3d Cir. 2005). In order for a policy to be discriminatory under the FHAA, the disabled status - the protected trait - must be "used as the *basis* for different treatment." *Id.* (emphasis in original). Where, as here, zoning ordinance addresses compatible and incompatible uses which are applied to the disabled and non-disabled alike, that ordinance does not discriminate on the basis of a disability.

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[6] Unless otherwise noted, emphasis is added throughout this memorandum.

In *Hemisphere, supra*, the Seventh Circuit upheld the municipality's denial of a developer's request for a zoning change that would have allowed the developer to build multi-unit residences designed to meet the needs of wheel-chair bound handicapped persons in a single-family district, and to further exceed the municipality's density requirements for multi-family districts. The developer contended that the interest at stake was that of handicapped people in being able to obtain suitable housing at the lowest possible price. The court rejected this argument. It reasoned: "…[A] zoning ordinance that merely raises the cost of housing hurts everyone who would prefer to pay less and forgo whatever benefits the higher cost confers, and so need not be waived for the handicapped." 171 F.3d at 440. The court concluded that the zoning requirements at issue did not discriminate in violation of the FHAA, in that the zoning did not hurt the disabled by reason of the disability, but "by virtue of what they have in common with other people." *Id.*

Similarly, where an owner of group homes for the disabled failed to extend water and sewage lines to the edge of its property line, as required, and the municipality accordingly shut off the water supply, the owner's challenge to the municipality's action under the FHAA was rejected. *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557 (7th Cir. 2003). As the Seventh Circuit explained,

> The city did not deny developmentally disabled adults the opportunity for group living. The city denied water to a certain lot, and because that lot has no water it cannot be inhabited by Good Shepherd's residents, or by anyone else for that matter. These developmentally disabled adults are no differently affected by the lack of water than any other resident would have been…. Cutting off water prevents anyone from living in a dwelling, not just handicapped people, and therefore the prohibitions found in the FHAA…do not apply in this case.

*Good Shepherd*, 323 F.3d at 562. As described in *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170, 178-179 (3d Cir. 2005), a case discussed more fully below, a rule that prohibits seeing-eye dogs discriminates against the blind by "proxy." However, a rule that requires all domesticated dogs to be vaccinated does not discriminate "because of" a disability, even though a seeing-eye dog would fall subject to the requirement.

Thus, the purpose of the FHAA is to "prohibit []local governments from applying land use restrictions in a manner that will…give disabled people less opportunity to live in certain neighborhoods than people without disabilities." *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557 (7th Cir. 2003), citing *Oconomowoc Residential Programs, Inc. v.*

*City of Milwaukee,* 300 F.3d 775, 784 (7th Cir. 2002), quoting *Smith & Lee Associates v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996). It does not mean, however, that handicapped facilities are afforded "carte blanche" when it comes to zoning principles that apply across the board to non-disabled and disabled alike.

**III. Plaintiffs Lack Standing Because they are not "Disabled" or "Handicapped"**

As a threshold matter, Plaintiffs fail to establish that they have standing under the FHAA (or ADA). Accordingly, the City has moved for summary judgment as to the claims in Counts I to VI and Counts VIII to XII. The City reasserts these grounds herein, and refers the Court to its pending Motion for Partial Summary Judgment and accompanying papers. *See* [DE 110, 111 and 130].[7]

**IV. Summary Judgment Should be Entered in Favor of the City, not Plaintiffs, as to the Plaintiffs' Claim That Ordinance No. 4649 is Facially Invalid under the FHAA (Count I) and the ADA (Count IV)**

The Plaintiffs seek summary judgment on Count I of the Third Amended Complaint on the theory that Ordinance No. 4649 is "facially invalid" – that, on its face, it treats "disabled" recovering substance abusers differently than "similarly situated individuals without disabilities" because of their alleged disability (also referred to as "disparate treatment"). *See* Plaintiffs' Memorandum, p.9. Ordinance No. 4649, however, does not discriminate "because of" a disability. It prohibits only large scale commercial and medical uses in residential locations — uses that are NOT otherwise permitted in residential districts to the non-disabled. *See*, Code, Art. IX and Art. X.

[7] Plaintiffs filed declarations of three residents in support of their Motion for Summary Judgment. These self-serving declarations appear to attempt to demonstrate an inability by these three residents to perform certain activities (none of which are "major life activities"). The City immediately sought to depose these three individuals. One (Frank Jichetti) has been withdrawn by the Plaintiffs. The other two are set for deposition after the extended deadline for the filing of this Response. Accordingly, the City has not yet been able to test the validity of the assertions contained in the affidavits. Interestingly, the Corporate Plaintiffs' executive director testified that he knew each of the three new declarants (who were never previously disclosed) and that they are each able to do everything that non-substance abusers can do. City's Facts, Part II, ¶25. Thus, once again, the testimony establishes that the Corporate Plaintiffs' residents are not substantially limited in their major life activities.

### A. Plaintiffs Fail to Make Out a Prima Facie Case That Ordinance No. 4649 Facially Discriminates in Violation of the FHAA and ADA

"In order to make out a prima facie violation of the FHA under a disparate treatment theory, a plaintiff needs to show that the defendant expressly treats members of a protected group differently than others who are similarly situated." *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1495 (W.D. Wash. 1997)(regarding differential treatment on the face of an ordinance). "A case of disparate treatment may be established against a public entity by demonstrating that a given legislative provision discriminates against the handicapped on its face, i.e. applies different rules to the disabled than are applied to others." *ARC of New Jersey, Inc. v. State of New Jersey*, 950 F. Supp. 637, 643 (D.N.J. 1996). *See also, Bangerter v. Orem City Corp.*, 46 F.3d 1491,1501 (10th Cir. 1995) (a prima facie case of facial discrimination is made out by showing "that a protected group has been subjected to explicitly differential—i.e. discriminatory—treatment"); *Community House, Inc. v. City of Boise*, 2006 WL 3231393 (9th Cir. Nov. 9, 2006) ("The men-only policy is facially discriminatory because it explicitly treats women and families different from men.") That Plaintiffs fail to meet their burden of making out a prima facie case in this case is evident: Ordinance No. 4649 does not apply different rules to recovering addicts than the City's Zoning Code applies to ordinary residents (in fact, Ordinance No. 4649 does not apply any rules to individuals, rather it merely sets appropriate locations for commercial uses). Accordingly, the Court should enter summary judgment in favor of the City on Count I of Plaintiffs' Third Amended Complaint, and based upon the same reasoning, Count IV (the parallel count for facially invalidity under the ADA).

#### 1. Location of "Substance Abuse Treatment Facilities" in medical or commercial districts

As set forth above, Ordinance No. 4649 permits non-licensed facilities that do not condition occupancy on drug-testing or participation in rehabilitation or treatment activities to locate in residential districts. Additionally, Ordinance No. 4649 in fact permits these medical and commercial uses in residential districts, provided that the facility is licensed as a "community residential home." Furthermore, a recovering addict wishing to live in a large group setting in a residential district is free to do so under Ordinance No. 4649, as long as no commercial and medical uses occur on the property as a condition of occupancy.

Thus, of the housing options available to recovering addicts under the City's Code, only "substance abuse treatment facilities," as defined, are located in an MC district as a permitted

use, along with, *inter alia,* doctors offices, hospitals, convalescent homes, nursing homes, interim care facilities, outpatient surgical centers, medical and dental laboratories and testing facilities, and adult congregate living facilities. *See* Section 28-922, City Code. Additionally, of the housing options available to recovering addicts, only "substance abuse treatment facilities" are located (alternatively) in an R-B-1 district as a conditional use, along with other conditional uses in such districts, including hotels, motels and tourist homes. *See* Section 28-743, City Code.

Thus, the classification of "substance abuse treatment facilities" as permitted uses in MC districts and conditional uses in R-B-1 districts are not classifications "because of a disability" under the FHAA. Rather, the classification of "substance abuse treatment facilities" is a classification based on the medical or commercial characteristics of what is in the first instance only one of several types of housing available to the recovering addict. Moreover, "substance abuse treatment facilities" themselves are not singled out for discriminatory treatment, but rather, are grouped with numerous other facilities that share common characteristics.

Plaintiff's claim is wholly dependent upon the premise that its facilities are "similarly situated" to apartment buildings, and thus must be treated the same. That is simply not true. As Louis Agudo, the Executive Director of Boca House and Awakenings has admitted in his deposition, Boca House and Awakenings are not ordinary apartment buildings. *See* City's Facts, Part II, ¶2. Thus, the characteristics of Boca House and Awakenings differ fundamentally from those of apartment buildings, because among other things:

| **Characteristic** | **Boca House/Awakenings** | **Apartment Building** |
|---|---|---|
| On-site individual therapy | Yes | No |
| On-site AA/NA meetings; morning meetings; life skills meetings; and community meetings, run by staff members | Yes | No |
| Mandatory drug screening | Yes | No |
| Three phase treatment progression | Yes | No |
| Weekly payment of "rent," paying for additional services | Yes | No |
| Strict rules, regulations and | Yes | No |

| | | |
|---|---|---|
| enforcement, including ban on overnight guests and strict curfews | | |
| Mandatory daily room inspections | Yes | No |
| Immediate discharge and forfeiture of deposit and last week's rent for drug or alcohol use | Yes | No |

*See*, City's Facts, Part II, ¶¶1-21.

In addition to the foregoing, a large office use is also taking place at the "main" Boca House property (321-341 West Camino Real). This office use comprises four offices and a conference room, totaling approximately 2,000 square feet. Approximately twelve employees work out of the offices, from which Mr. Manko operates not only the corporate plaintiffs, but also all of his real estate investments. City's Facts, Part II, ¶21. This is not merely an "accessory use" to the residential use taking place at the property (as would be allowed for any apartment). It is a separate use because of its size and because it is not limited to operations of the specific property on which it is located.

Ordinance No. 4649 is not facially discriminatory. Instead, Ordinance No. 4649 situates "substance abuse treatment facilities" in medical and commercial districts based on non-discriminatory characteristics that substance abuse treatment facilities do not share with typical residences, but share with other facilities that are also located in those districts.

In this regard, the instant case is analogous to *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170 (3d Cir. 2005). In *Wind Gap*, the Third Circuit held that the classification of a group home as a "commercial" entity rather than as a "residential" entity for purposes of the charging of increased sewer fees was not facially invalid and did not run afoul of the FHAA. At issue in that case were regulations governing sewage services, whereby recipients of the services were classified as either a "residential unit" or as a "commercial unit." The commercial category assessed variable rates depending upon the unit's sub-classification as "house, apartment, or condominium," "trailer," "hotel, nursing home, personal care home, or boarding house…." and so forth. The group home was considered a "personal care home" under the classification scheme. The court held, *inter alia*, that the classification did not discriminate

"because of a handicap." Rather than "single out" "personal care homes" for discriminatory treatment, the classification instead served to group "personal care homes" with other facilities that shared common characteristics. The *Wind Gap* court explained:

> In the instant matter…the classification of the many facilities subject to increased fees and burdens associated with the sewer service—the alleged discrimination—was broad-based, with different sewer charges assessed against numerous different types of facilities based on whether they were deemed "residential" or "commercial." The term "personal care home"—the alleged proxy for disabled status—was not used to "single out" facilities for assessment of increased fees. Rather, the term was included in an illustrative list of a number of different types of facilities used to encompass what the Authority deemed to be "commercial" for the purpose of assessing fees. Further, far from being singled out, "personal care home" was grouped with other multi-adult rooming facilities in a subset of the "commercial" list. This subset included "hotels," "motels," "nursing homes," and "boarding houses" the common characteristic of which appears to be that all such facilities provide room and boarding services. Given that the facilities in this group typically charge a fee for the provision of these services, the logical inference is that "personal care homes" fit within this subset of the "commercial" category because "personal care homes" typically board adults and have a "commercial" quality.

*Wind Gap*, 421 F.3d at 181.

In this case, Ordinance No. 4649 is not facially invalid because it merely locates those facilities which are commercial and medical in nature in zoning districts with other similarly situated commercial or medical facilities. Furthermore, the operations of Boca House and Awakenings differ substantially from typical apartment houses permitted in multi-family districts: commercial activities, treatment services, and far-reaching office operations materially distinguish Boca House and Awakenings from typical residential uses.

**2. 1,000 foot spacing requirement for a "substance abuse treatment facility" that is a conditional use in an R-B-1 district**

In addition to the district requirements of Ordinance No. 4649, the ordinance imposes a very narrowly drawn dispersal requirement that applies only to a "substance abuse treatment facility" that is located in an R-B-1 district, and prohibits the location of one such "substance abuse treatment facility" within 1,000 feet of another in that district. Notwithstanding the Plaintiffs' mischaracterization, only "substance abuse treatment facilities" which locate within an R-B-1 district that are subject to this rule. "Substance abuse treatment facilities" that locate in an MC district as a permitted use are not subject to this requirement.

Plaintiffs falsely analogize this narrowly drawn dispersal requirement in a commercially zoned district with dispersal requirements in reported cases that reach small scale group housing available to the disabled persons in residential areas. In this case, the narrowly drawn spacing requirement for "substance abuse treatment facilities" is not facially invalid, in that it concerns only those "substance abuse treatment facilities" located in an R-B-1 district. It does not reach the broader housing opportunities that are available to recovering addicts in residential settings.

**B. Ordinance No. 4649 Is Otherwise Justified**

Even if Ordinance No. 4649 were facially invalid, facial invalidity in itself does not render the Ordinance discriminatory under the FHAA. "If a Title VII plaintiff establishes that a statute or ordinance is facially discriminatory, the burden shifts to the governmental defendant to justify the disparate treatment." *ARC of New Jersey, Inc. v. New Jersey*, 950 F.Supp.637, 643 (D.N.J. 1996). There is no Eleventh Circuit case that discusses the standard that such justification is required to meet.[8]

The Eighth Circuit applies rational basis scrutiny to ordinances that are found to be facially invalid under the FHAA in the first instance. *See, Oxford House-C v. City of St. Louis,* 77 F.3d 249 (8th Cir. 1996); *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991). Under this standard, a facially invalid statute will be upheld if it is rationally related to a legitimate government purpose. *Family Style*, 923 F.2d at 94.

In *Bangerter v. Orem City Corp*., 46 F.3d 1491 (10th Cir. 1995), the Tenth Circuit disagreed, and instead considered two justifications: public safety and benign discrimination. Recognizing that the FHAA itself expressly allows discrimination rooted in public safety concerns in 42 U.S.C. §3604(f)(9), the court read the FHAA as permitting restrictions "when justified by public safety concerns, given that housing can be denied altogether for those same reasons," provided that such safety concerns are narrow and not "based on blanket stereotypes about the handicapped, but…tailored to particularized concerns about individual residents."

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[8] In *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir. 1992), the court held that the FHAA did not apply to a city zoning ordinance permitting a maximum occupancy of four unrelated individuals to occupy a dwelling, owing to the exemption found in the FHAA for maximum occupancy requirements. This holding was overruled in *City of Edmonds v. Oxford House, Inc*., 514 U.S. 725, 115 S.Ct. 1776 (1995), which held that family composition rules do not constitute maximum occupancy requirements. The Eleventh Circuit in *Elliott* specified that its holding did not reach "the precise contours of the proof which a plaintiff must adduce in order to establish a violation…." 960 F.2d at 979, fn. 5. The Eleventh Circuit has not yet reached this issue.

*Bangerter*, 46 F.3d at 1503. Further, if a special requirement is imposed upon housing for the disabled "based on concerns for the protection of the disabled themselves or the community," it must be "individualiz[ed] to the needs or abilities of particular kinds of developmental disabilities" and must have a "necessary correlation to the actual abilities of the persons upon whom it is imposed." *Bangerter*, 46 F.3d at 1503 (citations omitted). *See also*, *Larkin v. State of Michigan*, 89 F.3d 285 (6th Cir. 1996) (echoing the Tenth Circuit, and requiring that special restrictions imposed on the disabled be warranted by the unique and specific needs of the handicapped).

In this case, Ordinance No. 4649 does not impose special requirements on the residents of "substance abuse treatment centers," such as special fire and safety regulations or supervision requirements. *Cf. Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43 (6th Cir. 1992) (requiring extensive safety protections for single-family home housing developmentally disabled persons, without individualized requirements to particular kinds of disabilities at issue); *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wash. 1997)(prohibition against short-term residency and requirement of live-in staff at group home for youths). As explained, the Ordinance is facially neutral because it merely locates "substance abuse treatment centers" in districts with compatible uses. However, assuming *arguendo* that Ordinance No. 4649 is facially discriminatory, whether the Eighth Circuit test, or the tests of either the Tenth or Sixth Circuit are applied, Ordinance No. 4649 is justified.

The case of *Familystyle, supra*, is factually similar to this case. There, the court considered a commercially operated "campus of group homes," comprised of twenty-one houses in a one and a half block area, housing 119 mentally ill persons. A city ordinance and state law required quarter mile dispersal. Recognizing that the aim of the state law and local ordinance was to integrate the mentally ill into mainstream society, the court held that the restrictions did not run afoul of the FHAA. The court further found that the large scale treatment facility in question was "counterproductive to the desegregation of the mentally ill." *Family Style*, 923 F.2d at 94. While the Eighth Circuit in *Familystyle* applied a rational basis test, it must be noted that the Sixth Circuit, which rejects this standard, expressly highlighted the result in *Familystyle*. In *Larkin*, the court considered a law imposing a dispersal and neighbor notification requirement upon the licensure of a four-person group home. The *Larkin* court stated:

> However, *Familystyle* is distinguishable from the present case. In *Familystyle*, the plaintiff already housed 119 disabled individuals within a few city blocks. The

> courts were concerned that plaintiffs were simply recreating an institutionalized setting in the community, rather than deinstitutionalizing the disabled.
>
> Here, however, Larkin seeks only to house four disabled individuals in a home which happens to be less than 1500 feet from another AFC facility. The proposed AFC facility, and many more like it that are prohibited by the spacing requirement, do not threaten Michigan's professed goal of deinstitutionalization. Because it sweeps in the vast majority of AFC facilities which do not seek to recreate an institutional setting, the spacing requirement is too broad, and is not tailored to the specific needs of the handicapped.

*Larkin*, 8f F.3d at 291-292.

In this case, Boca House and Awakenings, unlike the plaintiff in *Larkin* (and just like the plaintiff *Familystyle*) provide housing to approximately 300 male residents (Boca House) and 90 female residents (Awakenings) in fourteen buildings, grouped into three complexes (for each of three phases of housing and treatment) within ¼ mile of each other. City's Facts, Part II, ¶3. Under either the *Familystyle* or *Larkin* standard, this clustering does not serve the purpose of integrating recovering addicts into the residential community in which they are presently located. Instead, Boca House and Awakenings "recreate an institutional setting" rather than "deinstitutionalizing" the recovering addicts - the very antithesis of the goal of the FHAA. City's Facts, Part II, ¶40.

Moreover, Ordinance No. 4649 is justified by specific "public safety concerns" that are not "based on stereotypes" about the recovering addicts who reside in Boca House and Awakenings. *See, Bangerter, supra*. For the year spanning November, 2001 to November, 2002, there were in excess of 350 police calls to Boca House and Awakenings combined. City's Facts, Part II, ¶22; *see also*, Transcript of May 29, 2002 Hearing ("Hearing Transcript"), *passim*, which has been previously filed [DE 135].

**C. Ordinance No. 4649 Was Not Enacted With A Discriminatory Purpose**

Plaintiffs baldly assert, "Quite simply, the facts are indisputable that Ordinance No. 4649 was enacted with an intentionally discriminatory purpose." Plaintiffs' Memorandum at p.13. This assertion does not even articulate a basis for Plaintiffs' intentional discrimination claim, much less satisfy a summary judgment standard.

Claims for intentional discrimination are analyzed under the burden-shifting analysis established for employment discrimination cases. *See, e.g., Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 39 (2d Cir. 2002). "To establish a

prima facie case of intentional discrimination, the plaintiffs must present evidence that 'animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive.'" *Id.* (citations omitted). If the plaintiffs make out a prima facie case, the burden shifts to the defendants to provide a legitimate, nondiscriminatory reason for their decision. *Id.* The plaintiffs must then prove that the defendants in fact intentionally discriminated against them on a prohibited ground. *Id.*

In this case, the Plaintiffs fail to make out even a prima facie case of discrimination. As proof of their claim, Plaintiffs rely primarily on a narrow grouping of selective statements made by a few City residents at the City Council Meeting on May 29, 2002. There is no evidence, however, that the Ordinance was ultimately passed by the City Council on the basis of these comments, much less that any discriminatory animus on the part of the resident speakers was a "significant factor" in the City Council's vote. *See* City's Facts, Part II, ¶43 (and declarations cited therein). The intent of Ordinance No. 4649 is to group together compatible uses, and segregate non-compatible uses. *Id.* The Council officially stated its intent when it amended Ordinance No. 4649:

> Whereas, Ordinance No. 4649 was adopted to establish local regulations for Substance Abuse Treatment Facilities consistent with state legislation, and did not, nor did it intend to, discriminate against any individuals recovering from substance abuse, and did not, nor did it intend to, violate any state or federal laws, including the Americans with Disabilities Act and the Fair Housing Act….

The public hearing itself was in no way a "mob mentality" type of hearing. City's Facts, Part II, ¶44. Of course, Florida law required that the hearing be held and that members of the public be permitted to speak. *See,* § 166.041, Florida Statutes. However, despite public notice, very few people attended the meeting. *Id.* Only eighteen people spoke. *See,* Hearing Transcript, *passim*. No one was holding signs or wearing specially made shirts, as often happens in public hearings on highly charged issues. Rather, the hearing was rather tame. *Id.*

The hearing began, as is customary, with a brief staff presentation that simply explained the nature of the ordinance in a wholly neutral fashion. *See*, Hearing Transcript, pp.2-4. All persons wishing to speak at the meeting were permitted to do so, including several speakers who opposed the enactment of the Ordinance, including: Ronda Gluck, Esq. who spoke on behalf of her client, Alternatives in Treatment, a substance abuse treatment facility; Cara Sansonia, a

resident; Jacob Frydman, the owner of Alternatives in Treatment; and Tom Hantzarides, a resident of a unit leased to him by Boca House. *Id.*, pp.5-8; 29-32; 37-41; 48-53.

Although Mayor Steven Abrams could obviously not control the content of the speakers' remarks, either pro or con, the Mayor conducted the meeting fairly. He admonished the audience not to applaud a speaker who spoke in favor of the Ordinance, stating, "Thank you. We don't have an applause meter up here, folks." *See*, Hearing Transcript, p.26. He warned a speaker who spoke in favor of the Ordinance to wind up his remarks, when the speaker was exceeding the five minute time-frame. *Id.*, pp.14-15. The Mayor also advised the speakers to address the Council, not the audience - in an effort to keep the meeting on track. *Id.*, pp.46–48.

Moreover, even if isolated comments of certain persons who spoke at the public hearing may be perceived as being generalized notions and stereotypes about recovering addicts, the "motivations of the witnesses cannot be held against the decisionmakers." *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277, 283 (7th Cir. 2003). There is nothing in the remarks made by any of the decision makers that cast recovering addicts in a negative light, or which demonstrate that their decision-making was driven by stereotyped, generalized considerations or irrational concerns.

Plaintiffs selectively quote the remarks of the Mayor, when at the end of the meeting, he made a comment to the effect that while there are appropriate places for the facilities in question, a residential setting is inappropriate. This remark does not demonstrate a discriminatory intent, but rather, summarizes the neutral purpose of the Ordinance: to require that "substance abuse treatment facilities" that provide commercial and medical services are in fact located in districts with compatible uses.

Additionally, the full text of the hearing demonstrates multiple, legitimate, nondiscriminatory reasons for the enactment of the Ordinance. The discussion between Council members and the City Attorney (selectively quoted by Plaintiffs) reveals that the decision makers were focused on zoning considerations. *See,* Hearing Transcript, pp.64-67. The Mayor asked the City Attorney to comment on a suggestion which had been made that the City distinguish between licensed and non-licensed facilities. The City Attorney explained that the Ordinance was drafted to encompass non-licensed as well as licensed facilities because the scope of the State's licensing requirements had been drawn narrowly, and did not reach facilities that had the same "adverse impacts" in residential settings. By "adverse impacts," the City Attorney was

speaking of the institutional, commercial and medical character of Boca House and Awakenings - not about the character, much less any disabled status, of their occupants.

In fact, much of the hearing, including public comments, reveals wholly legitimate comments directed toward the commercial, medical character of treatment facilities and public safety issues. *See*, Hearing Transcript, *passim*. Further, the hearing transcript itself reveals specific complaints about the nuisances created by Boca House and Awakenings, including testimony regarding police responses. *Id.*

In sum, the entire transcript of the hearing, fairly read, demonstrates not only that discriminatory animus was not a "significant factor" in the enactment of Ordinance No. 4649, but that legitimate, non-discriminatory reasons for the enactment were expressed, considered and acted upon. Accordingly, summary judgment should be entered against the Plaintiffs on their claim for intentional discrimination in the enactment of Ordinance No. 4649.

## V. Summary Judgment Should be Entered in Favor of the City, not the Plaintiffs, as to the Plaintiffs' Claim That Section 28-2 is Facially Invalid under the FHAA (Count VIII)

### A. The Corporate Plaintiffs Waived Their Right To Challenge Section 28-2

Boca House and Awakenings were cited for violation of Section 28-2, City Code, in 1996. The Corporate Plaintiffs could have challenged the citation and, ultimately sought judicial review of the provision. Instead, Boca House and Awakenings settled the violation, entering into a voluntary stipulation that they would comply with the three person requirement. *See,* City's Facts, Part II, ¶¶23-24. Notwithstanding the settlement and agreement to comply with Section 28-2, the corporate Plaintiffs years later filed this action. Such conduct constitutes a waiver by the corporate Plaintiffs, barring their claim based upon the alleged invalidity of Section 28-2.

### B. The City Code's Treatment of Family Is Not Facially Invalid Under The FHAA

Moreover, Plaintiffs' argument concerning Count VIII is flawed in several respects. In Count VIII, Plaintiffs allege that Section 28-2, defining "family," is discriminatory on its face. Pursuant to Section 28-2, the term "family" means:

> 1 person or a group of 2 or more persons living together and interrelated by bonds of consanguinity, marriage or legal adoption, or a group of persons not more than 3 in number who are not so interrelated, occupying the whole or part of a dwelling as a separate housekeeping unit with a single set of culinary facilities.

Plaintiffs' Motion for Partial Summary Judgment, and indeed, Plaintiffs' Third Amended Complaint, entirely ignore the fact that community residential homes are permitted in all residential districts in the City.[9] Therefore, while Section 28-2, City Code, defines "family" in such as way as to limit the number of unrelated persons who may constitute a "family" to three such persons, Section 28-1304, City Code, supersedes the application of the term in the context of group homes for the disabled and others, licensed pursuant to Section 419.001, Florida Statutes. Section 28-1304(a), City Code, provides that homes of six or fewer unrelated residents "shall be deemed a single-family unit and a noncommercial residential use" under the City Code. Section 28-1304(b), City Code, provides for community residential homes with seven to fourteen unrelated residents. Reading Section 28-2 together with 28-1304, Plaintiffs' argument fails.

Plaintiffs argue that a number of courts have concluded that municipalities violate the FHAA when they attempt to prohibit persons with disabilities from living in single-family zoned homes of their choice because the number of residents exceed family composition requirements. However, the cases relied upon by Plaintiffs are inapposite in at least three key respects.

First, Plaintiffs cite to a number of cases involving "Oxford Houses." As succinctly explained by the court in *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991):

> Oxford Houses are intended to provide a drug and alcohol-free environment combined with support and encouragement of other recovering persons….No professional staff resides in Oxford Houses, and no professional treatment is provided. The houses have three fixed rule: no use of drugs or alcohol, no disruptive behavior, and regular payment of their rent…These rules are enforced by the residents themselves, with guidance from the OHI…The current group decides who will move in to the house and how house chores are to be divided. Oxford Houses are not treatment facilities, but rather houses rented by a group of individuals recovering from drug or alcohol addition.

796 F. Supp. at 1332.

Oxford Houses are not large scale commercially run enterprises and are "not treatment facilities," but are group homes that are wholly operated on democratic principles by the individuals who reside in them. As explained, Boca House and Awakenings house over 350 persons in fourteen apartment buildings. Boca House and Awakenings do not merely lease premises to recovering addicts, but in addition provide a variety of commercial and medical services on premises to the occupants as part of the fees that such occupants pay for residing

[9] *See* n.3, *supra.*

there. *See,* City's Facts, Part II, ¶¶1-21. Thus, the cases cited by Plaintiffs which pertain to smaller, non-commercial settings in Oxford Houses do not support Plaintiffs' position. *See also, Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556 (E.D. Mo. 1994), *rev'd,* 77 F.3d 249 (8th Cir. 1996); *Tsombanidis v. City of West Haven*, 180 F.Supp.2d 262 (D. Conn. 2001), *aff'd* 352 F.3d 565 (2d Cir. 2003); *Oxford House v. Town of Babylon*, 819 F.Supp. 1179 (E.D.N.Y. 1993); *Oxford House v. Township of Cherry Hill*, 799 F.Supp. 450 (D.N.J. 1991).

Second, the cases cited by Plaintiffs for the most part concern municipal zoning codes that do not, in addition to the definition of "family," provide for a group home for the disabled to be treated as the functional equivalent of a "family" for zoning purposes. *See, Town of Babylon, supra,* (one or more persons related by blood, marriage or adoption and unrelated persons not exceeding four); *City of Plainfield, supra* (one or more persons living together as a single non-profit housekeeping unit); *Township of Cherry Hill, supra* (collective body of persons…in a domestic relationship based upon birth, marriage or other domestic bond); *Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643 (W.D.Pa. 2003) (one or more persons related by blood or marriage or adoption and unrelated persons not exceeding three).

Third, the foregoing cases for the most part do not concern facial challenges to zoning requirements under the FHAA. *See, Town of Babylon, supra* (disparate impact challenge); *City of Plainfield, supra* (intentional discrimination and discriminatory impact challenge); *Township of Cherry Hill, supra* (disparate impact challenge); *Gertrude A. Barber, supra* (disparate impact challenge); *Tsombanidis, supra* (intentional discrimination, discriminatory impact, and failure to make reasonable accommodation challenge).

The one decision that is closely on point is *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996), where the court considered a municipality's family composition rules that were comparable to the City's in this case. In *City of St. Louis*, the municipality limited to three the number of unrelated persons who would qualify to live together in a single-family district, but also included group homes for the disabled of up to eight persons as part of the definition. The court stated:

> Rather than discriminating against Oxford House residents, the City's zoning code favors them on its face. The zoning code allows only three unrelated, nonhandicapped people to reside together in a single family zone, but allows group homes to have up to eight handicapped residents….

*City of St. Louis*, 77 F.3d at 251.

In this case, the City Code does not facially discriminate against recovering addicts by reason of Section 28-2, City Code. Rather, the City Code as a whole actually favors recovering addicts on its face: whereas the City's recovering addicts may live in groups of unrelated persons larger than three, this same opportunity is not available to unrelated, non-disabled persons. Thus, the Plaintiffs' challenge to Section 28-2, City Code, under the FHAA is wholly without merit.

## VI. Summary Judgment should be Entered in Favor of the City as to the Plaintiffs' Reasonable Accommodation Claims for Ordinance No. 4649 (Counts III and VI)

### A. The Individual Plaintiffs never sought any type of accommodation from the City as to Ordinance No. 4649

The Plaintiffs' Complaint only asserts that the Corporate Plaintiffs – not the Individual Plaintiffs – made a request for a reasonable accommodation from Ordinance No. 4649. Complaint, ¶¶65-72. In addition, the Plaintiffs have not set forth any evidence (nor can they) that the Individual Plaintiffs requested a reasonable accommodation from Ordinance No. 4649. City's Facts, Part II, ¶¶26-30.

As such, the Plaintiffs' Motion, to the extent that it seeks summary judgment in favor of the Individual Plaintiffs as to Count III (Reasonable Accommodation Claim under FHAA as to Ordinance No. 4649), should be denied and summary judgment should be entered in the City's favor. For the same reason, summary judgment should likewise be entered in the City's favor as to the Individual Plaintiffs' claims in Count VI (Reasonable Accommodation Claim under ADA as to Ordinance No. 4649). *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1364 (11th Cir. 1999)(affirming the summary judgment entered in favor of the defendant as plaintiff's failure to demand a reasonable accommodation was "fatal to her ability to prevail on her claim that [the defendant] discriminated against her by failing to provide a reasonable accommodation."); *Wood v. President and Trustees of Spring Hill College in the City of Mobile*, 978 F.2d 1214, 1222 (11th Cir. 1992)(holding that "a plaintiff cannot establish a claim under the Rehabilitation Act alleging that the defendant discriminated against him by failing to provide a reasonable accommodation unless he demanded such accommodation").[10]

[10] Congress intended for courts to rely on cases interpreting the Rehabilitation Act, 29 U.S.C. § 791, when interpreting similar language in the ADA. *Gaston*, 167 F.3d at 1363 (11th Cir. 1999). Likewise, because the FHAA adopted the concept of a reasonable accommodation from § 504 of the Rehabilitation Act, cases interpreting "reasonable accommodation" under the Rehabilitation Act also apply to claims under the FHAA. *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001).

**B. Summary Judgment Should be Entered in Favor of the City as to the Corporate Plaintiffs' reasonable accommodation claims regarding Ordinance No. 4649**

**1. The Corporate Plaintiffs' reasonable accommodation claims as to Ordinance No. 4649 are not ripe because they never sought a decision from the City through the City's established procedures**

Unlike the Individual Plaintiffs, there were a series of letters exchanged between attorneys for the Corporate Plaintiffs and the City relating to Ordinance No. 4649 – some which occurred after the instant lawsuit had been initiated. Plaintiffs' Facts, ¶¶31-32.[11] However, the Corporate Plaintiffs: never followed the procedures in Chapter 28, Article IV, to rezone any real property in the City (i.e. rezoning their properties to be either MC or R-B-1); never followed the established City procedures in Article VI of the City's Charter to propose ordinances to the City Council or to seek reconsideration by the City Council of Ordinance No. 4649 or Ordinance No. 4701; or sought an accommodation from the City as to specific conditions in Ordinance No. 4649 or Ordinance No. 4701 through a Petition for Special Case Approval, which is the City's established administrative form and procedure utilized to bring matters to the City Council that are not specified in the City's Code of Ordinances. City's Facts, Part II, ¶26. Thus their reasonable accommodation claims for Ordinance No. 4649 are not ripe.

In order to establish a reasonable accommodation claim under the FHAA, the Corporate Plaintiffs must give the City a chance to accommodate them through the City's established procedures for adjusting the zoning code; otherwise, its reasonable accommodation claim is not ripe and should be dismissed. *See Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996); *United States v. Village of Palatine,* 37 F.3d 1230, 1233 (7th Cir.1994); *Oxford House, Inc. v. City of Virginia Beach,* 825 F.Supp. 1251, 1261 (E.D.Va.1993).

The FHAA does not "insulate [the Corporate Plaintiffs] from legitimate inquiries designed to enable local authorities to make informed decisions on zoning issues." *Oxford House-C,* 77 F.3d at 253, *citing City of Virginia Beach,* 825 F.Supp. at 1262. Congress did not intend for the Act to remove handicapped people from the "normal and usual incidents of

[11] The Plaintiffs' Statement of Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment [DE 142] will be cited as "Plaintiffs' Facts, ¶__." The Corporate Plaintiffs attach several letters written by their counsel, which they contend constitute their requests for reasonable accommodation from Ordinance No. 4649. However, they fail to attach all of the referenced responses from the City's counsel. Plaintiffs' Facts, Ex. 8-13; City's Facts, Ex.5-8.

citizenship, such as participation in the public components of zoning decisions, to the extent that participation is required of all citizens whether or not they are handicapped." *Id.* By defining discrimination under the FHAA to include the "refusal to make reasonable accommodations in rules, policies, [and] practices," Congress "obviously contemplated providing cities, among others, the opportunity to adjust their generally applicable rules to allow handicapped individuals equal access to housing." *See City of Virginia Beach*, 825 F.Supp at 1261, *citing* 42 U.S.C. § 3604(f)(3)(B). The zoning process serves that purpose. *Id.* Indeed, were it otherwise, federal courts "increasingly would become entangled prematurely in disputes regarding application of neutral zoning ordinances to the handicapped" and would thus "become not zoning boards of appeals, but zoning boards of first instance, a result Congress surely did not intend." *Id.*

While strict compliance with every local ordinance or regulation is not required before the denial of a reasonable accommodation claim may be deemed final, the applicant must show that under the circumstances, that it has afforded the appropriate local authority a reasonable opportunity to consider the project in some final form, to seek the input of the public and of other affected persons, and to state the reasons for its decision. *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F.Supp. 2d 376, 385-386 (E.D. Pa. 1999).

Here, the Corporate Plaintiffs never, through the City's established procedures, attempted to seek a repeal or amendment to Ordinance No. 4649 or Ordinance 4701, rezone their properties (i.e. to MC or R-B-1) or otherwise seek an accommodation through a Petition for Special Case Approval. City Facts, Part II, ¶26. Rather, the Corporate Plaintiffs, who asserted that Ordinance No. 4649 was purportedly discriminatory on its face and enacted with discriminatory intent, merely sent letters to the City's counsel[12] demanding an outright repeal or amendment of the ordinance within three weeks[13] in order to avoid and/or settle the instant lawsuit.[14] Plaintiffs'

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[12] Despite the fact that the Corporate Plaintiffs' counsel were notified that the City was represented by the undersigned's law firm, one of the letters from the Corporate Plaintiffs' counsel was improperly directly addressed to the Mayor and City Council. Plaintiffs' Facts, Ex.9, City's Facts, Ex.5.

[13] The two December 19, 2002 letters demanded that Ordinance No. 4649 be repealed at the City's first meeting in January 2003. Plaintiffs' Facts, Ex.9-10.

[14] Thus, these letters are not admissible as they were part constitute confidential settlement negotiations between the parties. *See* Rule 408, Federal Rules of Evidence (Evidence of conduct or statements made in compromise negotiations not admissible).

Facts, Ex. 8-13; City's Facts, Part II, ¶¶26. Even if such letters actually requested an accommodation (which they did not), they were still insufficient to support a claim for a denial of a reasonable accommodation.

In *Marriott Senior Living Service*, the plaintiff's lawyer sent a letter to the township's commissioners, requesting that it make a reasonable accommodation under the FHAA and that the township respond within 14 days. 78 F.Supp. 2d at 384. The township's counsel thereafter rejected the request. *Id.* The court still granted summary judgment in favor of the township as the plaintiff, like the Corporate Plaintiffs, never afforded the township an opportunity to review a formal proposal. The court further held that the response from the township's attorney did not constitute the City's final decision given an incomplete record and small response time window. *Id.* at 386.

Just like the plaintiff in *Marriott Senior Living Services*, the Corporate Plaintiffs did not follow the City's established procedures to seek any type of rezoning, repeal or amendment of a zoning provision, or other accommodation, and only gave the City only a small window of time (which was even shorter given that it encompassed the holiday season) to respond to its demands. The responses by the City's counsel certainly do not represent a decision by the City, especially given the short time to respond under the threat of impending litigation. Plaintiff's Facts, Ex.9-11. The Corporate Plaintiffs cannot use settlement demand letters from its attorneys to avoid the absolute requirement that it utilize the City's established procedures to change the zoning code. Accordingly, the Corporate Plaintiffs' reasonable accommodation claims as to Ordinance No. 4649 are not ripe, and summary judgment should be entered in the City's favor.

**2. The Corporate Plaintiffs' demand letters regarding Ordinance No. 4649 did not seek any accommodation nor were such requests reasonable and necessary to afford handicapped persons an equal opportunity for housing**

Assuming that the Corporate Plaintiffs' demand letters to repeal Ordinance No. 4649 were sufficient requests for a reasonable accommodation and had been submitted through the City's established procedures (which they were not), the Corporate Plaintiffs' reasonable accommodation claims relating to Ordinance No. 4649 still fail. To prevail on a reasonable accommodation claim, it is a plaintiff's burden to establish that a proposed accommodation is: (1) reasonable and (2) necessary (3) to afford handicapped persons equal opportunities to use and enjoy housing. *See Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603-604 (4th Cir.

1997); *See also, Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002)(stating that a plaintiff has the burden of proving that a proposed accommodation is reasonable). The Corporate Plaintiffs do not meet their burden .

To meet the reasonableness standard, a plaintiff must show that the proposed accommodation does not impose a "fundamental alteration in the nature of a program" or "undue financial and administrative burdens." *Groner v. Golden Gate Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001), *citing Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996). Though the Corporate Plaintiffs do not even attempt to meet this burden, they have not (and cannot) refute that the repealing of Ordinance No. 4649 amounts to "throwing the baby out with the bath water" and could lead to a fundamental alteration in the City's zoning scheme; the proliferation of facilities that provide commercial, medical and quasi-medical uses within the City's residential neighborhoods would effectively destroy the residential character of the City. *See, e.g. Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995)(allowing a hearing dog only for a hearing impaired person in an apartment building that prohibits pets did not unduly burden or fundamentally alter nature of apartment complex, but suggesting that lifting prohibition for everyone could).

The "necessary" element – the FHAA provision mandating reasonable accommodations which are necessary to afford an equal opportunity – requires the demonstration of a direct linkage between the proposed accommodation and the "equal opportunity" to be provided to the handicapped person. *Bryant Woods*, 124 F.3d at 604. This requirement has the attributes of a causation requirement, and if the proposed accommodation provides no direct amelioration of a disability's effect, it cannot be said to be necessary. *Id*. The "equal opportunity" requirement mandates not only the level of benefit that must be sought by a reasonable accommodation, but also provides a limitation on what is required. *Id.*

Even assuming that the Corporate Plaintiffs are "disabled" or "handicapped" (which they are not), they cannot demonstrate that the repeal of Ordinance No. 4649 is necessary to afford them equal opportunities to use and enjoy housing in the City's residential districts. As stated above, such opportunities already exist. *See* pp.2-4, *supra.* Moreover, the Plaintiffs would need to show that as a result of their residents' disabilities, it is therapeutically necessary for their residents to: (1) live in a residential neighborhood; (2) live in a facility providing on-site treatment; and (3) be subject to drug testing. The Corporate Plaintiffs cannot demonstrate any of

these things. Though the Corporate Plaintiffs require drug and alcohol testing as a condition of residency (which subjects them to Ordinance 4649), the Corporate Plaintiffs' own expert testified that drug testing is not needed to provide sober housing to recovering substance abusers and that the Corporate Plaintiffs can continue to operate and provide sober housing to recovering substance abusers without doing drug and alcohol testing. City's Facts, Part I, ¶11. The City's Expert has opined that it is not therapeutically necessary for recovering substance abusers to live in residential neighborhoods or to have on-site treatment. City's Facts, Part II, ¶37.

Thus, the Corporate Plaintiffs have not (and cannot) meet their burden to show that repealing Ordinance No. 4649 is necessary to afford handicapped persons equal opportunities to use and enjoy housing in the City's residential districts. Accordingly, summary judgment should be entered in the City's favor as to the Corporate Plaintiffs' reasonable accommodation claims relating to Ordinance No. 4649.

## VII. Summary Judgment should be Entered in Favor of the City as to the Plaintiffs' Reasonable Accommodation Claims Relating to the City's Unrelated Person Limitation (Counts X and XII)

### A. The Plaintiffs' reasonable accommodation claims as to the Unrelated Person Limitation are not ripe because they never made such requests to the City

The Plaintiffs' reasonable accommodation claims as to the City's Unrelated Person Limitation, like their reasonable accommodation claims as to Ordinance No. 4649, are not ripe. The Plaintiffs failed to give the City a chance to accommodate them through the City's established administrative procedures. *See* pp.21-23, *supra* (and cases cited therein). The Plaintiffs, through various correspondence from their attorneys on February 26, 27 and March 8, 2004, sent requests to the City Attorney seeking to allow up to four recovering alcoholics or drug addicts per residential unit. Plaintiffs' Facts, Ex.15-17. However, the Plaintiffs never sought to use the City's established procedures to obtain the relief that the Plaintiffs were seeking, even though counsel for the City advised them of such. City's Facts, Part II, ¶¶26, 30.

In fact, on April 1, 2004[15], counsel for the City sent correspondence to counsel for the Plaintiffs emphasizing was not denying the Plaintiffs' requests regarding the City's Unrelated Person Limitation (as alleged in their Third Amended Complaint) and that the Petition for

[15] The first page of the letter inadvertently stated that it was sent on March 31, 2004. However, the second page and fax confirmation sheets correctly indicate that it was sent on April 1, 2004. City's Facts, Ex.9.

Special Case Approval was the City's established administrative procedure to bring matters before the City Council that are not specified in the City's Code of Ordinances (as were the Plaintiffs' requests). City's Facts, Part II, ¶30.[16] The Plaintiffs ignored the City's invitation to use the City's established administrative procedure regarding the City's Unrelated Person Limitation, and they have offered no evidence or explanation as to why they failed to do so. City's Facts, Part II, ¶26. As such, their reasonable accommodation claims relating to the City's Unrelated Person Limitation are not ripe.[17] *See Oxford House-C*, *supra*; *Village of Palatine, supra*; *Marriott Senior Living Services, supra*; *City of Virginia Beach, supra*. Accordingly, the Plaintiffs' Motion as to Count X should be denied, and the City's Motion as to Counts X and XII should be granted.

**B. The Plaintiffs' purported reasonable accommodation are not reasonable and necessary to afford handicapped persons an equal opportunity for housing**

Even if the Plaintiffs had demonstrated that they (or their clients) were disabled under the FHAA and ADA or had properly followed the City's established procedures for a reasonable accommodation from the City's Unrelated Person Limitation (which they did not), their reasonable accommodation claims relating to the City's Unrelated Person Limitation still fail. Plaintiffs have not met their burden in demonstrating that such requests were reasonable and necessary to afford handicapped persons equal opportunities to use and enjoy housing. *See Bryant Woods, supra.*; *Loren*, *supra.*

**1. The Individual Plaintiffs do not need to live with three more persons in recovery**

The Individual Plaintiffs in their February 27, 2004 and March 8, 2004 correspondence (which are virtually identical with the exception of the names of the individuals) state that each of the Individual Plaintiffs reside with three other recovering substance abusers. Plaintiffs'

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[16] Curiously missing from the Plaintiffs' Memorandum and Statement of Facts is any mention of counsel for the City's April 1, 2004 correspondence. Rather, the Plaintiffs prematurely (and inaccurately) end their story before the City's April 1, 2004 correspondence.

[17] Matthew Wolf's reasonable accommodation claims also fail because he testified that he did not authorize counsel for the Individual Plaintiffs, James Green, to submit a request for reasonable accommodation from the Unrelated Person Limitation on his behalf. City's Facts, Part II, ¶31.

Facts, Ex.15-16.[18] The letters, drafted by counsel, then generically state, without any support whatsoever, that recovering substance abusers "are far more often successful when living in a household with at least three other persons in recovery, particularly in the early stages of recovery" and that the City's Unrelated Person Limitation therefore "interferes with the critical mass of individuals supporting each other in recovery." *Id.* The letters do not state whether (or present evidence that) the Individual Plaintiffs need to live with at least three other persons in recovery (e.g. a doctor's diagnosis that it is therapeutically necessary for each of the Individual Plaintiffs to live with at least three other persons in recovery per unit). *Id.*

Not only do the Individual Plaintiffs fail to demonstrate that they need the purported accommodation from the City's Unrelated Person Limitation, they admitted quite the opposite. They testified that they only "need" to live with one other person in recovery – not three or more persons in recovery. City's Facts, Part II, ¶32.[19] This is further supported by the City's expert. City's Facts, Part II, ¶¶38, 42. Thus, because the Individual Plaintiffs have failed to meet their burden, the City is entitled to summary judgment as to their reasonable accommodation claims pertaining to the City's Unrelated Person Limitation.

**2. The Corporate Plaintiffs have not demonstrated that persons in recovery need to live with three other persons**

In a similar generic format, the February 26, 2004 correspondence from the Corporate Plaintiffs' counsel to the City Attorney likewise seeks a reasonable accommodation from the City's Unrelated Person Limitation. Plaintiffs' Facts, Ex.15. However, the Corporate Plaintiffs' correspondence seeks a blanket waiver from the City's Unrelated Person Limitation, without providing any evidence whatsoever about the number of residences for which they seek an accommodation, or whether such accommodation is needed to ensure the Corporate Plaintiffs' financial viability or is therapeutically necessary for recovering substance abusers. *See Lapid-Laurel, L.L.C. v. Zoning Board of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 461 (3rd Cir. 2002)(holding that plaintiff failed to meet burden to show that expansion to a 95 bed care facility was necessary for therapeutic reasons or for the group home's financial viability);

[18] With the exception of Matthew Wolf, the letters incorrectly state that the Individual Plaintiffs live in housing operated by the Corporate Plaintiffs. City's Facts, Part II. ¶33.

[19] Bobby Hoover currently lives on his own and does not live in any residence owned or operated by the Corporate Plaintiffs, Steven Manko individually (the Corporate Plaintiffs' owner), or any entity controlled by Manko. City's Facts, Part II, ¶32.

*Bryant Woods*, 124 F.3d at 605 (there was no evidence that the sought accommodation of expanding group home limit from 8 persons to 15 persons was necessary to maintain the group home's financial viability).

It is patently obvious that the Corporate Plaintiffs' purported accommodation is nothing more than an attempt to turn a larger profit and is not necessary for therapeutic reasons or for the Corporate Plaintiffs' financially viability. In fact, the Corporate Plaintiffs currently house approximate 300 men and 90 women. City's Facts, Part II, ¶3. Moreover, Mr. Manko has testified that the Corporate Plaintiffs can be profitable with only three persons per unit, thus belying any assertion of financial necessity. See, City's Facts, Part II, ¶35.

In addition, the Corporate Plaintiffs cannot show that such request is necessary to allow additional recovering substance abusers an equal opportunity to live in the City's residential districts. There is no waiting list for additional recovering substance abusers to live at the Corporate Plaintiff's properties (City's Facts, Part II, ¶34), and recovering substance abusers have many additional opportunities to live in a protected sober environment in the City's residential areas [pp.2-4, *supra*]. *See Bryant Woods*, 124 F.3d at 605 (holding that expansion of group home is not necessary because handicapped individuals had "numerous" other group homes with vacancies).

Lastly, the Corporate Plaintiffs have not demonstrated that their request for an accommodation from the City's Unrelated Person Limitation is reasonable, because such an occupancy increase in the amount of all of the residential units owned by the Corporate Plaintiffs could result in a fundamental change in the City's land use regulations. If anything, an increase in the amount of individuals living at <u>all</u> of the Corporate Plaintiffs' facilities (now housing almost 400 people) could fundamentally alter the City's residential areas by, among other things, causing an increase in traffic and reduction in the amount of required parking per resident.

Thus, for all of these reasons, the City is entitled to summary judgment as to the Corporate Plaintiffs' reasonable accommodation claims pertaining to the City's Unrelated Person Limitation.

**WHEREFORE**, the City respectfully requests that this Court deny the Plaintiffs' Motion, grant the City's cross-motion, and for such additional relief as the Court deems appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by e-mail this 20th day of December, 2006, to William Hill, Esq., 200 South Biscayne Boulevard, Suite 2500, Miami, Florida 33131, (305) 374-7593, and James K. Green, Esq., Suite 1630, Esperanté, 222 Lakeview Avenue, West Palm Beach, Florida 33401, (561) 655-1357.

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