UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JEFFREY O., et al.

Plaintiffs,

vs.

CITY OF BOCA RATON, a Florida Municipal Corporation,

Defendant.
_____/

PLAINTIFFS' MOTION FOR NEW TRIAL OR TO ALTER OR AMEND JUDGMENT

Plaintiffs, pursuant to Federal Rule of Civil Procedure 59, move for a new trial, or to alter or amend the judgment in this matter, and as grounds for their motion, state:

INTRODUCTION

Plaintiffs challenged two ordinances of the city of Boca Raton ("City") under two separate federal statutes, the Fair Housing Act ("FHA") and the Americans with Disabilities Act ("ADA"). The Court recognized that the FHA was the "crux of this case." (Final Order at 7, Feb. 26, 2007, DE 220.) The ordinances challenged were City Ordinance 4649, as amended by Ordinance 4701 (collectively referred to as "Ordinance 4649" or "the Sober House Ordinance") and the City's restrictive definition of family contained in City's Code of Ordinances § 28-2 ("28-2"). After a non-jury trial, this Court ruled that both ordinances violate the FHA. (Final Order at 22, 25.) Judgment was entered in favor of Plaintiffs and against the Defendant City by Order of Final Judgment entered on March 1, 2007. (DE 221.)

Although the Court found that both ordinances violate the FHA, the Court let stand the first definition of "substance abuse treatment center" found in Ordinance 4649 (Definition 1).

Finding that the second definition of substance abuse treatment center in Ordinance 4649, referencing drug or alcohol testing, violated the FHA, the Court enjoined its enforcement. The Plaintiffs respectfully request that the Court alter the judgment and invalidate that definition as well. As set forth more fully below, the first definition violates the Fair Housing Act and should not be allowed to stand.

The Court also found that § 28-2 violated the FHA through its disparate impact on recovering, disabled persons. (Final Order at 28.) The Court enjoined enforcement of § 28-2, but limited the injunction to enforcement against disabled individuals, and excluded the Provider Plaintiffs from the injunction. Id. The Plaintiffs seek to alter or amend judgment as to the exclusion of the Provider Plaintiffs from the injunction as to § 28-2. In regard to the exclusion of the Provider Plaintiffs from the injunction as to § 28-2, the Court's *sua sponte* injection of the affirmative defense of unclean hands, due to the fact that the Provider Plaintiffs previously agreed to abide by the City's family definition, was not warranted because unclean hands was never pled or even raised by the Defendant. Additionally, under binding federal case law, because the equitable doctrine of unclean hands should not be applied in a statutory case such as this, where its application would thwart the underlying purpose of the statute, unclean hands should not apply to an injunction under the FHA. Moreover, the fact that the Provider Plaintiffs were previously cited by the City for violating a law that itself violated the Federal Fair House Act should not give rise to a finding of unclean hands.

Plaintiffs additionally seek to alter or amend the judgment, or a new trial, on the Court's factual finding that the Provider Plaintiffs have 390 recovering persons all within one quarter mile of one another. As far as the concentration of persons housed by the Provider Plaintiffs is concerned, the Court's finding is a manifest factual error, but easily corrected. The Provider Plaintiffs house far fewer than 390 recovering persons. More importantly, though, the Provider

Plaintiffs' buildings are not all located within one quarter-mile of one another, but are much more widely dispersed.

Finally, as to Ordinance 4649, Definition 1, it too violates the FHA, based on the Court's reasoning for finding that Ordinance 4649, subsection (2) ("Definition 2") violates the FHA. Definition 1 would require any facility that is licensed or required to be licensed under Fla. Stat. § 397.311(18) to locate only in the City's medical or commercial zones. While the Provider Plaintiffs are not licensed or required to be licensed under the specified statute, the City threatens to take action against the Provider Plaintiffs based on the City's unilateral view that, notwithstanding contrary findings by the Florida Department of Children and Families ("DCF"), the Provider Plaintiffs are "required to be licensed." Hence, under the City's view, the Provider Plaintiffs would be required to move out of their present location in residential neighborhoods, contrary to the Court's rulings. Additionally, even though the Provider Plaintiffs are not licensed or required to be licensed, licensed facilities for the handicapped enjoy the same protection under the FHA as non-licensed facilities. Because the City could not establish a legitimate, recognized justification for its facially discriminatory Ordinance 4649, Definition 1 violates the FHA.

MEMORANDUM OF LAW

I. Unclean Hands

A. The Defendant City Did Not Raise Unclean Hands in Connection with Boca House's Prior Agreement to Abide by the Family Definition in § 28-2.

Unclean hands is an affirmative defense to claims for equitable relief. See, e.g., Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 854, 863 (5th Cir. 1979).[1] As an affirmative defense, if not pled, it is waived. Fed. R. Civ. P. 8(c); see Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1551 (11th Cir. 1991) (citing Morgan Guarantee Trust Co. of N.Y. v. Blum, 649 F.2d 342, 344 (5th Cir. 1981) ("All affirmative defenses must be specifically pleaded in the answer or in an amended answer permitted under Fed. R. Civ. P. 15(a), or be deemed waived."). In this case, the City did not raise an affirmative defense of unclean hands based on any allegation that the Provider Plaintiffs had previously agreed to abide by the family definition in § 28-2.

In its answer and affirmative defenses, the City raised 26 affirmative defenses, including an affirmative defense based on the allegation that the Provider Plaintiffs had previously agreed to abide by § 28-2. Affirmative defense 19 stated:

> Boca House and Awakenings have waived any challenge to § 28-2 they were previously cited for violating the number of unrelated persons allowed to occupy a single dwelling and voluntarily stipulated to an order of enforcement instead of challenging such purported limitations. Furthermore, neither Boca House or Awakenings ever raised (in response to being cited for violating the number of persons allowed to occupy a single dwelling) that such provision was discriminatory or that an accommodation from such provisions was necessary to afford handicapped or disabled persons an equal opportunity to use and enjoy in the City's residential neighborhoods.

[1] Decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to September 30, 1981 are binding precedent in the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir.1981).

Thus, while the City did raise a factual allegation in connection with the Provider Plaintiffs' agreement to abide by § 28-2, the City clearly made that allegation to support an affirmative defense of waiver[2] and did not mention unclean hands.

This waiver defense was reiterated by the City in its Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment (and in favor of City's Cross Motion) (DE 150-1) at page 17. The City further reiterated its waiver defense in the Joint Pretrial Stipulation (DE 148), at pages 14 and 18 (issue of law for determination at trial: "whether Boca House and Awakenings waived their right to challenge the City's definition of 'family' in § 28-2"). In short, the City consistently pressed a waiver defense based on the Provider Plaintiffs' prior consent to abide by the family definition, but never an unclean hands defense based on that fact.

Nor does the Joint Pretrial Stipulation mention unclean hands as an issue of fact or law to be tried. Likewise, while undersigned counsel does not have a transcript of the trial in this case, counsel's notes do not reflect that the City's attorneys argued the doctrine of unclean hands at trial. The issue was never briefed on summary judgment. The City thus did not put on a case to support the application of unclean hands to deny the Provider Plaintiffs the benefit of the Court's ruling that § 28-2, the City's restrictive definition of family, violates the FHA.

The only mention of unclean hands that the undersigned can find in the record is an affirmative defense of unclean hands raised in the City's answer and affirmative defenses, but that defense is based on entirely different facts. The City's affirmative defense number 24 states:

> The claims of Boca House and Awakenings are barred by the doctrine of unclean hands as they have been and continue to violate ***other existing ordinances, laws and/or statutes***.

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[2] The City's purported waiver defense was of dubious validity, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 262 F.3d 543, 550 (6th Cir.2001)(a school did not waive its First Amendment rights by joining an athletic association, where there was no express waiver of right to sue), cert. granted, Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S.Ct. 852 (U.S. Jan 05, 2007), and contrary to the public policy embodied in the FHAA to make group sober housing available in residential neighborhoods for persons in recovery. This Court rejected the waiver defense in this case.

This affirmative defense is based on an allegation that the Provider Plaintiffs were guilty of unclean hands because of some unspecified violation of ordinances, laws, or statutes other than those at issue in the case, i.e. other than Ordinance 4649 or § 28-2. This affirmative defense was not based on any allegation that a violation by Boca House of § 28-2 itself supported the finding of unclean hands.[3]

In short, the City never raised as an affirmative defense that the Provider Plaintiffs' alleged violations of, or agreements to, abide by § 28-2 amounted to unclean hands so as to defeat any relief sought in this case. The issue was not tried by consent. The affirmative defense was therefore waived, and the Court should not afford City the benefit of an affirmative defense that it had a duty to raise, but did not.

Finally, the Provider Plaintiffs are prejudiced by the application of an affirmative defense that was neither pled nor otherwise ever raised by the City. The Provider Plaintiffs were not given the opportunity to put on testimony or other evidence explaining its decision to abide by § 28-2, a decision that involved legal counsel. Had this affirmative defense been properly pled, the Provider Plaintiffs could have taken steps to meet it, both factually and with legal briefing. As a result of the City's failure to raise the defense, the Provider Plaintiffs were aware of its potential application for the first time upon receipt of this Court's order. The Provider Plaintiffs are thus prejudiced by the Court's raising affirmative defenses *sua sponte*.

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[3] To the extent that this affirmative defense appears to be in any way ambiguous as to what the City meant by violations of "other existing ordinances, law, and/or statues," such ambiguity is cured by reviewing affirmative defense number 23, found just above the unclean hands affirmative defense, affirmative defense number 24. Affirmative defense number 23 states: "Boca House and Awakenings do not have standing to challenge the subject ordinances because they have been and continue to violate other existing ordinances, laws and/or statues." Read together, it is clear that both affirmative defense numbers 23 and 24 seek bars to the relief sought by the Provider Plaintiffs based on violations of some unspecified ordinances, laws, or statutes other than the "subject ordinances" Ordinance 4649 and § 28-2.

B. Case Law Establishes that the Equitable Defense of Unclean Hands Should Not Be Applied to Preclude the Benefit of Statutory Protections.

The equitable defense of unclean hands is not applicable to the Provider Plaintiffs here because their cause of action in regard to § 28-2 was to enjoin the City's violation of a federal statute, the FHA. Indeed, this Court found on page 25 of the Final Order that § 28-2 violates the FHA as written because that section does not include an exception for handicapped individuals such as the residents of Boca House. The Court nonetheless held that the Provider Plaintiffs should be excluded from the temporary enjoinment of the enforcement of § 28-2, citing Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979), for the proposition that the Provider Plaintiffs came to the Court with unclean hands because they previously agreed to comply with § 28-2. (Final Order at 29.) This holding conflicts with the actual holding in Mitchell Bros. Film Group, along with other controlling case law limiting the use of the unclean hands defense in a case involving a statutory injunction like the one ordered by the Court. (Final Order at 28.)

We have found no published opinion under the FHA in which any court refused to grant a party injunctive relief based on that party's unclean hands. Indeed the unclean hands defense has long been held to have only limited applicability. See, e.g., Clark Equip. Co. v. Lift Parts Mfg. Co., No. 82 C 4585, 1984 WL 1348, at *6 (N.D. Ill. 1984); see also Deal v. Migoski, 122 So. 2d 415, 417 (Fla. 3d DCA 1960)). Further, a careful reading of Mitchell Bros. Film Group reveals that the facts of this case do not support the Court's sua sponte application of the unclean hands defense to the temporary injunction of § 28-2. (Final Order at 28.) The Mitchell Bros. Film Group court states unambiguously that the lower court's creation of a defense to the statute at issue "in the name of unclean hands . . . adds a defense not authorized by Congress that may . . .

actually frustrate the congressional purpose underlying [the] statute . . . . The Supreme Court and this court have held that equitable doctrines should not be applied where their application will defeat the purpose of a statute." 604 F.2d at 861 (citing Perma-Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138 (1968) (*overruled on other grounds in* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)). Therefore, the unclean hands doctrine may not be applied to the Provider Plaintiffs under the Mitchell Bros. Film Group holding because this Court found that § 28-2 violates the FHA and application of the doctrine could defeat the purpose of that Act by allowing the City to deny fair housing opportunities to the Provider Plaintiffs' residents.

Here, § 3613(c)(1) of the FHA expressly provides for injunctive relief in the event of a violation: "if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may . . . grant as relief, as the court deems appropriate, any permanent or temporary injunction . . . ." The Act does not provide for the defense of unclean hands. See generally § 3601 et seq. In Smith v. Dovenmuehle Mortgage, Inc., No. 94 C 139, W1994 WL 275034 (N.D. Ill. 1994), the court reached this conclusion in the context of an ADA claim and held that the traditional equitable defense of unclean hands was inapplicable to a statutory cause of action for equitable relief. Id. at *1. (Defendant has not cited any case in support of its argument that the "unclean hands" doctrine bars a claim for reinstatement under the ADA. Therefore, if plaintiff succeeds at trial under his ADA claim, his "unclean hands" will not prevent the court from ordering "reinstatement.") Here, the Court has temporarily enjoined the City under § 3613(c)(1) against enforcing § 28-2. (Final Order at 28.) Because such injunction arises under the FHA and not a cause of action for traditional equitable relief, the *traditional* equitable defense of unclean hands should not be applied to the Provider Plaintiffs. See Steffel v. Thompson, 415 U.S. 452, 471 (1974) (noting the difference between traditional equitable causes

of action and statutory ones and holding that any requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment under the Declaratory Act would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate). Rather than affording the sort of relief intended by Congress under the FHA, this Court's application of the unclean hands doctrine to the Provider Plaintiffs, and the potential effect on the Provider Plaintiffs' residents, serves only to frustrate Congress' purpose in enacting § 3613(c)(1)—namely, to afford a remedy to handicapped individuals when they are unfairly denied housing of their choice.

Just such a result was avoided by the old 5th Circuit when it refused to apply the unclean hands doctrine in Mitchell Bros. Film Group based, in part, upon the Supreme Court of the United States' refusal to apply the similar equitable defense of *in pari delicto* to a cause of action under antitrust laws in Perma-Life Mufflers, Inc., 392 U.S. at 138. In that case, the Court held that it is inappropriate to invoke broad common-law barriers to relief where a private suit serves important public purposes. Id. More recently, the Court reinvigorated its decision in Perma-Life Mufflers, Inc. when it held that "[e]quity's maxim that a suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands . . . has not been applied where Congress authorizes broad equitable relief to serve important national policies. We have rejected the unclean hands defense 'where a private suit serves public purposes.'" McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995) (quoting Perma-Life Mufflers, Inc. 392 U.S. at 138). Here, as recognized by this Court on pages 23-24 of the Final Order, the Provider Plaintiffs' suit against the City to enjoin enforcement of § 28-2 serves the important public purpose of attacking the disparate impact § 28-2 has on handicapped individuals' fair access to housing. Thus under McKennon and Perma-

Life Mufflers, Inc., this Court should not apply the unclean hands defense to an injunction under the FHA.

Rejection of the unclean hands defense is also appropriate in this matter under the Supreme Court's holding in the earlier case of Precision Inst. Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806 (1945), quoted on page 29 of the Final Order. In that case, the Court held that the maxim "he who comes into equity must come with clean hands" requires that plaintiffs "shall have acted fairly and without fraud or deceit as to the controversy in issue." Id. at 814-15. But the Court continued by stating that "where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions" because "in such a case it not only prevents the wrongdoer from enjoying the fruits of his transgression but averts an injury to the public." But clearly distinguishable from the instant matter, public interest supported the position of the *defendant* in Precision Inst. Mfg. Co., due to fact that the plaintiff was attempting to enforce certain patents and contract rights that conflicted with the public's "right to access to a free and open market." Id. at 815-16. Likewise, the Provider Plaintiffs' argument that § 28-2 violates public policy, and this Court's finding of the same (Final Order at 25-26), necessitate a *narrowing*, as opposed to a widening, of the Court's use of discretion in refusing equitable relief, so as to further the far-reaching social goals of the FHA and allow the temporary injunction of § 28-2 to operate for the benefit of the Provider Plaintiffs' residents.

Further, as to the specific facts of the case, the Provider Plaintiffs' decision to cease compliance with the 3-person limit under § 28-2 after filing this lawsuit does not rise to the level of "unfair fraud" or "deceit" as would give rise to application of the unclean hands defense under Precision Inst. Mfg. Co. See id. at 814-15. The unclean hands defense is only applicable where a plaintiff "has so conducted [itself] as to shock the moral sensibilities of the judge." Jackson v.

Waffle House, 413 F.Supp. 2d 1338, 1362 (N.D.Ga. 2006). The Provider Plaintiffs' prior act of complying with § 28-2, in order to continue operating their business within the City, clearly does not rise to such a level and they should not now be punished for the same. Rather, squarely in line with the Supreme Court's analysis in Perma-Life Mufflers, Inc., in the context of an antitrust suit, the Provider Plaintiffs and their residents should be permitted to share the benefit of the temporary injunction against the City's enforcement of § 28-2, *because* they complied with the restraints imposed by the City, and did not outright refuse to so comply until they brought suit under the FHA to enjoin such restraint. See Perma-Life Mufflers, Inc., 392 U.S. at 139-40. The Perma-Life Mufflers, Inc. Court based its holding in this regard on the fact that the plaintiffs in that case "accepted many of [the] restraints [at issue] solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity . . . . [Plaintiffs] cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business." Id. at 140-41.

Strikingly similar to the reasoning of the Court in Perma-Life Mufflers, Inc., the Provider Plaintiffs cannot be blamed for agreeing to comply with § 28-2 before bringing the instant lawsuit for the following reasons: (1) such compliance was a condition of being permitted to operate their business in the City without being fined and ultimately put out of business in Boca Raton, Florida; (2) the evidence shows that the Provider Plaintiffs generally complied with the 3-person limit under § 28-2 up to their becoming aware that such provision violated the FHA; and (3) the Provider Plaintiffs filed this lawsuit to enjoin the City's enforcement of § 28-2 before refusing outright to comply with a law that violates the FHA. Notably, because conduct which occurs during the litigation of the lawsuit, rather than during the accrual of the action, cannot form the basis of an unclean hands defense, E.E.O.C. v. Bay Ridge Toyota, Inc., 327 F.Supp. 2d

167, 173 (E.D.N.Y. 2004), such defense cannot be raised against the Provider Plaintiffs for their post-filing refusal to comply with § 28-2.

In Simovits v. Chanticleer Condo. Ass'n, 933 F.Supp. 1394 (N.D.Ill. 1996), the District Court for the Northern District of Illinois refused to apply the unclean hands defense to a cause of action for injunctive relief under the FHA. The case involved a suit brought by condominium owners to enjoin the condominium association's enforcement of a "no children" covenant. In granting the relief sought by the owners, the court held that the former endorsement of the "no children" policy by one of the owners, a position taken solely for political reasons, did not give rise to the application of the defense. Id. at 1404. The plaintiffs did not raise the issue that Congress chose not to include the unclean hands defense in the FHA, and thus the court did not address it. Nevertheless, the court held that "even if the conduct of the Simovits indicated a clear willingness on their part to accept the benefits of the Association's exclusionary policy until that policy effectively prevented them from selling their unit for its full value, such conduct would not preclude their right to challenge its legality." Id. This holding is directly applicable to the facts in this case because, even if the Provider Plaintiffs' former compliance with § 28-2 allowed them to accept the benefit of being permitted by the City to continue providing housing to recovering individuals, such compliance does not preclude their right under the FHA to challenge the legality of the ordinance. The application of the unclean hands defense should therefore be denied to the City and the Provider Plaintiffs should be permitted to benefit from this Court's enjoining the City's enforcement of § 28-2.

Finally, as to the Court's reasoning regarding the 3-person limitation under § 28-2, the Provider Plaintiffs respectfully ask this Court to review the case of Children's Alliance v. City of Bellevue, 950 F.Supp. 1491 (W.D.Wash. 1997). Under that case, the City's interests in limiting the number of persons permitted to share group housing are limited to the extent that such

interests have a disparate impact on disabled persons. In reaching its holding in this regard, the Children's Alliance court stated that "[g]eneralized interests in public safety, stability, and tranquility have been enough to redeem ordinances that drew distinctions between groups when subjected to rational basis review. But under the *stricter level of scrutiny appropriate here*, these interests are only sufficient if they are threatened by the individuals burdened by the Ordinance." Id. at 1498 (emphasis added) (internal citation omitted). The court then added that although such generalized interests have been upheld as justifications for ordinances under rational basis review, they cannot withstand the more rigorous scrutiny required by Larkin v. State of Mich. Dep't of Soc. Servs., 89 F.3d 285 (6th Cir. 1996). Children's Alliance, 950 F.Supp. at 1499; see also Connecticut Hospital v. City of New London, 129 F.Supp. 2d 123 (D.Conn. 2001) (noting "that the town's definition of family which limits the number of unrelated persons who could live together, would be a violation of the FHA if used to stop the group homes from operating") (citing City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 738 (1995); Oxford House-Evergreen v. City of Plainfield, 769 F.Supp. 1329 (D.N.J. 1991)).

II. The Court Made a Factual Error in Finding that the Provider Plaintiffs Housed 390 Individuals in 14 Apartment Buildings All within a Quarter Mile of One Another.

In the Final Order, page 2, the Court made the following finding of fact: "Provider Plaintiffs served approximately 390 individuals in 14 apartment buildings, all of which are a quarter of a mile of each other." (Final Order at 2.) The finding appears to be material to the Court's ultimate decisions on the issues, as the Court returns to this factual finding later in the conclusions of law: "While I agree that recovering individuals need to be given the opportunity to live in group arrangements as discussed earlier, such arrangements need not include approximately 390 people in a group of buildings all within a quarter of a mile of each other."

(Final Order at 21-22.) Undersigned counsel is not aware of the evidence upon which the Court based this finding, but it is not accurate.

As set forth in the attached Declaration of Steven Manko, based on the official records of the Provider Plaintiffs, the total capacity for recovering at the Provider Plaintiffs' facilities is 356 persons, including the so-called "Graduate Housing" units that are not owned by the Provider Plaintiffs, but rather by family trusts ultimately controlled by Mr. Manko. The difference in the total capacity, 390 versus 356, may be due to the fact that some of Mr. Manko's housing units are occupied by non-recovering individuals. At any rate, the more important aspect, the concentration of the units, is simply not accurate. The buildings owned by the Provider Plaintiffs, as well as the Graduate Housing, are not all located within one quarter mile of one another. The most concentrated number of recovering individuals living together within the Boca House units is the Level 1 residents, who live in adjoining apartment buildings on West Camino Real which have the capacity to house 52 individuals in one apartment building and 40 in the other. The next-closest set of units are a number of Level 2 and 3 buildings (mostly fourplexes) located on 14th and 15th Street, which are over a half-mile from the main building on West Camino Real.[4] The Graduate Housing units are located between one half mile and one and one-half miles from the 321 Camino Real building, except for one at 398 West Camino Real, housing up to 3 persons, which is less that a quarter mile away. The Awakenings building, with a capacity for 84 recovering individuals (all women), is located approximately two and one-quarter miles away from the main Boca House building. Accordingly, Boca House does not have 390 recovering persons housed in buildings within one quarter mile of one another.

[4] Plaintiff's Trial Exhibit 31 also generally shows the locations and capacities of the Provider Plaintiff's building 9. The capacities shown are somewhat higher from the present capacity because certain units have been connected to non-recovery housing.

These facts are based on the simple Declaration of Mr. Manko attached hereto. If the Court wishes further testimony on this point, the Provider Plaintiffs are willing to provide it. Further, the distance between buildings is also independently verifiable by online mapping searches. In any event, the distances between units shown herein are generally consistent with the trial testimony on cross examination of the City's planner, Carmen Annunziato.

III. Definition 1 under Ordinance 4649 Violates the FHA.

The Court found that Definition 2 violates the FHA and enjoined the City from enforcing the same (Final Order at 28); however, the Court found that Definition 1 does not violate the FHA and allowed that portion of Ordinance 4649 to remain in effect. (Final Order at 27.) This finding constitutes a manifest error in law because, notwithstanding the fact that Definition 1 refers to Florida's statutory definition of licensed providers under Florida Statutes § 397.311(18), licensed facilities are protected under the FHA.

As the Court found on page 12 of the Final Order, "The amendments to the FHA were intended to prohibit the use of zoning regulations to limit 'the ability of [the handicapped] to live in the residence of their choice in the community.'" (Final Order at 12.) As such, the FHA does not distinguish between providers based upon licensure status. See Smith & Lee Ass'n, Inc. v. City of Taylor, Mich., 13 F.3d 920, 931 (6th Cir. 1993) (holding that a state-licensed residential care facility was protected under the FHA and noting that persons with disabilities "may have little choice but to live in a commercial home if they desire to live in a residential neighborhood"); see also U.S. v. City of Jackson, 318 F.Supp. 2d 395, 413 (D.Miss. 2002) (holding that a licensed emergency shelter was protected under the FHA because virtually all of the residents living at the shelter were handicapped within the meaning of the Act); Epicenter of Steubenville, Inc. v. City of Steubenville, 924 F.Supp 845, 849 (prohibiting the City of Steubenville, Ohio's enforcement of an ordinance against a licensed adult-care-provider facility

as violative of the FHA). Because Definition 1 therefore limits the ability of disabled individuals to live in the residence of their choice in vioaltion of the FHA, the City must be enjoined from enforcing Definition 1.

The essential problem with Definition 1, for purpose of the FHA, is that it is overbroad in requiring any facility licensable under Fla.Stat. § 397.311(18) to locate only in commercial or medical zones. That statute lists 9 different types of licensed-service providing, some of which have no residential component, e.g., outpatient treatment under § 397.311(18)(f). Additionally, however, § 397.311 defines certain facilities that would undoubtedly receive the protections of the FHA, e.g., a "[r]esidential treatment facility" that is used "for room and board only and in which treatment and rehabilitation services are provided on a mandatory basis at locations other than the primary residential facility." § 397.311(18)(d)(2). Hence, purely residential facilities would fall under Definition 1, and would be required to move. Such a law violates the FHA in treating recovering persons differently, and no justification can save it. This argument is particularly compelling when viewed in light of the City's other zoning provisions, such as those allowing nursing and convalescent homes in residential district city code, § 28-418.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request the Court to enter a new judgment altering or amending the Court's findings in the Final Order as appropriate, and if necessary, granting a new trial as to the concentration of residents issue.

CERTIFICATE OF COUNSEL

The undersigned certifies that he has discussed the issue raised by this motion with opposing counsel and could not agree on the relief sought herein.

March 15, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail (by agreement) this 15th day of March, 2007 on:

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