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Nos. 11-55460, 11-55461

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC SHORES PROPERTIES, LLC, *et al.*,

Plaintiffs-Appellants

v.

CITY OF NEWPORT BEACH,

Defendant-Appellee

NEWPORT COAST RECOVERY LLC, *et al.*,

Plaintiffs-Appellants

v.

CITY OF NEWPORT BEACH,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URING REVERSAL

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STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether, in granting summary judgment to defendant with respect to plaintiffs' challenge to Newport Beach City Ordinance 2008-5, the district court erred in holding that plaintiffs were required to establish that they were treated differently than similarly situated non-disabled individuals in order to establish their claim of intentional discrimination based on disability.

INTEREST OF THE UNITED STATES

The United States has a significant interest in the resolution of this appeal, which raises questions regarding the standards for proving intentional discrimination under provisions of the Fair Housing Act (FHA), 42 U.S.C. 3604(f)(1), 3604(f)(2), and 3604(f)(3)(B), and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12132. The United States Department of Justice and the United States Department of Housing and Urban Development share enforcement authority under the FHA. 42 U.S.C. 3610, 3612, 3614. The Attorney General also has authority to bring civil actions to enforce Title II. 42 U.S.C. 12133. In addition, the ADA directs the Attorney General to promulgate regulations to implement Title II based on regulations previously developed under Section 504 of the Rehabilitation Act. 42 U.S.C. 12134. If not reversed, the district court's misstatement of the proof required for intentional discrimination

claims could significantly hamper the ability of both the United States and private litigants to enforce the FHA and ADA, as well as other federal anti-discrimination laws. The United States thus has a substantial interest in participating in this appeal.

STATEMENT OF THE CASE

Plaintiffs-appellants consist of Pacific Shores Properties, Newport Coast Recovery, and Yellowstone Women's First Step House, Inc. – three organizations providing "sober homes" (homes for individuals recovering from alcohol and substance abuse addiction) – and several sober home residents.[1] They brought two separate actions against the City of Newport Beach (City) for violating the FHA, ADA, Equal Protection Clause, and California state law, by enacting and enforcing various zoning ordinances that restrict the operation of sober homes in the City. They allege that the City enacted these ordinances, targeting sober homes because of the residents' disabilities, with the intent to reduce the number of sober homes in the City, and challenge the validity and selective enforcement of the ordinances.

[1] Persons in recovery from alcohol or drug abuse have a disability for purposes of the FHA and ADA. See 42 U.S.C. 3602(h); 42 U.S.C. 12102(1), 12210(b); *City of Edmonds* v. *Washington State Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. 1994) (FHA); *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725, 737 (9th Cir. 1999) (ADA).

1. In April 2007, the City enacted a moratorium against operating any new "transitory uses" in a residential district. The moratorium, enacted as Ordinance 2007-8, defined "transitory uses" as "new residential uses where the average tenancy is usually less than ninety (90) days, including but not limited to new parolee-probationer homes, safe house, unlicensed residential care facilities, residential care facilities, general, short-term lodging, * * * and other similar residential uses that are transitory in nature." PS Doc. 85 at Ex. B-82.[2] In practice, the moratorium affected only group homes for people with disabilities (*i.e.*, group homes or sober homes), short-term rentals, and a few boarding houses at the time, because the other listed uses were not permitted in residential districts. Upon receiving extensive complaints by homeowners about including short-term lodging uses in the moratorium, in May 2007 the City Council enacted Ordinance 2007-10, which eliminated short-term lodging permits from the moratorium, but continued the prohibition on group homes. PS Doc. 85 at Ex. C. The City Council renewed the moratorium on group homes in October 2007. PS Doc. 85 at Ex. D.

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[2] "PS Doc. __" refers to the docket entry number of documents filed in *Pacific Shores Properties, LLC, et al.* v. *City of Newport Beach*, No. CV-08-457 (C.D. Cal.). "NCR Doc. __" refers to the docket entry number of documents filed in *Newport Coast Recovery, LLC, et al.* v. *City of Newport Beach*, No. CV-09-701 (C.D. Cal.).

While the moratorium was in effect, the City conducted public hearings and started drafting a proposed ordinance to amend the Municipal Code with respect to the zoning of group homes. At these hearings, members of the public expressed outrage at the presence of sober homes in the City. They referred to sober home residents as "criminals" and urged the City to draft an ordinance to eliminate existing and new sober homes from operating in the coastal communities on the Balboa Peninsula. The final draft of the proposed ordinance further limited the definition of "single housekeeping unit" by requiring that "the makeup of the household occupying the unit [be] determined by the residents of the unit rather than the landlord or property manager." NCR Doc. 96 (Plaintiffs' Corrected Statement Of Genuine Issues) at 112. Council Member Henn concluded that this version of the proposed ordinance would "result in a substantial reduction in the number of group homes on the Peninsula." NCR Doc. 96 at 112.

On January 22, 2008, the City Council enacted the proposed ordinance as Ordinance 2008-5, which repealed the moratorium and amended the Newport Beach Municipal Code to restrict certain group uses in residential districts. See PS Doc. 84 at Ex. A. The Ordinance, codified under Title 20 of the Newport Beach Municipal Code, defines three categories of "residential care facilities," or group homes for persons with disabilities. Two types of "residential care facilities" – "general facilities" of more than six residents and "small unlicensed facilities" with

six or fewer residents – are categorically excluded from any residential zoning districts, except multi-family residential districts (MFR), provided they obtain a permit. Residential facilities in the third category – state-licensed facilities for six or fewer individuals, which, the ordinance notes, "are required by State law [Cal. Health & Safety Code § 1267.8(c)] to be treated as a single housekeeping unit for zoning purposes" – are also restricted to MFR districts in some circumstances. PS Doc. 84 at A-8-9, A-11. Pursuant to the ordinance's "integral facilities" provision, facilities in this third category are excluded from most residential zones and allowed in MFR zones only by permit if any such facility is "under the control and management of the same owner, operator, management company or licensee or any affiliate of any of them" as at least one other residential care facility, and such facilities combined have seven or more residents who are individuals with disabilities. *Id*. at A-8, A-11.

All of the sober homes operated by plaintiffs in this case are classified as "Residential Care Facilities, General." "Residential Care Facilities, General" are defined as:

> Any place, site or building, or groups of places, sites or buildings, licensed by the state or unlicensed, in which seven or more individuals with a disability reside *who are not living together as a single housekeeping unit* and in which every person residing in the facility (excluding the licensee, members of the licensee's family, or persons employed as facility staff) is an individual with a disability.

PS Doc. 84 at Ex. A-9 (emphasis added). A "Single Housekeeping Unit" (SHU) is defined as:

> The functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit, including the joint use of and responsibility for common areas, and sharing household activities and responsibilities such as meals, chores, household maintenance, and expenses, and where, if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, *under a single written lease* with joint use and responsibility for the premises, *and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager*.

PS Doc. 84 at Ex. A-7 (emphases added). The requirements that all residents must be on a single written lease and that the makeup of the household must be determined by the residents make it extremely difficult for sober homes to qualify as SHUs. For example, each of plaintiff Yellowstone's sober homes was an unincorporated entity with its own bank account, and each executed a lease between the landlord and the particular unincorporated entity operating a given house. NCR Doc. 96 at 229-231. Thus, individual residents do not sign these leases. And plaintiff Pacific Shores, as the owner and manager of its sober homes, takes responsibility for assuring that residents are sober as a condition for occupancy, and retains authority to decide whether an individual is qualified to reside in its sober homes. PS Doc. 130-1 (Plaintiffs' Corrected Opp. To Defendant's Motion For Partial Summary Judgment) at 15-16.

Because of the ordinance's definitions, nearly all sober homes are restricted to MFR areas and must apply for a permit to operate. The ordinance added a new chapter to the zoning code specifically for "Use Permits in Residential Districts" that applies, in practice, only to group homes. The ordinance requires group homes to submit extensive and expensive supporting materials – that ordinarily are not required for obtaining use permits – with their applications for use permits. PS Doc. 84 at Ex. A-63-68. The ordinance also added new requirements for seeking and obtaining a reasonable accommodation. PS Doc. 84 at Ex. A-69-74.

2. The district court issued three dispositive orders. On October 28, 2008, the district court granted in part and denied in part the City's motion to dismiss Pacific Shores' Third Amended Complaint. PS Doc. 40. The court rejected Pacific Shores' allegations that Ordinance 2008-5 is facially invalid due to vagueness. PS Doc. 40 at 6-8.[3] Although the court allowed Pacific Shores to challenge the City's use permit *requirement*, the court dismissed all claims challenging the ordinance's use permit *process* because Pacific Shores never applied for a use permit. PS Doc. 40 at 10.

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[3] Although the court stated that "Pacific Shores rests its entire argument for facial invalidity on void for vagueness grounds," it identified this question as the "relevant inquiry" to analyze the plaintiffs' facial challenge under the FHA and ADA: "whether a policy applies less favorably to a protected group than to similarly situated groups." PS Doc. 40 at 5-6.

On October 25, 2010, the district court granted partial summary judgment to the City on, among other things, plaintiffs' intentional-discrimination challenge to Ordinance 2008-5. The court rejected that claim "[b]ecause [p]laintiffs ha[d] failed to identify any evidence showing that they were treated differently than similarly situated non-disabled individuals." PS Doc. 167 at 12. Although the court noted that plaintiffs presented extensive evidence of the City's discriminatory intent in enacting Ordinance 2008-5, the court refused to consider this evidence, calling it "irrelevant" without a showing that similarly situated individuals were treated more favorably than persons with disabilities in the application of the ordinance. PS Doc. 167 at 10-12. The court, however, denied summary judgment to the City as to Pacific Shores' challenges to the moratorium ordinances, finding that those ordinances, on their face, treated similarly-situated short-term lodgings for non-disabled individuals better than residential care facilities for individuals with disabilities, including sober homes. PS Doc. 167 at 14-15. This order left only the following claims: (1) the *Pacific Shores* plaintiffs' disparate impact and intentional discrimination claims regarding the moratorium ordinances; (2) all disparate impact claims concerning Ordinance 2008-5; and (3) Yellowstone and NCR's substantive challenges to the City's denial of their use permit and reasonable accommodation applications.

On January 12, 2011, the district court granted the City's motion for partial summary judgment concerning causation of damages arising from the 2007 moratorium ordinances. PS Doc. 191 at 4, 13. The court held that plaintiffs failed to show that the City was the actual or proximate cause of their injuries, such as loss of income and business opportunity, damage to business reputation, increased expenses, and emotional distress. PS Doc. 191 at 4-15.

The parties stipulated to dismissal of plaintiffs' remaining claims, and judgment was entered on March 14, 2011. See PS Doc. 199, 200; NCR Doc. 151, 152.

SUMMARY OF THE ARGUMENT

This Court has unequivocally held that there are two principal ways plaintiffs may prove intentional discrimination under the Fair Housing Act and Americans with Disabilities Act. A plaintiff may elect to proceed under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), originally adopted for employment discrimination claims under Title VII of the Civil Rights Act of 1964. Alternatively, a plaintiff may present evidence demonstrating that a discriminatory reason more likely than not motivated the challenged action. Allowing plaintiffs to proceed under this alternative approach is consistent with *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-268 (1977), in which the Supreme Court indicated that a

plaintiff need not always show more favorable treatment of a similarly situated individual in order to prevail on an intentional discrimination claim. See, *e.g.*, *Budnick* v. *Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008).

Despite the clear legal standards that this Court applies, the district court granted summary judgment to the City on plaintiffs' intentional discrimination claims, holding that plaintiffs failed to present evidence that similarly situated non-disabled individuals were more favorably treated under Ordinance 2008-5. In so holding, the court erred by focusing exclusively on whether plaintiffs adduced sufficient comparator evidence and ignoring plaintiffs' other evidence of the City's discriminatory intent in enacting the ordinance. As the district court acknowledged, plaintiffs presented a "large amount of evidence" regarding the City's intent to reduce the number of sober homes, based on the disabilities of sober home residents, when it enacted Ordinance 2008-5. But the district court called this evidence "irrelevant," and declined to consider it. Accordingly, this Court should reverse the district court's summary judgment to the defendant on plaintiffs' intentional discrimination claims, and remand for the district court to consider plaintiffs' abundant evidence that the City enacted Ordinance 2008-5 with an intent to discriminate based on disability.

ARGUMENT

THE DISTRICT COURT ERRED BY REQUIRING PLAINTIFFS TO PRESENT EVIDENCE THAT SIMILARLY SITUATED INDIVIDUALS RECEIVED MORE FAVORABLE TREATMENT IN ORDER TO PROVE INTENTIONAL DISCRIMINATION

The district court applied the wrong legal standard in granting summary judgment to defendant on plaintiffs' claim that the City enacted Ordinance 2008-5 with discriminatory intent. The district court acknowledged that plaintiffs had produced significant evidence that the City purportedly acted with discriminatory intent in *adopting* that ordinance. But the court erroneously concluded that such evidence of intent was irrelevant without proof that, in *enforcing* the ordinance, the City treated persons with disabilities less favorably than other similarly situated individuals. Under controlling precedent from the Supreme Court and this Court, however, plaintiffs in this case may permissibly challenge the enactment of the ordinance under an intentional discrimination theory, without also showing that the ordinance treats similarly situated individuals more favorably. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-268 (1977); *Budnick* v. *Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008).

A. Evidence Demonstrating That A Discriminatory Reason Motivated The Challenged Action, Without Reference To Comparators, Is Sufficient To Prove Intentional Discrimination

1. The Fair Housing Act makes it unlawful to "discriminate in the sale or rental * * * or otherwise make unavailable or deny" a dwelling to any person

because of disability, or 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 disability. 42 U.S.C. 3604(f)(1)-(2). This prohibition applies to zoning actions that discriminate based on disability. See *Gamble* v. *City of Escondido*, 104 F.3d 300, 304-305 (9th Cir. 1997) (applying FHA to landowner's complaint against city regarding the denial of conditional use permit to construct complex for adults with physical disabilities in single-family residential area); see also *Casa Marie, Inc.* v. *Superior Court of Puerto Rico*, 988 F.2d 252, 257 n.6 (1st Cir. 1993) ("The phrase 'otherwise make unavailable or deny' encompasses a wide array of housing practices, and specifically targets the discriminatory use of zoning laws and restrictive covenants.") (citation omitted). Indeed, the report of the House Judiciary Committee on the legislation states: "The Act is intended to prohibit the application of special requirements through land-use regulations, * * * and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988).

Likewise, Title II of the Americans with Disabilities Act prohibits discrimination by public entities on the basis of disability, and it applies to zoning decisions. See *Bay Area Addiction Research & Treatment* v. *City of Antioch*, 179

F.3d 725, 732 (9th Cir. 1999) (holding that the ADA applies to zoning). Section 12132 of the ADA provides that a public entity may not deny persons with disabilities "the benefits of the services, programs, or activities of a public entity." 42 U.S.C. 12132. Department of Justice regulations implementing Section 12132 prohibit public entities from utilizing criteria or methods of administration "[t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. 35.130(b)(3)(ii).

To prevail on claims for intentional discrimination under the FHA and ADA, a plaintiff must establish that disability was a motivating factor in the challenged decision. See *Gamble*, 104 F.3d at 305 ("Proof of discriminatory motive is crucial to a [Fair Housing Act] disparate treatment claim.") (citation omitted); see also *Tsombanidis* v. *West Haven Fire Dep't*, 352 F.3d 565, 579 (2d Cir. 2003) (discussing FHA and ADA).[4]

2. There are two principal ways a plaintiff may establish intentional discrimination under the FHA and ADA. A plaintiff may elect to proceed under the burden-shifting framework adopted for employment discrimination claims

[4] Similarly, plaintiffs must show that disability is a motivating factor to prove claims for intentional discrimination under the Equal Protection Clause and California's Fair Employment and Housing Act. See *Arlington Heights*, 429 U.S. at 265; Cal. Govt. Code § 12955.8(a).

under Title VII of the Civil Rights Act of 1964. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-803 (1973) (applying burden-shifting standard to intentional discrimination claim under Title VII); *Sanghvi* v. *City of Claremont*, 328 F.3d 532, 536 n.3 (9th Cir.) (stating that the *McDonnell Douglas* test extends to the FHA and ADA), cert. denied, 540 U.S. 1075 (2003). Alternatively, a plaintiff may present evidence showing that the defendant acted with discriminatory intent. See *Budnick*, 518 F.3d at 1114.

a. Under the *McDonnell Douglas* burden-shifting framework, a plaintiff must first satisfy the elements of a prima facie case of unlawful discrimination. The elements of a prima facie case of disparate treatment under the FHA vary, depending on the nature of the plaintiff's claim. For example, in cases involving the alleged discriminatory denial of a special use permit, the plaintiff may establish a prima facie case of disparate treatment by demonstrating that: (1) plaintiff is a member of a protected class; (2) plaintiff applied and is qualified for a special use permit; (3) the special use permit was denied despite plaintiff's being qualified; and (4) defendant approved a special use permit for a similarly situated party during a period relatively close to the time plaintiff was denied a permit. See

Budnick, 518 F.3d at 1114.[5] The burden then shifts to the defendant to articulate "a legitimate, nondiscriminatory reason for its action." *Ibid*. If the defendant meets its burden, in order to prevail, the plaintiff must show that the defendant's reason is a pretext for discrimination. *Ibid.*

b. Under the alternative method of proving intentional discrimination, "a plaintiff may * * * 'simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated' the challenged action." *Budnick*, 518 F.3d at 1114 (citation omitted); see also *Lowe* v. *City of Monrovia*, 775 F.2d 998, 1006-1007 (9th Cir. 1985) (stating that a plaintiff can establish a prima facie case of intentional discrimination without satisfying the burden-shifting test by providing evidence that "create[s] an inference of discrimination sufficient to establish a *prima facie* case"). As this Court stated in *McGinest* v. *GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004), *McDonnell Douglas*'s burden-shifting framework is a "useful 'tool to assist plaintiffs at the summary judgment stage so that they may reach trial,'" but a plaintiff responding to a summary judgment motion has "a choice regarding how to establish his or her

[5] To establish a violation of Title II of the ADA, a plaintiff must show that (1) he is a qualified individual with a disability; (2) he was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities; and (3) such exclusion was by reason of his disability. See *Lovell* v. *Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).

case"; that is, the plaintiff may proceed by using the burden-shifting framework "or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the defendant]." See also *Arlington Heights*, 429 U.S. at 265-268 (discussing factors to be considered in determining whether official actions were motivated by discriminatory intent).[6] Although plaintiffs in discrimination cases commonly rely on evidence that a similarly situated, non-protected comparator was treated better, comparator evidence is but one type of circumstantial evidence of discriminatory intent and is not required for plaintiff to make a prima facie showing of intent sufficient to avoid summary judgment. See *Pyke* v. *Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001) (A plaintiff who claims "that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus [] is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection.").

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[6] The Court held in *Arlington Heights*, 429 U.S. at 271 n.21, that once a plaintiff shows that the defendant's decision was motivated at least in part by discriminatory intent, the burden shifts to the defendant to prove that "the same decision would have resulted even had the impermissible purpose not been considered." See also *Smith & Lee Assocs., Inc.* v. *City of Taylor*, 102 F.3d 781, 791 (6th Cir. 1996).

B. The District Court Erred By Failing To Consider Plaintiffs' "Large Amount Of Evidence" Concerning The City's Discriminatory Intent In Enacting Ordinance 2008-5

In granting defendant's motion for summary judgment with respect to plaintiffs' challenge to Ordinance 2008-5, the district court erred by failing to consider whether plaintiffs presented sufficient evidence of the City's discriminatory intent to preclude summary judgment. PS Doc. 167 at 5-12.

In reviewing the district court's grant of summary judgment, this Court construes the facts in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Noyes* v. *Kelley Servs.*, 488 F.3d 1163, 1166 n.1, 1167 (9th Cir. 2007). The Court considers whether a genuine dispute of material fact exists, and whether the district court correctly applied the applicable substantive law. As the Court stated in *Lam* v. *University of Hawaii*, 40 F.3d 1551, 1564 (9th Cir. 1994), "[w]e require very little evidence to survive summary judgment in a discrimination case, because the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by the factfinder, upon a full record" (citations and internal quotation marks omitted).

1. As discussed above (pp. 16-17), one way plaintiffs may prove intentional discrimination is by presenting evidence that defendant's actions were motivated by discriminatory intent. Here, plaintiffs claimed that the City acted with

discriminatory intent in enacting Ordinance 2008-5, and that the ordinance has had an adverse effect on their ability to operate their sober homes. See, *e.g.*, PS Doc. 60 (Fourth Amended Compl.) at 5; NCR Doc. 19 (Second Amended Compl.) at 6. In opposing summary judgment, plaintiffs presented evidence that the City acted with intent to discriminate against individuals with disabilities by reducing the number of sober homes through the enactment and enforcement of Ordinance 2008-5. See PS Doc. 130-1 at 13-25; PS Doc. 160 (Plaintiffs' Supp. Brief In Opp. To Defendant's Motion For Partial Summary Judgment) (joined by Newport Coast Recovery and Yellowstone) at 2-10.

By focusing exclusively on *whether plaintiffs adduced sufficient comparator evidence*, the district court failed to consider whether the totality of plaintiffs' evidence raised genuine issues for trial on the City's discriminatory intent in enacting Ordinance 2008-5. As this Court stated in *Budnick*, 518 F.3d at 1114, plaintiffs may prove a claim for intentional discrimination by "'simply produc[ing] direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated' the challenged decision."

The district court stated that it "takes notice of the large amount of evidence submitted by [p]laintiffs regarding Newport Beach's allegedly discriminatory intent in passing Ordinance 2008-5," but deemed such evidence of discriminatory intent "irrelevant in the absence of a discriminatory act." PS Doc. 167 at 10. The

court further stated that "[p]laintiffs have not identified, and the [c]ourt has not found, any case in which a facially neutral statute that was passed with an intent to discriminate against a protected class was found to be invalid without an accompanying showing of either actual disparate treatment of others similarly situated or disparate impact on a protected class." PS Doc. 167 at 11. The court granted summary judgment solely "[b]ecause [p]laintiffs have failed to identify any evidence showing that they were treated differently than similarly situated non-disabled individuals." PS Doc. 167 at 12.

2. The district court's requirement that plaintiffs show "actual disparate treatment of others similarly situated" (PS Doc. 167 at 11) is at odds not only with this Court's precedent, but also *Arlington Heights*. In *Arlington Heights*, 429 U.S. at 266-268, the Supreme Court recognized that an official act can be challenged based on the discriminatory intent underlying the act.[7] The Court indicated that the following objective criteria should be considered for determining discriminatory intent: (1) the effect of the official action; (2) the historical background of the

[7] Although *Arlington Heights* did not directly address the FHA, courts examining exclusionary zoning cases under the FHA have followed the *Arlington Heights* analysis. See, *e.g.*, *Gallagher* v. *Magner*, 619 F.3d 823, 833 (8th Cir. 2010), petition for cert. pending, No. 10-1032 (filed Feb. 14, 2011); *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1216-1217 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988); *United States* v. *City of Birmingham*, 727 F.2d 560, 565-566 (6th Cir.), cert. denied, 469 U.S. 821 (1984).

decision; (3) the sequence of events leading up to the decision, including departures from normal procedures and usual substantive norms; and (4) the legislative or administrative history of the decision. *Ibid.* *Arlington Heights*, 429 U.S. at 265-268, does not require a plaintiff to produce a comparative analysis in order to establish a case of intentional discrimination, and a plaintiff therefore need not always show more favorable treatment of a similarly situated individual in order to prevail on an intentional discrimination claim. See also *Pyke*, 258 F.3d at 110. Thus, the district court erred in concluding that plaintiffs' failure to show that they were treated less favorably than similarly situated non-disabled individuals was fatal to their intentional discrimination claim.

Accordingly, this Court should reverse the district court's ruling in this regard, and remand the case for the district court to consider plaintiffs' evidence of the City's discriminatory intent in light of the factors articulated in *Arlington Heights* for proving intentional discrimination – without making a comparative analysis a prerequisite for proving an intentional discrimination claim. As the district court acknowledged, plaintiffs submitted a "large amount of evidence" concerning the adverse effect of the definition of single housekeeping unit on sober homes, as well as the factual and legislative history of the ordinance, to show the City's discriminatory intent – none of which the court considered in granting summary judgment for the City. PS Doc. 167 at 10. See *Metoyer* v. *Chassman*,

504 F.3d 919, 931 (9th Cir. 2007) (stating that when the plaintiff offers direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant, "a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial"); see also *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003) (holding that circumstantial and direct evidence should be treated alike).

3. By failing to even consider plaintiffs' evidence of discriminatory intent regarding the enactment of Ordinance 2008-5, the district court plainly failed in its obligation to construe the evidence in the light most favorable to plaintiffs and to draw all reasonable inferences in their favor. Indeed, the summary judgment record contains abundant evidence that supports plaintiffs' intentional discrimination claims under the *Arlington Heights* standard.

First, the record supports plaintiffs' claim that they were adversely affected in the operation of their sober homes by the enactment of Ordinance 2008-5. For example, the evidence shows that the ordinance's definition of a single housekeeping unit – requiring that "the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager" and that all adult residents must be on a single written lease, PS Doc. 84 at Ex. A-7 – was included in the ordinance as a way to prevent most sober homes from qualifying as SHUs, and in fact had that intended effect. Prior to the

enactment of Ordinance 2008-5, when the City inspected Pacific Shores' sober homes in August 2007, it found that the homes were operating as SHUs. PS Doc. 130-1 at 16; NCR Doc. 96 at 78. The same homes did not meet the new definition of an SHU in Ordinance 2008-5. In addition, the number of sober homes in operation in the City decreased by around 40% between mid-2007, when the moratorium was in effect, and July 2008 (six months after the enactment of Ordinance 2008-5). NCR Doc. 96 at 195. Moreover, since mid-2007, no new group homes have opened in the City. NCR Doc. 96 at 197. This evidence regarding the harmful effect of Ordinance 2008-5 upon the operation of sober homes in the City strongly supports plaintiffs' claim of intentional discrimination under the *Arlington Heights* factors as well as this Court's decision in *Budnick*.

The historical background and sequence of events leading to the enactment of this ordinance also support plaintiffs' intentional discrimination claim. The record shows that the Mayor of Newport Beach, who stated on December 2, 2006, that sober homes "do nothing to really solve the problem but only serve as w[a]rehouses for alcoholics and drug addicts until they really hit bottom" (NCR Doc. 96 at 40), directed the City Council to form a committee to investigate sober homes. NCR Doc. 96 at 41. As suggested by the Mayor, the City Council formed a Committee on Intense Residential Occupancy (IROC) on January 27, 2007, to consider public complaints concerning "problems" residents were "experiencing

with [the] increased numbers of residential care facilit[ies], * * * specifically ones that cater to recovering alcoholics and drug addicts." NCR Doc. 96 at 41. Between January and April 2007, IROC conducted several public forums concerning sober homes, at which citizens complained that the presence of sober home residents contributed to increased crime and reduced property values. NCR Doc. 96 at 43, 45-46. Meanwhile, Assistant City Manager David Kiff compiled an inventory of group homes to target for enforcement. NCR Doc. 96 at 93.

In addition, the record shows that, according to City Attorney Robin Clauson, the original moratorium ordinance applied to short-term lodgings as well as sober homes because "the City's outside counsel advised including the [short-term] rentals to avoid the appearance of discriminating against drug recovery facilities[,] which[] would enjoy some state and federal protection." NCR Doc. 96 at 48-49. Plaintiffs presented evidence showing that short-term lodgings were removed from the subsequent moratorium ordinance in response to public objection to including short-term lodgings in the ordinance – notwithstanding concerns by some members of the City's Planning Commission that short-term lodgings represented a large percentage of non-conforming uses subject to abatement in residential districts, and contrary to advice of the City's outside counsel. NCR Doc. 96 at 90-92, 95-97, 103-105. In fact, after outside counsel advised that the City needed to apply the proposed ordinance to short-term lodging

to avoid discriminating against group homes, the City terminated its relationship with outside counsel. NCR Doc. 96 at 92-93. During this time, citizens continued to vehemently speak out against sober homes, stating that the number of such homes was "unacceptable," calling sober home residents "drug dealers," and stating that the City needs to "close [sober homes] down," at public meetings about the proposed ordinance. NCR Doc. 96 at 98, 101-102; see also NCR Doc. 96 at 85-89, 92-104 (additional examples of criticism of sober homes by City officials and private citizens).

Council Member Henn, who chaired the committee that drafted the ordinance, made multiple statements about how the ordinance will substantially reduce the number of sober homes in the city. NCR Doc. 96 at 112-114. He made the following statement about the final version of the ordinance, which included the new definition of an SHU, including the requirement that all adult residents must be on a single written lease: "I believe that taken together these findings and requirements will, in fact, result in a substantial reduction in the number of group homes on the Peninsula." NCR Doc. 96 at 112. Henn also stated that he was "not aware of any other city in the State of California that has adopted an ordinance that's as aggressive as [Ordinance 2008-5] in terms of the location of new [group homes]," and that the ordinance has "by far the longest list of qualifications, requirements, investigations, application information, and findings [of] any

ordinance passed anywhere in the State of California." NCR Doc. 96 at 113-114. Henn further stated that the ordinance is "a very substantive attack on this issue, and substantive from the perspective of the existing homes on the Peninsula," and that "this issue of the overconcentration [of group homes] will be substantially mitigated by the operation of this ordinance, and appropriately mitigated by the operation of this ordinance." NCR Doc. 96 at 114.

Furthermore, plaintiffs presented extensive evidence regarding the City's significant departures from its normal practices in enacting Ordinance 2008-5. For instance, the City conducted a public opinion survey of group homes in four locations with many group homes. NCR Doc. 96 at 56. The survey had an unusually short a four-day turnaround period and, as stated by the City Attorney, the purpose of the survey and the limited geographic scope was to gather evidence in the record to support the City's regulation of sober homes and overcome the discriminatory comments in the legislative record. NCR Doc. 96 at 57-59.

Moreover, plaintiffs presented evidence that the City established three different versions of ad hoc committees on group residential uses, all of which were chaired by Council Member Henn, to facilitate passage of the ordinance. PS Doc. 160-1 (Plaintiffs' Supp. Statement Of Material Facts) at 2-5. These committees drafted and revised the proposed ordinance, as well as discussed with other components of the City government the identity of sober homes in the City,

enforcement of the ordinance against specific homes, and the status of applications for reasonable accommodations and upcoming administrative hearings. PS Doc. 160-1 at 6-14. These meetings, including meetings with the City Council, were neither noticed nor open to the public, which was contrary to California's open meeting requirement, Cal. Govt. Code § 54952.2(b). PS Doc. 160-1 at 6, 12. Council Member Henn testified that he was not aware of any other time the City had established an ad hoc committee concerning the enforcement of an ordinance. PS Doc. 160-1 at 12. And, in fall 2007, the ad hoc committee wrote to the State Department of Alcohol and Drug Programs (ADP), which licenses facilities to provide addiction treatment services, requesting that the ADP deny licenses to applicants located in the City. PS Doc. 160-1 at 8-9; see also NCR Doc. 96 at 79-81. The City Attorney previously wrote to the ADP in March 2007, with the same request. NCR Doc. 96 at 79-80.[8]

* * * * *

[8] Ordinance 2008-5 also provides that small residential care facilities with six or fewer residents that are under the control of the same owner are treated as a single facility collectively for purposes of determining whether they qualify as an SHU. PS Doc. 84 at A-8 (integral facilities requirement). Although this provision did not adversely affect plaintiffs in this case because they operated sober homes with more than six residents, it is yet another example of a provision in the ordinance that is designed to make it more difficult for sober homes specifically, and group homes for persons with disabilities generally, to qualify as SHUs and locate in any residential zones other than multi-family housing zones.

Viewing the evidence in the light most favorable to plaintiffs, and drawing all reasonable inferences in their favor, the district court should have concluded that the evidence raised genuine issues of material fact concerning the City's intent to discriminate against disabled individuals by targeting sober homes in the enactment of Ordinance 2008-5. Summary judgment for the City on this issue was therefore reversible error.

CONCLUSION

This Court should reverse the district court's grant of summary judgment to defendant on plaintiffs' intentional discrimination claims, and remand the case for the district court to consider plaintiffs' evidence that the City enacted Ordinance 2008-5 with an intent to discriminate based on disability.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Word 2007 and contains 6,385 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2011, I electronically filed the forgoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the Appellate CM/ECF system.

I further certify that on October 11, 2011, I served a copy of the foregoing brief on the following parties or their counsel of record by First Class Mail:

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Written by Paul Dumont
10.13.2011

CIVIL RIGHTS - On Tuesday, October 11, 2011 sober living homes in Newport Beach heard news they had been longing to hear for many years: the United States Department of Justice, Civil Rights Division, weighed in with Amicus Curiae support for housing providers echoing their complaints the City had been violating the Fair Housing Act.

The Department of Justice, along with Housing and Urban Development, is tasked with enforcing provisions of the Federal Fair Housing Act and the Americans with Disabilities Act. These laws specifically provide protection against discriminatory land use ordinances imposed by municipalities that unduly limit housing opportunities for protected classes, including recovering alcoholics and addicts. Until Tuesday, the Federal government had declined to interfere in the Newport Beach controversy over limitations on sober living homes imposed by their Ordinance enacted in 2008.

Specifically, the DOJ asserts Newport Beach intentionally discriminated against a protected class and a lower Court mistakenly believed th at was okay due to a lack of proof non-disabled people were treated differently. Justice clarifies the legal requirements to prove discriminatory intent. They point out the lower court's misstatement of the proof required for intentional discrimination claims could significantly hamper the ability of both the United States and private litigants to enforce the FHA and ADA.

Many provisions of the Newport Beach ordinance are mirrored in the Community Care Facilities ordinance proposed in Los Angeles. And many of the stated reasons to support the ordinance found to be discriminatory in Newport Beach can be found in the legislative history in Los Angeles.

Evidence demonstrating discriminatory reasons motivated an ordinance is enough to prevail on a claim of intentional discrimination. Los Angeles initially sought only to regulate sober living homes and then broadened the scope to all shared living arrangements in an attempt to evade this FHA protection. Judges are not stupid; they look to the intent of an ordinance.

The time has come for the City of Los Angeles to go back to the drawing board and figure out a way to use existing nuisance abatement laws to regulate problem properties of all kinds, regardless of whether the residents happen to be sober. The proposed LA law should be scrapped.

(Paul Dumont is a sober living home owner and a sober housing advocate.) -cw

Tags: Newport Beach, Fair Housing Act, Civil Rights, Department of Justice, Los Angeles,

Community Care Facilities

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