Sec. 114-1. - Definitions.

The following words, terms and phrases when used in this subpart B, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Accessory building means a detached subordinate building or portion thereof, the use of which is incidental to and customary in connection with the main building or use and which is located on the same lot with such main building or use. Where there is no main building on the lot, an accessory building shall be considered as a main building for the purpose of the height, area, and bulk regulations.

Accessory use means a subordinate use which is incidental to and customary in connection with the main building or use and which is located on the same lot with such main building or use.

Adult congregate living facility means any state licensed institution, building, residence, private home, boarding home, home for the aged, or other place whether operated for profit or not, which undertakes through its ownership or management to provide for a period exceeding 24 hours, one or more personal services for four or more adults, not related to the owner or administrator by blood or marriage, who require such services. A facility offering personal services for fewer than four adults shall be within the meaning of this definition if it holds itself out to the public to be an establishment which regularly provides such services.

Adult congregate living facility unit means any room, or inter-connected rooms with one main entrance, in an adult congregate living facility, containing one or more beds.

Aggregate area or aggregate width means the sum of two or more designated areas or widths to be measured, limited, or determined under these regulations.

Alcoholic beverage shall be as defined by F.S. § 561.01(4).

Alcoholic beverage establishment means any commercial establishment located in the city which allows for alcoholic beverages (liquor, beer or wine) to be consumed by patrons on the premises.

Alcoholic beverage establishment (midnight to 2 a.m.) means a commercial establishment located in the city which allows for alcoholic beverages (liquor, beer or wine) to be consumed by patrons on the premises, up until 2:00 a.m.

Alcoholic beverage establishment (midnight to 5 a.m.) means a commercial establishment located in the city which allows for alcoholic beverages (liquor, beer or wine) to be consumed by patrons on the premises, up until 5:00 a.m.

Alley means a public or private thoroughfare which affords only a secondary means of access to abutting property and which is not otherwise designated as a street.

Apartment building means a building with or without resident supervision occupied or intended to be occupied by more than two families living separately with separate cooking facilities in each unit.

Apartment hotel means a building containing both apartment units and hotel units, under resident supervision, and having an inner lobby through which all tenants must pass to gain access.

Apartment unit means a room, or group of rooms, occupied or intended to be occupied as separate living quarters by one family and containing independent cooking and sleeping facilities. (Term includes condominium.)

Applicant means any person seeking to undertake any development as defined in this section.

Archeological site means a specific location which has yielded or is likely to yield information about local history or prehistory. Archeological sites may be found within archeological zones, historic sites, or historic districts.

Architectural district means that area listed on the National Register of Historic Places, as of May 14, 1979, in accordance with the National Preservation Act of 1966 as amended and in the Florida Master Site File under Number 8-DA 1048 as the city architectural district.

Availability or *available* mean with regard to the provision of facilities and services concurrent with the impacts of development, means that at a minimum the facilities and services will be provided in accordance with the standards set forth in F.A.C. 9J-5.055(2).

Awning means a detachable, roof like cover, supported from the walls of a building for protection from sun or weather.

Balcony means a platform that projects from the wall of a building and has a parapet or railing, the long side of which is open above the guardrail or parapet. The platform may service one unit or it may be a continuous platform serving more than one unit with a wall separating the platform between the units.

Bar means an alcoholic beverage establishment which is not also licensed as a restaurant, dance hall or entertainment establishment.

Bar counter, accessory outdoor means an accessory freestanding or substantially unenclosed counter or similar device either stationary or mobile at or behind which alcoholic beverages may be prepared and served.

Base flood elevation, for the City of Miami Beach shall be as defined in Section 54-35.

Beachfront park and promenade plan means a revegetation program including beach recreation structures which are primarily constructed of wood, concrete or other hard surface and located on the dune, for the purpose of permitting the passage of pedestrians along, over and across the dune in such a manner as to protect and stabilize the dune, vegetation, and beach.

Bed and breakfast inn means a historic structure originally built as a single-family residence which is owner occupied and operated to provide guest rooms with breakfast and/or dinner included as part of the room rate.

Beer means a brewed beverage containing malt.

Block means a segment of the city, usually but not always a square area, formed by and lying between intersecting streets or other physical boundaries, unless otherwise defined by an official plat of property in the city. Also, the length of one side of such a square.

Building means any structure having a roof supported by columns or walls for the shelter or enclosure of persons or property and includes the word structure and includes any part thereof.

Building card means a document maintained by the building services department for purposes of recording building permits and other pertinent construction data and zoning related actions that affect the property which document originates at the time a parcel of land is created and is kept as a history of the property.

Building official means the individual appointed by the city manager to administer and enforce the South Florida Building Code in the city.

Building permit means a permit issued by the designated building official, his designee or authorized agency or department of the city which allows a building or structure to be erected, constructed, demolished, altered, moved, converted, extended, enlarged, or used, for any purpose, in conformity with applicable codes and ordinances.

Building site means any improved lot, plot, or parcel of land where there may exist a main permitted structure and any accessory/auxiliary building or structure including, but not limited to, swimming pools, tennis courts, walls, fences, or any other improvement which was heretofore constructed on property containing one or more platted lots or portions thereof shall constitute one building site.

Bulkhead line means an official line designated by the city commission for properties located along Biscayne Bay, Government Cut or the Atlantic Ocean, as described in chapter 14, article V.

Cabana means an accessory structure used as a bathhouse or a shelter directly associated with a swimming pool or deck.

Cafe, beachfront means a permanent structure located on the beach in the dune overlay district where food and beverages are served.

Cafe, outdoor means a use characterized by outdoor table service of food and beverages prepared for service in an adjacent or attached main structure for consumption on the premises. This definition does not include an accessory outdoor bar counter, which is considered to be a separate accessory use to an outdoor

cafe or a hotel pool deck, as described in section 142-1109.

Cafe, sidewalk means a use located on a public right-of-way which is associated with a restaurant where food or beverages are delivered for consumption on the premises but not having cooking or refrigeration equipment. It is characterized by tables and chairs and may be shaded by awnings, canopies or umbrellas.

Canopy means a detachable, rooflike cover, supported from the ground, or deck, or floor of a building, and from the walls of a building, for protection from sun or weather.

Carport/shelter means a canopy or rooflike structure, open on at least two sides, which may be attached or detached from the main building, for the purpose of providing shelter for one or more motor vehicles.

Certificate of appropriateness means a certificate issued by the historic preservation board indicating that new construction, alteration or demolition of an historic structure or an improvement within an historic district is in accordance with chapter 118, article X of this Code.

Certificate of compliance means a document issued by the proper authority certifying that the plans for a proposed use meet all applicable codes, regulations and ordinances.

Certificate to dig means a certificate issued by the historic preservation board allowing for the excavation or fill on a site designated as archaeologically significant.

Certificate of occupancy means a document issued by the building official allowing the occupancy of a building and certifying that the structure has been constructed in compliance with all applicable codes, regulations and ordinances.

Certificate of use means a document issued by the fire department, department of code compliance allowing the use of a building and certifying that the use is in compliance with all applicable city codes, regulations and ordinances.

City of Miami Beach Freeboard, for purposes of measuring building height, "City of Miami Beach Freeboard" means the additional elevation between the minimum finished floor elevation and the base flood elevation, as provided in section 54-48, specific standards.

Clinic means a medical use without overnight facilities where patients are admitted for examination and treated by a group of physicians or dentists practicing medicine together. The term does not include a place for the treatment of animals.

Club, private means building and facilities or premises used or operated by an organization or association for some common purpose, such as, but not limited to, a fraternal, social, educational or recreational purpose, but not including, clubs organized primarily for profit or to render a service which is

customarily carried on as a business and are incorporated under the Laws of Florida as a nonprofit corporation and their purpose shall not be the serving of alcoholic beverages.

Commercial establishment means an establishment operated for profit, whether or not a profit is actually made.

Commercial uses means any activity where there is an exchange of goods or services for monetary gain. Such activities include but are not limited to, retail sales, offices, eating and drinking establishments, theaters and similar uses.

Commercial vehicle means any vehicle, including, but not limited to, trucks, trailers, semitrailers, tractors, motor homes, and vehicles for rent or lease utilized in connection with the operation of a commerce, trade, or business, or automobile rental agency as defined in section 102-356, and not utilized as a dwelling.

Commercial vessel means every vessel which is used or operated for profit or fee on the navigable waters of the city; that is either carrying passengers, carrying freight, towing, or for any other such use.

Community redevelopment agency means the redevelopment agency of the city, a public agency created pursuant to F.S. § 163.330 et seq. and section 34-31 et seq.

Comprehensive plan means the document adopted by the city commission in accordance with the Local Government Comprehensive Planning and Land Development Regulation Act of 1986, as amended, meeting the requirements of F.S. §§ 163.3177 and 163.3178; principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the city.

Concurrency means a condition where the necessary public facilities and services to maintain the adopted level of service standards are available when the impacts of development occur.

Concurrency management system means the procedures and/or process that the city will utilize to assure that development orders and permits when issued will not result in a reduction of the adopted level of service standards at the time that the impact of development occurs, as specified in chapter 122 of this Code.

Conditional use means a use that would not be appropriate generally or without restriction throughout a particular zoning district, but would be appropriate if controlled as to number, area, location, or relation to the neighborhood.

Conditional use permit means a permit issued by the planning and zoning director and recorded in the public records of the county allowing a specific conditional use that was approved for a particular property pursuant to procedures set forth in chapter 118, article IV.

Consistency or consistent means compatible with the principles of, and furthering the objectives, policies, land uses, and intensities of the city comprehensive plan.

Construction vehicle means any vehicle or motorized equipment utilized for the manufacture of a structure, and not utilized as a dwelling.

Contributing building, structure, improvement, site, or landscape feature means one which by location, scale, design, setting, materials, workmanship, feeling or association adds to a local historic district's sense of time and place and historical development. A building, structure, improvement, site or landscape feature may be contributing even if it has been altered if the alterations are reversible and the most significant architectural elements are intact and repairable.

Court means an open space which may or may not have direct street access and around which is arranged a single building or a group of related buildings.

Courtyard, internal means that portion of a lot whether sodded, landscaped or paved, unoccupied by any part of a structure and open to the sky, which is substantially surrounded by a single building or group of buildings on three or more sides.

Crown of road shall be as defined in Section 54-35.

Crown of road, future shall be as defined in Section 54-35.

Currently available revenue sources means an existing source and amount of revenue presently available to the city. It does not include the city's present intent to increase the future level or amount of a revenue source which is contingent on ratification by public referendum or the present intent to increase revenue sources which may require future action by the city commission.

Dance hall means a commercial establishment where dancing by patrons is allowed, including, but not limited to, restaurants, alcoholic beverage establishments and entertainment establishments.

Day care facility means any establishment other than a family day care facility providing care during the day, but not at night, of children under the age of six who are not attending a school in grade kindergarten or higher, and who are not related to the resident family.

Demolition means the partial, substantial, or complete removal or destruction of any structure, building or improvement.

Design review means the process set forth in chapter 118, article VI.

Development means the undertaking of any building or construction, including new construction, rehabilitation, renovation or redevelopment, the making of any material changes in the use or appearance of property or structures, the subdivision of land, or any other action for which development approval is necessary.

Development agreement means an agreement entered into by the city and the property owner with respect to a project, by which the development, use, timing, capital improvements and other elements of the project may be specified.

Development approval means any zoning, rezoning, conditional use, variance or subdivision approval, or any other official approval of local government required for the alteration or use of land or improvements.

Development rights, transfer (TDR) means the removal of the right to develop or build, expressed in floor area, from land in one zoning district to land in another zoning district where such transfer is permitted.

Dining room, accessory means a portion of a building devoted exclusively to the serving of food and refreshment for consumption on the premises by occupants.

Dormitory means an accessory use located in a building which provides sleeping accommodations for students enrolled in a religious, educational, or business program who occupy rooms on a contractual basis generally for a period of time corresponding to the length of the program.

Drive means the area which connects a parking aisle in a parking lot or parking garage either to a street, alley or another parking aisle; or which serves as the approach to the off-street parking space(s) or parking garage for a single-family residence or townhome.

Drive-in means an establishment or part thereof designed or operated to serve a patron seated in an automobile parked in an off-street parking space.

Dune means a mound or ridge of loose usually sand-sized sediments, lying landward of the beach and extending inland to the leeward toe of the mound or ridge which intercepts the 100-year storm surge.

Dwelling means a building or portion thereof, designed or used exclusively for residential occupancy, but not including trailers, mobile homes, hotels, boardinghouses and lodginghouses, tourist courts, or tourist homes.

Dwelling, multiple-family means a building designed for or occupied by three or more families.

Dwelling, single-family means a building designed for or occupied exclusively by one family.

Dwelling, single-family detached means a dwelling designed for or occupied, exclusively by one family surrounded by yards or other landscape areas on the same lot.

Dwelling unit, portable means any vehicle designed for use as a conveyance upon the public streets and highways and for dwelling or sleeping purposes.

Entertainment establishment means a commercial establishment with any live or recorded, amplified or nonamplified performance, (excepting television, radio and/or recorded background music, played at a volume that does not interfere with normal conversation, and indoor movie theater operations). Entertainment establishments may not operate between the hours between the hours of 5:00 a.m. and 10:00 a.m., except as provided for under subsection 6-3(3)(b).

Erosion control line (ECL) means the line determined in accordance with the provisions of F.S. §§ 161.041—161.211 and amendments thereto, which represents the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the Atlantic Ocean, the Gulf of Mexico and the bays, lagoons, and other tidal reaches thereof on the date of the recording of the survey as authorized in F.S. § 161.181.

Evaluation guidelines means the standards applicable to alteration, renovation, new construction for a historic site or improvement within a historic district, which standards will be used as criteria by the historic preservation board and its staff in making decisions on applications for certificates of appropriateness.

Exterior means all external surfaces of any improvement.

Fallout shelter means a structure or portion of a structure intended to provide protection to human life during periods of danger from nuclear fallout, air raids, storms or other emergencies.

Family means an individual or two or more persons related by blood or marriage, or a group of not more than three persons (excluding servants) who need not be related by blood or marriage, living together as a single housekeeping unit in a dwelling.

Family day care facility means an occupied residence in which chid care is regularly provided for children and which receives a payment, fee, or grant for any of the children receiving care, whether or not operated for profit. A family day care facility shall be allowed to provide care for one of the groups of children as defined in subsection 142-905(b)(1) and in F.S. § 402.302(5).

State Law reference— Local zoning regulations regarding family day care homes are defined in F.S. §§ 402.302(5), 166.0445.

Filling station means any establishment that sells, distributes or pumps fuels for motor vehicles.

Fire prevention and safety code means the code adopted pursuant to chapter 50.

Fixture means an article in the nature of personal property which has been permanently attached or affixed to a building, structure or land by means of cement, plaster, nails, bolts or screws.

Floor area means the sum of the gross horizontal areas of the floors of a building or buildings, measured from the exterior faces of exterior walls or from the exterior face of an architectural projection, from the centerline of walls separating two attached buildings. However, the floor area of a building shall not include the following unless otherwise provided for in these land development regulations.

(1) Accessory water tanks or cooling towers.

(2) Uncovered steps.

(3) Attic space, whether or not a floor actually has been laid, providing structural headroom of less than seven feet six inches.

(4) Terraces, breezeways, or open porches.

(5) Floor space used for required accessory off-street parking spaces. However, up to a maximum of two spaces per residential unit may be provided without being included in the calculation of the floor area ratio.

(6) Commercial parking garages and noncommercial parking garages when such structures are the main use on a site.

(7) Mechanical equipment rooms located above main roof deck.

(8) Exterior unenclosed private balconies.

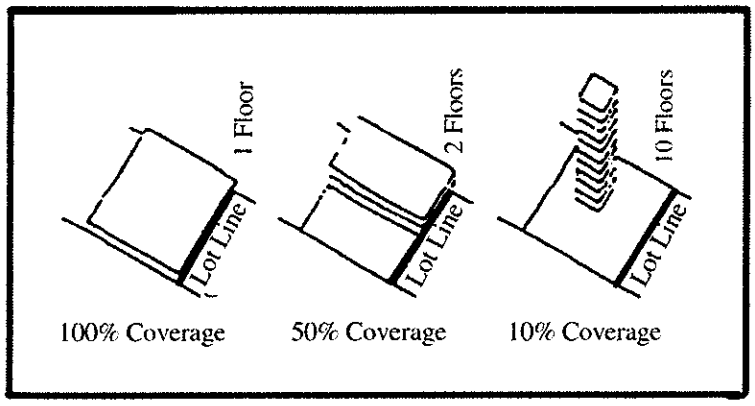
(9) Floor area located below grade when the top of the slab of the ceiling is located at or below grade. However, if any portion of the top of the slab of the ceiling is above grade, the floor area that is below grade shall be included in the floor area ratio calculation.

(10) Enclosed garbage rooms, enclosed within the building on the ground floor level.

Volumetric buildings, used for storage, where there are no interior floors, the floor area shall be calculated as if there was a floor for every eight feet of height.

When transfer of development rights are involved, see chapter 118, article V for additional regulations that address floor area.

Floor area ratio means the floor area of the building or buildings on any lot divided by the area of the lot.



Each example illustrated above has a floor area ratio of 1.0.

Freeboard shall be as defined in Section 54-35.

Freeboard, maximum shall be as defined in Section 54-35.

Freeboard, minimum shall be as defined in Section 54-35.

Full building permit means the full and complete building permit allowing construction of the entire project, and requiring submission of all plans required and approved by the design review board, the historic preservation board, the planning board or the board of adjustment. A full building permit shall not be merely a demolition, electrical, foundation, mechanical or plumbing permit or any other partial permit that does not include all plans for the entire project as submitted, required and approved by the design review board, the historic preservation board, the planning board or the board of adjustment; except that projects that have been approved for phased development by the design review board, the historic preservation board, the planning board or the board of adjustment may obtain a phased development permit instead of a full building permit.

Garage, accessory means an accessory building designed or used for parking for the main permitted structure.

Garage, commercial means a building or a portion thereof, used primarily for indoor parking of vehicles for compensation.

Garage, mechanical means any premise where vehicles are mechanically repaired, rebuilt or constructed for compensation.

Grade means the city sidewalk elevation at the centerline of the front of the property. If there is no sidewalk, the elevation of the crown of the road at the centerline of the front of the property shall be used.

Grade, adjusted means the midpoint elevation between grade and the minimum required flood elevation for a lot or lots.

Grade, average existing means the average grade elevation calculated by averaging spot elevations of the existing topography taken at 10-foot intervals along the property lines.

Grade, future adjusted means the midpoint elevation between the future crown of the road as defined in the CDM Smith Stormwater Plan, and the base flood elevation plus minimum freeboard for a lot or lots.

Green infrastructure shall be as defined in Section 54-35.

Guest/servants quarters means living quarters within a detached or semi-detached accessory building located on the same lot with the main building for use by temporary guests or servants of the occupants of the premises. Such quarters shall not have separate utility meters, shall not be rented or otherwise used as a separate dwelling or have cooking facilities except as set forth in section 142-905.

Height of building means the vertical distance from the lowest floor according to the following, as applicable:

(a) When the minimum finished floor elevation is located between grade and base flood elevation plus "City of Miami Beach Freeboard", height shall be measured from the minimum finished floor elevation to the highest point of the roof;

(b) When the minimum finished floor elevation in located above the base flood elevation plus Freeboard, height shall be measured from the base flood elevation plus Freeboard.

The highest point of a roof is as follows:

1. The highest point of a flat roof;
2. The deck line of a mansard roof;
3. The average height between eaves and ridge for gable hip and gambrel roofs; or
4. The average height between high and low points for a shed roof.

(c) As all rights-of-way have not yet been elevated, for commercial properties, height shall be measured from the base flood elevation, plus freeboard, provide that the height of the first floor shall be tall enough to allow the first floor to eventually be elevated to base flood elevation, plus minimum freeboard, once the adjacent right-of-way is elevated as provided under the City's Public Works Manual.

Historic building, improvement or structure means a building, improvement or structure which has been designated as historic pursuant to the procedures in chapter 118, article X, division 4 or which is designated as historic in the historic properties database. The public portions of interiors of historic buildings and significant landscape features may also be considered historic if they have been so designated pursuant to chapter 118, article X, division 4 or in the historic properties database.

Historic district means a geographically definable area which has been designated as an historic district pursuant to chapter 118, article X, division 4.

Historic district suites hotel means any contributing structure within a local historic district or any designated historic site, which existed as an apartment building as of March 13, 1999, and is subsequently rehabilitated to operate as a suites hotel pursuant to section 142-1105 in a district where suite hotels are a main permitted use.

Historic landscape feature means vegetation, geological feature, ground elevation, body of water or other natural or environmental feature which has been designated as a historic landscape feature pursuant to chapter 118, article X, division 4.

Historic preservation and urban design director means that individual appointed by the city manager who is the deputy director of the development, design and historic preservation department.

Historic properties database (database) means a list maintained by the city containing the names, addresses and relevant historic data regarding the following:

(1)

Buildings, structures, improvements, sites, interiors and landscape features designated pursuant to chapter 118, article X, division 4 as historic buildings, structures, improvements, sites, interiors and landscape features.

(2) Buildings located in a historic district. Properties located in a historic district shall be classified in the database as historic, contributing or noncontributing. Entries for historic and contributing buildings may include architecturally significant features of the public portions of interiors of the buildings.

(3) Historically significant properties. The database may be updated, amended and revised by the historic preservation board.

Historic site means a site which has been designated an historic site pursuant to chapter 118, article X, division 4 or which is designated as a historic site in the historic properties database.

Historically significant property means a building, structure, improvement or site which has not been designated historic pursuant to chapter 118, article X, division 4 and is not located in a historic district, but meets the requirements for historic designation as set forth in subsection 118-592.

Home based business office means an accessory business office in a single family residence or apartment unit which is incidental to the primary residential use and which satisfies the criteria prescribed in section 142-1411.

Hospital means an institution licensed by the State of Florida as a hospital, having facilities for in-patients, providing medical or surgical care for humans requiring such treatment, and which may include accessory uses, related facilities such as nursing homes, convalescent homes, home health agencies, hospice facilities and other accessory hospital facilities as described in subsection 142-452(2).

Hospital-based physician means a physician who is affiliated with a hospital:

(1) As an anesthesiologist, radiologist, pathologist, or emergency room doctor; or

(2) As a full time hospital employee; or

(3) On a full time basis pursuant to a contract.

Hospital staff means physicians and other medical staff affiliated with, and having staff privileges at a hospital who are not hospital-based physicians.

Hotel means a building occupied or intended to be occupied by transient residents, with all residents occupying hotel units and where ingress or egress may or may not be through a common lobby or office that is supervised by a person in charge at all times.

Hotel, convention means a newly constructed or substantially rehabilitated hotel located within 2,500 feet of the city convention center.

Hotel unit means a room, or group of rooms, with ingress or egress which may or may not be through a common lobby, intended for rental to transients on a day-to-day, week-to-week, or month-to-month basis, not intended for use or used as a permanent dwelling and without cooking facilities. (This term includes a suite hotel unit, see section 142-1105.)

Houseboat means a watercraft designed for dwelling purposes which is propelled by sail, motor or both.

Housebarge means a vessel or watercraft capable of being utilized as a residence floating on water, usually permanently moored, which does not have a system of propulsion.

Improvement means any building, structure, fence, gate, wall, walkway, parking facility, light fixture, bench, fountain, sign, work of art, earthworks or other manmade object constituting a physical betterment of real property.

Individual means any person, corporation, firm, partnership, limited partnership, association, joint stock association, estate, trust, or business entity.

Institution means a use, building or organization of a public character or providing a public or semipublic service.

Interior side yard open space means that open space portion of a lot whether sodded, landscaped or paved, unoccupied by any part of a structure and open to the sky, which is surrounded by a single building or group of buildings on three sides by walls, and extending towards an interior or side facing street yard.

Land development regulations means ordinances enacted by the city commission of the city for the regulation of any aspect of development, which includes these land development regulations and any other regulations governing subdivision, building construction, or any other regulations controlling the development of land.

Landscape feature means all vegetation, geological features, ground elevation, bodies of water, or other natural or manmade environmental feature.

Level of service means an indicator of the extent or degree of service provided by, or proposed to be provided by a public facility on and related to the operational characteristics of the public facility. Level of service shall indicate the capacity per unit of demand for each public facility.

Liquor means all distilled or rectified spirits, brandy, whiskey, rum, gin, cordials or similar distilled alcoholic beverages, including all dilutions and mixtures of one or more of the foregoing.

Live aboard means any person who utilizes a vessel as a temporary or permanent place of abode or habitation. A vessel used for recreation or entertainment, but not sleeping shall not be deemed a live aboard.

Loading space means space logically and conveniently located for bulk pick-ups and deliveries, scaled to delivery vehicles expected to be used, and accessible to such vehicles when required off-street parking spaces are filled.

Lot means a parcel of land of at least sufficient size to meet minimum zoning requirements for use, minimum width, and area, and to provide such yards and other open spaces as are required in these land development regulations. Such lot shall have frontage on a public street, and may consist of:

(1) A single lot of record;

(2) A portion of a lot of record;

(3) A combination of complete lots of record, and portions of lots of record; or of portions of lots of record;

(4) A parcel of land described by metes and bounds.

"Lot" includes the word "plot" or "parcel" or "tract" or "site."

Lot area means the total horizontal area within the lot lines of the lot.

Lot, corner means a lot abutting upon two or more streets at their intersection.

Lot coverage means the percentage of the total area of a lot that, when viewed directly from above, would be covered by all principal and accessory buildings and structures, or portions thereof; provided, however, that exterior unenclosed private balconies, awnings and porte-cocheres shall not be included in determining the building area.

Lot depth means the mean horizontal distance between the front and rear lot lines.

Lot front means the front of a lot shall be construed to be the portion nearest the street. For corner lots, the lot front shall be the narrowest portion abutting the street unless determined otherwise by the city.

Lot frontage means the distance for which the front lot line and the street line are coincident.

Lot, interior means a lot, other than a corner lot.

Lot, key means an interior lot having its side lot lines coincident on one or both sides with the rear lot lines of adjacent lots.

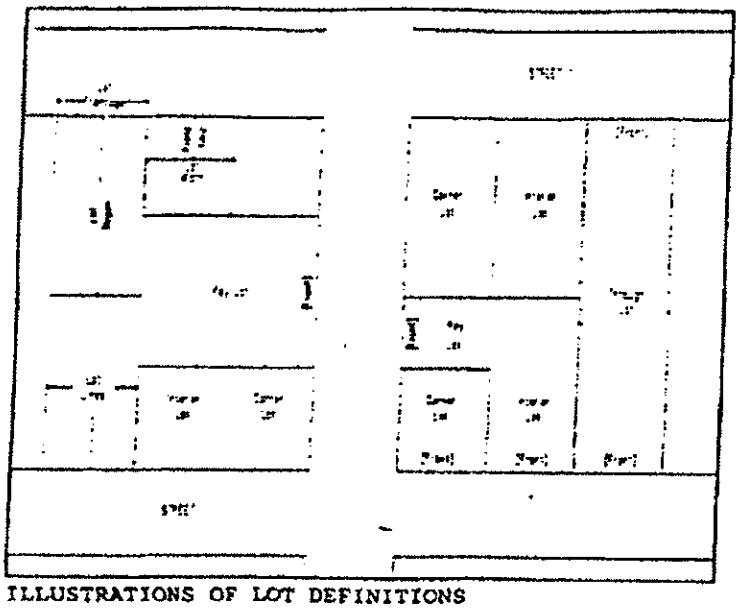
Lot line means the boundary line of a lot.

Lot, oceanfront means any lot having the erosion control line (ECL) as a property line. Floor area computations shall include all of lot area measured to the erosion control line.

Lot of record means a lot which is part of a subdivision, the map of which has been recorded in the public records of the county, or a lot described by metes and bounds, the description of which has been recorded in the public records of the county. (See "Site.")

Lot, through (double frontage) means any lot having frontages on two parallel or approximately parallel streets.

Lot width means the level distance between the side lot lines measured at the required front yard setback line and parallel to the front street line.



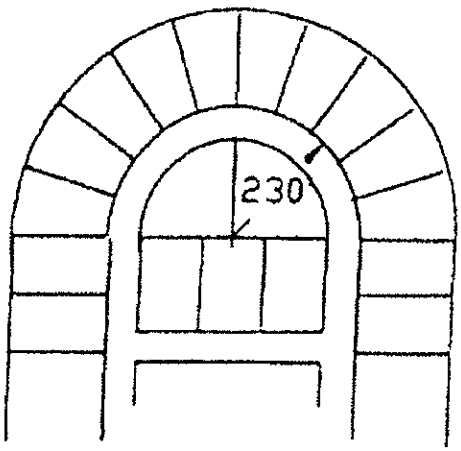
ILLUSTRATIONS OF LOT DEFINITIONS

However, in single-family districts, the lot width shall be the average of the front and rear lot widths if a lot meets the following criteria means:

(1) Side lot lines are not parallel.

(2) The front lot line is a least 30 feet wide.

(3) The lot fronts on a turning circle of a cul-de-sac or a circular street with a radius of less than 230 feet.



CIRCULAR STREET WITH
RADIUS OF 230'
(NOT TO SCALE)

Major cultural dormitory facility means a building which is occupied by members, and their authorized guests, of a sponsoring major cultural institution with all residents occupying major cultural dormitory facility units and where ingress or egress may be through a common lobby or office that is supervised at all times for security purposes.

Major cultural dormitory facility unit means a room, or group of rooms with one main entrance with ingress or egress through a common lobby or office, occupied or intended to be occupied by members, and their authorized guests, of a sponsoring major cultural facility; not leased or subleased to the general public and without cooking facilities.

Major cultural institution means an institution that meets the mandatory requirements as set forth in section 142-1332.

Mandatory requirements means requirements or provisions of these land development regulations not subject to relaxation or waiver by the variance process.

Marina means a place for docking pleasure boats or commercial vessels and providing services to the occupants thereof, including minor servicing and minor repair to boats, sale of fuel and supplies, and provision of lodging, food, beverages, commercial offices, and entertainment as accessory uses.

Marine dockage means accessory use only, a place for docking of pleasure boats.

Mezzanine means an intermediate floor in any story or room. When the total floor area of any such mezzanine floor exceeds one-third the total floor area in that room or story in which the mezzanine occurs, it shall be considered as constituting an additional story. The clear height above or below the mezzanine floor construction shall be not less than seven feet.

Miami Beach Property Maintenance Standards refers to section 58-176 et seq. and section 58-336 et seq.

Minimum finished floor elevation means the lowest enclosed floor above grade and shall not include areas for building access, provided such areas do not exceed a depth of 20 feet from the exterior building face. Interior stairs, ramps and elevators used to transition from grade to the minimum finished floor elevation may be located beyond the 20 feet depth from the exterior building face. However, areas for building access may exceed a depth of 20 feet from the exterior building face if approved by the design review board or historic preservation board, as applicable.

Motion picture theater means a building or part of a building used solely for the purpose of showing movies, motion pictures, and projections of events and performances conducted elsewhere, including permitted accessory uses such as eating and drinking concessions; and provided such theater, or any part thereof, is not an adult entertainment establishment (section 142-1271), dance hall, nor entertainment establishment (section 114-1).

Neighborhood plan means the neighborhood plan adopted by the city commission which establishes design guidelines, planning concepts and zoning recommendations for a geographical area.

Nonconforming building or structure means a building or structure or portion thereof which was designed, erected or structurally altered prior to the effective date of these land development regulations in such a manner that characteristics of the building or structure, other than its use, do not comply with the restrictions of these land development regulations.

Nonconforming use means a use which exists lawfully prior to the effective date of these land development regulations and is maintained at the time of and after the effective date of these land development regulations, although it does not conform to the use restrictions of these land development regulations.

Noncontributing building, structure, improvement, or landscape feature means a building, structure, improvement, site or landscape feature located in a designated historic district which does not add to the district's sense of time and place and historical development; or one where the location, design, setting, materials, workmanship, feeling and association have been so altered or have so deteriorated that the overall integrity of the building has been irretrievably lost.

Nursing home means a facility licensed by the state as a nursing home and providing long-term care of the chronically ill, the physically disabled, and the aged who are unable to move about without the aid of another person or device.

Occupational license means the required license to conduct business within the city pursuant to chapter 18.

Overlay district means constitutes a set of regulations which are superimposed upon and supplement, but do not replace, the underlying zoning district and regulations otherwise applicable to the designated areas.

Parking aisle means the area to the rear of off-street parking spaces utilized for maneuvering of motor vehicles in a parking lot or parking garage.

Parking garage means a substantially enclosed structure used for the parking of motor vehicles.

Parking lot means an at-grade, level area used for the parking of motor vehicles.

Parking lot, commercial means a parking lot where parking is offered to the general public for compensation.

Parking lot, provisional means a parking lot designed and authorized to be used for a period of time shorter than that permitted for a temporary parking lot. (See section 130-69.)

Parking lot, temporary means a parking lot designed to be used for a temporary period of time. (See section 130-68.)

Parking space, off-street means an area, not in a street or alley, that is maintained for the parking of one motor vehicle.

Parking space, tandem means an area, not in a street or alley, maintained for the stacked parking of two motor vehicles.

Pawn means either of the following transactions:

(1) *Loan of money.* A written or oral bailment of personal property as security for an engagement or debt, redeemable on certain terms and with the implied power of sale on default.
(2) *Buy-sell agreement.* Any agreement whereby a purchaser agrees to hold property for a specified period of time to allow the seller the exclusive right to repurchase the property. A buy-sell agreement is not a loan of money.

Pawnbroker means Any person, corporation, partnership, or other business organization or entity which is not solely a secondary metals recycler subject to F.S. ch. 538, pt. II, which is regularly engaged in the business of making pawns. The term does not include a financial institution as defined in F.S. § 655.005 or any person who regularly loans money or any other thing of value on stocks, bonds or other securities.

Pawnshop means a place or premise at which a pawnbroker is registered to conduct business as a pawnbroker, or conducts such business.

Pedestal means that portion of a building or structure which is equal to or less than 50 feet in height above sidewalk elevation.

Performance standard use means any development in the PS performance standard district for which a building permit or development approval is required, and, which use is permissible as of right or by conditional use in the PS district.

Personal service means any services in addition to housing and food service, which include, but are not limited to, personal assistance with bathing, dressing, ambulation, housekeeping, supervision, emotional security, eating, supervision of self-administered medications, and assistance with securing health care from appropriate sources.

Planned residential development means a residential development of ten acres or more which has a cohesive site development plan encompassing more than one building, and meeting the requirements of section 118-1.

Planning and zoning director means the individual appointed by the city manager who is the deputy director of the development, design and historic preservation department.

Pleasure craft or pleasure boat means a vessel not within the classification of a commercial vessel, housebarge or houseboat and which is designed primarily for the purpose of movement over a body of water and which is equipped with a means of propulsion, in operating condition, which is appropriate to the size and type of vessel.

Porte-cochere means an attached or detached rooflike structure extending from the entrance of a building over an adjacent driveway.

Premises means a lot, together with all buildings and structures thereon.

Promenade linkage means a structure which functions as a stairway or ramp connecting the upland property to the beachfront park and promenade. Such structure shall conform to the design specifications for the beachfront park and promenade and shall be located at points established by the planning, design and historic preservation division. All such structures shall conform to the requirements of the State of Florida Department of Natural Resources, Division of Beaches.

Property owner means the person or persons having a legal or equitable interest in real property, including property that is the subject of a development agreement, and includes the property owner's successor in interest.

Public facilities and services means facilities relating to comprehensive plan elements required by F.S. § 163.3177 and for which level of service standards must be adopted under F.A.C. ch. 9J-5. The public facilities and services means roads, sanitary sewer, solid waste, drainage, potable water, recreation, and mass transit.

Recycling receiving station means a building or a portion thereof, where, for compensation certain types of recyclable materials including, but not limited to aluminum, plastic, paper and scrap metal could be rendered for its wrapping, packing and shipping to another environmentally approved location where the actual recycling of the materials will take place. The term does not include a motor vehicle junkyard.

Redevelopment area means that portion of the city designated by the city commission pursuant to F.S. § 163.330 et seq., and amendments thereto.

Redevelopment plan means the South Shore Revitalization Strategy prepared pursuant to F.S. § 163.330 et seq. adopted by the city commission on February 15, 1984, and constituting the redevelopment plan for the redevelopment area as well as the redevelopment element of the city comprehensive plan.

Religious institution means a use where an establishment, organization or association conducts religious prayer or activity that is open to members and/or the general public, and may be accompanied by accessory uses customarily associated with religious institutions such as, but not limited to, education classes, youth centers, day care, offices, and rooms for licensed catering of life cycle or other gatherings or celebrations (e.g., weddings, confirmations, and coming-of-age events). A group privately assembling for worship, prayer or religious service in a private home or dwelling in which at least one member of the group resides, is not a religious institution, even if life cycle rituals are included in the service, including weddings, confirmations, and coming-of-age (such as bar or bat-mitzvah) observances and meals accompany the service.

Replacement value means a figure determined by the county tax assessor which is the cost of replacing all or a portion of a building based on new construction.

Restaurant means a commercial establishment where refreshments or meals may be purchased by the public and which conducts the business of serving of food to be consumed on or off the premises.

Roof deck means a structural platform located above the finished main roof line of a building, designed for outdoor occupation.

Roominghouse means a building other than an apartment, apartment hotel, hotel, where, for compensation and by pre-arrangement for definite periods, lodging, meals, or lodging and meals are provided for three or more persons but not for more than 20 persons.

Safety barriers means a screened-in patio, a wooden or wire fence, a stone or concrete block wall, crime prevention fence or other materials constructed or used to separate persons from potential hazards on the premises.

Self-service laundry means a business establishment equipped with customer operated automatic washing machines having a capacity per unit not exceeding 25 pounds of dry clothing.

Service station. (See "Filling station.")

Shall is mandatory, the word "may" is permissive.

Shared parking means parking space that can be used to serve two or more individual uses without conflict or encroachment.

Sign means an identification, description, illustration, or device which is affixed to or represented directly or indirectly upon land or a building or structure or object and which directs attention to a place, activity, product, person, institution, or business.

Sign area means that area within a line including the outer extremities of all letters, figures, characters, and delineations, or within a line including the outer extremities of the framework or background of the sign, whichever line includes the larger area. The support for the sign background, whether it be columns, a pylon, or a building or part thereof, shall not be included in the sign area. Only one side of a double-faced sign shall be included in a computation of sign area. The area of a cylindrical sign shall be computed by multiplying one-half of the circumference by the height of the sign.

Sign, awning means any sign painted, stamped, perforated or stitched on an awning, canopy, roller curtain or umbrella.

Sign, construction means a temporary sign which is located at a construction-site and which lists the name of the project, developer, architect, contractor, subcontractor and sales information.

Sign, detached means a sign not attached to or painted on a building but which is affixed to the ground. A sign attached to a flat surface such as a fence or wall not a part of the building, shall be considered a detached sign.

Sign, double-faced means a sign with two parallel, or nearly parallel, faces, back to back and located not more than 24 inches from each other.

Sign, establishment service-identification means a sign which pertains only to the use of a premises and which, depending upon the zoning district in which it is located, contains any or all of the following information:

(1) The name of the owner, operator, and/or management of the use.

(2) Information identifying the types of services or products provided by the establishment.

Sign, flashing means an illuminated sign on which the artificial or reflected light is not maintained stationary and constant in intensity and color at all times when in use. Any revolving illuminated sign shall be considered a flashing sign.

Sign, flat means any sign attached to, and erected parallel to, the face of, or erected or painted on the outside wall of a building and supported throughout its length by such wall or building and not extending more than 12 inches from the building wall.

Sign, general advertising means any sign which is not an accessory sign or which is not specifically limited to a special purpose by these regulations.

Sign, illuminated means any sign designed to give forth artificial light or designed to reflect light from one or more sources of artificial light erected for the purpose of providing light for the sign.

Sign, marquee means any sign attached to or hung from a marquee for a theatre. For the purpose of these land development regulations, a marquee is a nondetachable roof-like structure supported from the walls of a building and projecting over the main entrance for protection from sun and weather.

Sign, monument means a freestanding sign permanently affixed to a monument or other similar detached architectural feature without the need of posts and/or poles. A monument sign may be a double-faced sign.

Sign, pole means a detached sign erected on a metal pole or poles and attached to the ground by a permanent foundation.

Sign, projecting means a sign which is attached to and projects more than 12 inches from the face of a wall of a building. The term projecting sign includes a marquee sign. A projecting sign which extends more than 36 inches above a roof line or parapet wall shall be designated as a roof sign.

Sign, roof means a sign which is fastened to and supported by or on the roof of a building or which extends over the roof of a building or a projecting sign which extends more than 36 inches over or above the roof line or parapet wall of a building.

Site means a parcel of land considered as a unit, capable of being occupied by a use permitted in this subpart, possessing a continuous or unbroken boundary not divided by a public street, alley, right-of-way, private street, or waterway; except for properties which are involved in the transfer of development rights where the site is that property within a project that has been approved under chapter 118, article V.

Site plan means a drawing illustrating a proposed development and prepared in accordance with the specifications and requirements as set forth in chapter 118, article II, divisions 2 and 3, and chapter 118, articles IV and VI.

Site plan approval means final approval by the properly designated city agency, department or official pursuant to the procedure set forth in chapter 118, article II, divisions 2 and 3, and chapter 118, articles IV and VI.

South Florida Building Code means the South Florida Building Code adopted pursuant to section 14-31.

Story means that portion of a building included between the surface of any floor and the surface of the floor next above it; or if there be no floor next above it, then the space between such floor and the ceiling next above it. A basement shall be counted as a story if its ceiling is equal to or greater than four feet above

grade.

Street means a public or private thoroughfare which affords a means of access to abutting property.

Street line means the right-of-way line of a street.

Structural alteration means any change, except for repair or replacement, in the supporting members of a building or structure, such as bearing walls, columns, floor or roof joists, beams or girders.

Structure means anything constructed or erected, the use of which requires permanent location on the ground. Among other things, structures include buildings or any parts thereof, walls, fences, parking garages, parking lots, signs and screen enclosures.

Substantial rehabilitation means rehabilitation, the cost of which exceeds 50 percent of the replacement value of the building, structure or improvement, as determined by the county property appraiser's office, and resulting in a structure which meets all applicable requirements of the city property maintenance standards, the South Florida Building Code, and the fire prevention and safety code.

Subterranean means that portion of a building or structure which is equal to or less than the sidewalk elevation. Where a subterranean area abuts a side lot line, open and unencumbered access shall be provided from the front yard area to the roof or deck of such area by means of a ramp or stairs.

Surface stormwater shallow conveyance shall be as defined in Section 54-35.

Swimming pool, commercial means any conventional pool, spa type pool, wading pool, or special purpose pool, constructed and operated pursuant to the standards and regulations of the state department of health and serving any type of structure or group of structures of four or more dwelling units.

Terrace means a platform that extends outdoors from a floor of a house serving as an outdoor living space, and which may not be covered.

Tower means that portion of a building or structure which exceeds 50 feet in height.

Townhome or townhome development means a grouping of single-family attached or detached units on one site arranged so that no unit is above another with each unit having separate ingress and egress.

Use means any purpose for which buildings or other structures or land may be arranged, designed, intended, maintained, or occupied; or any occupation, business, activity, or operation carried on or intended to be carried on in a building or other structure or on land.

Used or *occupied* include the words "intended," "designed" or "arranged" to be used or occupied.

Value determination means the method set forth in the South Florida Building Code for determining the estimated cost of new construction or substantial rehabilitation.

Variance means a relaxation of certain regulations contained in these land development regulations as specified in section 118-352.

Vendor means an individual who sells or offers for sale a product.

Venetian Causeway Historic Site Designation Report means the document prepared by the city planning, design and historic preservation division, adopted by the city commission on April 15, 1989, containing the review guidelines for the Venetian Causeway Historic Preservation site.

Wine means all beverages made from fresh fruits, berries or grapes, either by natural fermentation or by natural fermentation with brandy added, in a manner required by the laws and regulations of the United States, and includes all sparkling wines, champagnes, combinations of the aforesaid beverages, vermouths and the like products.

Waterway means any body of water, including any creek, canal, river, lake, bay, or ocean, natural or artificial except a swimming pool or ornamental pool located on a single lot.

Yard means an open area, other than a court, which is on the same lot as a building and which is unoccupied and unobstructed from the ground upward, except as otherwise provided in these regulations. The words "required yards" or "minimum required yards" and "minimum yards" includes the word "setback."

Yard, front means a yard extending the full width of the lot between the main building and the front lot line.

Yard, rear means a yard extending the full width of the lot between the main building and the rear lot line.

Yard, required means the minimum distance allowed between a lot line and a building or structure excluding allowable encroachments.

Yard, side means a yard between the building and the adjacent side of the lot, and extending from the front yard to the rear yard thereof.

Zoning district map means the city zoning district map as amended, dated and signed by the mayor and city clerk of the city, upon adoption.

Zoning ordinance means the city zoning ordinance printed in subpart B of this Code.

(Ord. No. 89-2637, eff. 4-15-89; Ord. No. 89-2665, §§ 3-1, 3-2, eff. 10-1-89; Ord. No. 90-2719, eff. 11-6-90; Ord. No. 90-2722, eff. 11-21-90; Ord. No. 91-2767, eff. 11-2-91; Ord. No. 91-2768, eff. 11-2-91; Ord. No. 92-2778, eff. 3-28-92; Ord. No. 92-2779, eff. 3-28-92; Ord. No. 92-2786, eff. 7-19-92; Ord. No. 93-2867, eff. 8-7-93; Ord. No. 93-2885, eff. 11-27-93; Ord. No. 94-2925, eff. 6-15-94; Ord. No. 94-2926, eff. 4-14-94; Ord. No. 95-3003, eff. 7-22-95; Ord. No. 95-3019, eff. 11-4-95; Ord. No. 96-3035, eff. 3-1-96; Ord. No. 96-3050, § 1, 7-

17-96; Ord. No. 97-3083, § 1, 6-28-97; Ord. No. 97-3097, § 1, 10-8-97; Ord. No. 98-3108, § 1, 1-21-98; Ord. No. 98-3109, § 1, 5-20-98; Ord. No. 99-3176, § 1, 3-3-99; Ord. No. 99-3222, § 2, 12-15-99; Ord. No. 2000-3264, § 1, 9-13-00; Ord. No. 2000-3271, § 1, 9-27-00; Ord. No. 2006-3539, § 1, 10-11-06; Ord. No. 2008-3593, § 1, 1-16-08; Ord. No. 2011-3714, § 1, 1-19-11; Ord. No. 2014-3876, § 1, 6-11-14; Ord. No. 2014-3891, § 1, 9-10-14; Ord. No. 2014-3899, § 1, 10-22-14; Ord. No. 2014-3907, § 1, 11-19-14; Ord. No. 2015-3944, § 1, 6-10-15; Ord. No. 2015-3955, § 1, 7-31-15; Ord. No. 2016-4010, § 5-11-16)

Cross reference— Definitions generally, § 1-2.

Sec. 118-6. - Use of, and cost recovery for, consultants for applications for development approval.

(a) *Purpose and summary.* The city commission declares that new procedures are required to provide for preparation and review of traffic and other technical studies and/or reports to restore and instill confidence in the development approval process. Further, such new procedures are necessary to confirm that adverse effects of development are adequately evaluated for property owners, citizens, residents and taxpayers in the City of Miami Beach. The new procedures will provide for the creation and maintenance of an approved list of qualified consultants to provide impartial expertise for preparation and/or review of studies and reports required for assessment of impacts of applications for development approval, upon which applicants for development approval, affected citizens, and the city can rely.

(b) *Consultant list.* The city's procurement division shall maintain a list of approved consultants of various specialties available to prepare and/or review studies and reports required for applications for development approval.

(c) *[Defined.]* For purposes of this section, "application for development approval" shall mean any application for approval by a city land use board (planning board, board of adjustment, historic preservation board, design review board).

(d) *Requirements for selection of a city consultant and procedures for payment.* Prior to the applicant submitting an application for development approval, the applicant shall meet with city staff to determine the types of studies and/or reports required for the proposed project, as well as the methodology to be followed as part of the production of the study.

(1) When an applicant is required to submit, as part of an application for development approval, a traffic or any other technical study and/or report, the applicant shall prepare the required study/report using its own consultant.

(2) The city shall review the study/report, and shall retain a consultant from the city's approved list having the necessary expertise to perform such review. The applicant shall be responsible for all costs associated with the city's consultant review, and shall pay for the costs associated with the city's consultant review prior to proceeding to approval of the application by the applicable land use board.

(e) *[City not liable.]* In no event shall the city be held liable, whether to applicants and/or third parties, for any work and/or services rendered by any consultant on the city's approved list, and/or otherwise in connection with a consultant's preparation or review of any study and/or report contemplated herein.

(f) *Expert reports and appearances.*

(1) All required consultant or expert studies and/or reports, including those requested by a board, shall be provided to the city in written form, supplemented with digital format when available.

(2) Applicant's reports and/or studies shall be submitted to the planning department a minimum of 60 days prior to the board hearing. Rebuttal reports submitted by opponent's consultants shall be submitted to the city no less than 30 working days before the public hearing. Failure to meet these

deadlines shall result in the subject report/study being deemed inadmissible for that public hearing, subject to a waiver of this inadmissibility by a 5/7 vote of the applicable board.

(3) Consultants or experts submitting reports/studies for consideration at public hearings must appear at the public hearing in order to allow for questions from the board and/or cross-examination. This provision may be waived by a 5/7 vote of the applicable board, authorizing the report/study to be sufficient for the purposes of the subject public hearing.

(Ord. No. 2010-3677, § 1, 3-10-10; Ord. No. 2010-3707, § 1, 11-17-10; Ord. No. 2015-3978, § 2, 12-9-15, eff. 4-1-16)

Sec. 118-9. - Rehearing and appeal procedures.

The following requirements shall apply to all rehearings and appeals by land development boards unless otherwise more specifically provided for in these land development regulations, and applicable fees and costs shall be paid to the City as required under section 118-7 and Appendix A to the City Code. As used herein, "land use board(s)" shall mean the board of adjustment, design review board, historic preservation board and planning board.

(a) *Rehearings.*

(1) The types of land use board decisions eligible for a rehearing are as follows:

A. Historic preservation board. Historic preservation board order relating to the issuance of a Certificate of Appropriateness, dig or demolition. Bert J. Harris rehearing is separately addressed at subsection (a)(6), below.

B. Design review board. Design review board final order relating to design review approval, only.

C. Except as delineated above. Rehearings are not available for any other application, or for any other land use board action without a final order.

D. There shall only be allowed one rehearing for each final order arising from an application, although multiple persons may participate in or request the rehearing.

(2) Eligible rehearing applications shall be filed in accordance with the process as outlined in subsections A through D below:

A. *Timeframe to file.* A petition for rehearing shall be submitted to the planning director on or before the 15th day after the rendition of the board order. Rendition shall be the date upon which a signed written order is executed by the board's clerk.

B. *Eligible parties.* Parties eligible to file an application for rehearing are limited to:

(i) Original applicant(s);

(ii) The city manager on behalf of the city administration;

(iii) An affected person, which for purposes of this section shall mean either a person owning property within 375 feet of the applicant's project reviewed by the board, or a person that appeared before the board (directly or represented by counsel), and whose appearance is confirmed in the record of the board's public hearing(s) for such project;

(iv) Miami Design Preservation League;

(v) Dade Heritage Trust.

C. *Application requirements.* The petition to the board shall be in a writing that contains all facts, law and argument, by or on behalf of an eligible party, and demonstrate the following:

(i)

Newly discovered evidence which is likely to be relevant to the decision of the board, or

(ii) The board has overlooked or failed to consider something which renderers the decision issued erroneous.

D. *Notice requirements.* All land use board applications eligible to request a rehearing are subject to the same noticing requirements as an application for a public hearing, in accordance with section 118-8, "Notice Procedures for Quasi-Judicial Land Use Board Actions and for Administrative Decisions Requiring Notice". The rehearing applicant shall be responsible for all associated costs and fees.

(3) Outside Counsel to the Planning Department. In the event of a rehearing to the applicable land use board, the planning director may engage the services of an attorney, or utilize a separate, independent, attorney from the city attorney's office, for the purpose of representing the administrative officer and planning staff during the rehearing.

(4) Actions by the applicable land use board. After the rehearing request is heard, the applicable land use board may take the actions outlined in subsections (i) through (v) below:

(i) Rehear or not rehear a case,

(ii) If the decision is to rehear the application, the board may take additional testimony,

(iii) Reaffirm their previous decision,

(iv) Issue a new decision, and/or

(v) Reverse or modify the previous decision.

(5) Stay of work. A rehearing application to the applicable land use board stays all work on the premises and all proceedings in furtherance of the board action; however, nothing herein shall prevent the issuance of building permits or partial building permits necessary to prevent imminent peril to life, health or property, as determined by the building official.

(6) Tolling. See tolling provision under (c)(6).

(7) Rehearings due to Bert J. Harris Claim. A petition for rehearing pursuant to a Harris Act claim, the petition shall include the following documentation which shall be submitted no later than 15 days after the submission of the petition for rehearing:

A. A bona fide, valid appraisal supporting the claim of inordinate burden and demonstrating the loss, or expected loss, in fair market value to the real property as a result of the board's action;

B. All factual data described in subsection 118-564(c), "Decisions on certificates of appropriateness"; provided, however, in the event all or any portion of the factual data was available to the applicant prior to the conclusion of the public hearing before the historic preservation or joint design review board/historic preservation board and the applicant

failed to furnish same to the board's staff as specified in subsection 118-564(c), "Decisions on certificates of appropriateness" then, the board may, in its discretion, deny the applicant's request to introduce such factual data;

C. A report prepared by a licensed architect or engineer analyzing the financial implications of the requirements, conditions or restrictions imposed by the board on the property or development proposed by the applicant with respect to which the applicant is requesting a rehearing;

D. A report prepared by a licensed architect or engineer analyzing alternative uses for the real property, if any;

E. A report prepared by a licensed architect or engineer determining whether, as a result of the board action, the owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable; and

F. A report prepared by a licensed architect or engineer addressing the feasibility, or lack of feasibility, of effectuating the board's requirements, conditions or restrictions and the impact of same on the existing use of the real property or a vested right to a specific use of the real property.

(b) *Administrative appeal procedures:*

(1) Decisions eligible for administrative appeals:

A. *Planning Board Conditional Use Applications.* An eligible party may appeal a decision of the planning director to the planning board regarding a decision reached on a conditional use application.

B. *Board of Adjustment administrative appeals.*

(i) With the exception of those items expressly identified within this section for appeals of administrative decisions specifically delegated to the other land use boards, the board of adjustment shall have the power and duty to hear and decide appeals when it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of these land development regulations.

(ii) An administrative appeal pursuant to subsection 118-397(b), "Existence of a nonconforming building or use."

C. *Historic preservation board administrative appeals.* An eligible party may appeal a decision of the planning director regarding the following to the historic preservation board:

(i) An administrative appeal pursuant to subsection 118-563(d)(1) or (3), "Review procedure,"

(ii) An administrative appeal pursuant to section 118-565, "Special review procedure," or

(iii) An administrative appeal pursuant to section 118-609, "Completion of work."

D. *Design review board administrative appeals.* An eligible party may appeal a decision of the planning director regarding the following administrative determinations to the design board:

(i) An administrative appeal pursuant to section 118-395, "Repair and/or rehabilitation of nonconforming buildings and uses,"

(ii) An administrative appeal pursuant to section 118-260, "Special review procedure," or

(iii) An administrative appeal pursuant to section 142-108, "Provisions for the demolition of single-family homes located outside of historic districts."

(2) Eligible administrative appeals shall be filed in accordance with the process as outlined in subsections A through D below:

A. *Timeframe to file:*

(i) *Planning board.* A petition for an administrative appeal shall be submitted to the planning director published a decision on the conditional use application on or within 15 days after the date on which the director or designee published a decision reached on a Conditional Use application. For this section of the code, published shall mean the ruling being released, in writing, and distributed by the planning director, or his designee.

(ii) *Board of adjustment.* A petition for an administrative appeal shall be submitted to the planning director on or before the 30th day after the date of the publication of a refusal of a permit by, notice of violation, ruling, decision or determination of, the building official or other administrative official.

(iii) *Historic preservation board.* A petition for an administrative appeal shall be submitted to the planning director on or before the 15th day after the date on which the director or designee published a decision on applications submitted pursuant to subsection 118-563(d)(1), "Review procedure," pertaining to ground level additions to existing structures, and subsection 118-563(d)(3), "Review procedure " pertaining to facade and building restoration.

(iv) *Design review board.* Administrative appeals shall be submitted to the planning director on or before the 15th day after the date on which the decision is published pursuant to either section 118-395, "Repair and/or rehabilitation of nonconforming buildings and uses" or [section] 142-108, "Provisions for the demolition of single-family homes located outside of historic districts."

B. *Eligible parties.* Parties eligible to file an application for an administrative appeal are limited to the following:

(i) Original applicant/property owner.

(ii)

The city manager on behalf of the city administration, except for administrative appeals pursuant to sections 118-260, "Special review procedure," 118-395, "Repair and/or rehabilitation of nonconforming buildings and uses," 118-609, "Completion of work" and 142-108, "Provisions for the demolition of single-family homes located outside of historic districts".

(iii) An affected person, which for purposes of this section shall mean a person owning property within 375 feet of the site or application which is the subject of the administrative appeal, except for administrative appeals pursuant to sections 118-260, "Special review procedure" 118-395, "Repair and/or rehabilitation of nonconforming buildings and uses," 118-609, "Completion of work," and 118-260, "Special review procedure."

(iv) Miami Design Preservation League, except for administrative appeals pursuant to sections 118-260, "Special review procedure," 118-395, "Repair and/or rehabilitation of nonconforming buildings and uses," 118-260, "Special review procedure," 118-609, "Completion of work," and 142-108, "Provisions for the demolition of single-family homes located outside of historic districts."

(v) Dade Heritage Trust, except for administrative appeals pursuant to sections 118-260, "Special review procedure," 118-395, "Repair and/or rehabilitation of nonconforming buildings and uses," 118-260, "Special review procedure," 118-609, "Completion of work," and 142-108, "Provisions for the demolition of single-family homes located outside of historic districts."

C. *Application requirements.* The following shall be required for all applications for administrative appeals:

(i) The petition to the board shall be in writing; and

(ii) Shall be submitted by or on behalf of an eligible party; and

(iii) Shall set forth the factual, technical, architectural, historic and legal bases for the appeal; and

(iv) The party filing the appeal shall be responsible for providing all plans and exhibits, subject to planning department procedures, as well as the duplication of all pertinent plans and exhibits.

D. *Notice requirements.* All land use board applications eligible to request an appeal are subject to the same noticing requirements as an application for a public hearing, in accordance with section 118-8, "Notice Procedures for Quasi-Judicial Land Use Board Actions and for Administrative Decisions Requiring Notice." The hearing applicant shall be responsible for all associated costs and fees.

(3) *Outside Counsel to the Planning Department.* In the event of an administrative appeal to the applicable land use board, the planning director may engage the services of an attorney, or utilize a separate, independent, attorney from the city attorney's office, for the purpose of

representing the administrative officer who made the decision that is the subject of the appeal.

(4) *Board Decisions on Administrative Appeals.* The applicable land use board may, upon appeal, reverse or affirm, wholly or partly, the order, requirement, decision, or determination, and to that end shall have all the powers of the officer from whom the appeal is taken. The concurring vote of five members of the applicable land use board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official or to decide in favor of the applicant on any matter upon which the applicable land use board is required to pass under these land development regulations.

No permit shall be issued for work prior to expiration of the appeal period or final disposition of any appeal.

(5) Stay of Work and Proceedings on Appeal. An administrative appeal to the applicable board stays all work on the premises and all proceedings in furtherance of the action appealed from, unless one of the exceptions below applies:

A. The official from whom the appeal was taken shall certify to the applicable land use board that, by reason of facts stated in the certificate, a stay would cause imminent peril to life or property. In such a case, proceedings or work shall not be stayed except by a restraining order, which may be granted by the board or by a court of competent jurisdiction, upon application, with notice to the officer from whom the appeal is taken and for good cause shown; or

B. If the appeal arises from an application for a quasi-judicial public hearing before a land use board, the hearing before the board to which application was made may proceed, provided any approval does not vest. The final order shall contain appropriate conditions to stay its effectiveness until the final resolution of all administrative and court proceedings. No building permit, or certificate of occupancy, or business tax receipt, dependent upon such hearing approval, shall be issued until the final resolution of all administrative and court proceedings as certified by the city attorney. The applicant for such land use board hearing shall hold the city harmless and agree to indemnify the city from any liability or loss resulting from such proceedings. Notice of the final resolution of administrative and court proceedings shall be provided as required for notice of hearings under these land development regulations.

(c) *Appeals of land use board applications.*

(1) Decisions of the following shall be final, and there shall be no further review thereof except by resort to a court of competent jurisdiction by petition for writ of certiorari:

A. Planning board.

B. Board of adjustment.

C. Design review board, with respect to variance decisions and administrative appeals, only.

D.

Historic preservation board, with respect to variance decisions and administrative appeals, only.

E. Historic preservation special master.

(2) Decisions from the following may be appealed as noted:

A. *Historic preservation board.*

(i) Any applicant requesting an appeal of an approved application from the historic preservation board (for a Certificate of Appropriateness only) shall be made to the historic preservation special master, except that a land use board order granting or denying a request for rehearing shall not be reviewed by the Historic preservation special master.

(ii) The historic preservation special master shall meet the following requirements:

a. Historic preservation special master qualifications, Historic preservation special masters appointed to hear appeals pursuant to this subsection shall be attorneys who are members in good standing of the Florida Bar and have expertise in the area of historic preservation.

b. Historic preservation special master terms. Historic preservation special masters shall serve terms of three years, provided however, that they may be removed without cause upon a majority vote of the city commission. Compensation for historic preservation special masters shall be determined by the city commission.

B. *Design review board.* Any applicant requesting an appeal of an approved application from the design review board (for design review approval only) shall be made to the city commission, except that orders granting or denying a request for rehearing shall not be reviewed by the city commission.

(3) Eligible appeals of the design review board or historic preservation board shall be filed in accordance with the process as outlined in subsections A through D) below:

A. Timeframe to file. A petition for an appeal shall be submitted to city clerk on or before the 20th day after the rendition of the board order. Rendition shall be the date upon which a signed written order is executed by the board's clerk.

B. Eligible parties to file an application for an appeal are limited to the following:

(i) Original applicant;

(ii) The city manager on behalf of the city administration;

(iii) An affected person, which for purposes of this section shall mean either a person owning property within 375 feet of the applicant's project reviewed by the board, or a person that appeared before the board (directly or represented by counsel) and whose appearance is confirmed in the record of the board's public hearing(s) for such project;

(iv) Miami Design Preservation League;

(v) Dade Heritage Trust.

C. Application requirements:

(i) The appeal shall be in writing, and include all record evidence, facts, law and arguments necessary for the appeal (this appellate document shall be called the "brief"); and

(ii) Shall include all applicable fees, as provided in appendix A; and

(iii) Shall be by or on behalf of a named appellant(s); and

(iv) Shall state the factual bases and legal argument in support of the appeal; and

(v) A full verbatim transcript of all proceedings which are the subject of the appeal shall be provided by the party filing the petition, along with a written statement identifying those specific portions of the transcript upon which the party filing it will rely for purposes of the appeal. The verbatim transcript and written statement shall be filed no later than two weeks prior to the first scheduled public hearing to consider the appeal.

D. Notice requirements. All applications for an appeal of the design review board or historic preservation board are subject to the same noticing requirements as an application for a public hearing, in accordance with section 118-8, "Notice Procedures for Quasi-Judicial Land Use Board Actions and for Administrative Decisions Requiring Notice." The appeal applicant shall be responsible for all associated costs and fees.

(4) Action. In order to reverse, amend, modify, or remand amendment, modification, or rehearing the decision of the board, the city commission (for design review board appeals), and the historic preservation special master (for historic preservation board appeals of Certificates of Appropriateness. Dig or Demolition), shall find that the board did not comply with any of the following:

(i) Provide procedural due process;

(ii) Observe essential requirements of law; and

(iii) Based its decision upon substantial competent evidence.

The decision on the appeal shall be set forth in writing, and shall be promptly mailed to all parties to the appeal. In order to reverse, or remand, a five-sevenths vote of the city commission is required for appeals of the design review board to the city commission.

(5) Stay of work and proceedings on appeal. An appeal of a board order stays all work on the premises and all proceedings in furtherance of the action appealed from, unless one of the exceptions below applies:

(i) A stay would cause imminent peril to life or property. In such a case, proceedings or work shall not be stayed except by a restraining order, which may be granted by the board or by a court of competent jurisdiction, upon application for good cause shown; or

(ii)

If the appeal arises from an application for development review board hearing or other approval requiring a hearing before a land use board, the final order shall contain appropriate conditions to stay its effectiveness until the final resolution of all administrative and court proceedings. No building permit, or certificate of occupancy, or business tax receipt, dependent upon such hearing approval, shall be issued until the final resolution of all administrative and court proceedings as certified by the city attorney. The applicant for such land use board hearing shall hold the city harmless and agree to indemnify the city from any liability or loss resulting from such proceedings. Notice of the final resolution of administrative and court proceedings shall be provided as required for notice of hearings under these land development regulations. Notwithstanding the foregoing, an appeal to the board or court, or other challenge to an administrative official's decision, shall neither stay the issuance of any building permit, full building permit or phased building permit nor stay the running of the required time period set by board order or these land development regulations to obtain a full building permit or phased building permit.

(6) Tolling during all appeals. Notwithstanding the provisions of subsections 118-193(2), "Applications for conditional uses," 118-258(c), "Building permit application," 118-532(c), "Proceedings before the historic preservation board," or 118-564(11), "Decisions on certificates of appropriateness," in the event the original decision (board order) of the applicable board, is timely appealed, the applicant shall have 18 months, or such lesser time as may be specified by the board, from the date of final resolution of all administrative and/or court proceedings to obtain a full building permit, a certificate of occupancy, a certificate of use or a certificate of completion, whichever occurs first. This tolling provision shall only be applicable to the original approval of the board and shall not apply to any subsequent requests for revisions or requests for extensions of time.

(Ord. No. 2015-3977, § 1, eff. 12-19-15)

Sec. 118-51. - Powers and duties.

The planning board shall have the following powers and duties:

(1) To acquire, compile and collate all available data, materials, statistics, maps, photographs, reports and studies necessary to obtain an understanding of past conditions and present trends, which affect the city and the economic and general welfare of its residents. The board shall evaluate data and determine the past, present and future trends as they relate to population, property values, economic bases, land use, and to evolve the principles and policies required to guide the direction and type of future development and expansion of the city.

(2) To conduct such public hearings as may be helpful in gathering information and data necessary for the presentation of suitable and appropriate plans for the comprehensive and systematic development of the city and to transmit the same for consideration by the city commission.

(3) To make, cause to be made, or obtain special studies on the location, condition and adequacy of specific facilities of the city. These may include, but are not limited to, studies on single and multiple-family housing, including hotels, apartment buildings, cooperatives and condominiums, commercial and industrial conditions and facilities, beaches, parks, playgrounds and other recreational facilities, public buildings, public and private utilities, traffic, transportation and parking. The board shall be authorized to study and consider any and all studies made and published by the federal, state and county governments.

(4) To make appropriate studies of the location and extent of present and anticipated use of land, population, social and economic resources and problems, and to submit such data, with the recommendations of such board, to the city commission.

(5) To consider and to act upon any and all matters referred to it by the city commission or by the provisions of any city ordinance pertaining to land use and to submit its findings and recommendations on such matters to the city commission.

(6) In granting a request, the board may prescribe appropriate conditions and safeguards which are consistent and supportive of the city's comprehensive plan, neighborhood plan or capital improvement plan. Violation of such conditions and safeguards shall be deemed a violation of these land development regulations.

(7) To carry out its responsibilities as the local planning agency pursuant to the state and the Local Government Comprehensive Planning and Land Development Regulations Act (F.S. ch. 163).

(8) To insure a high degree of aesthetics and promote quality in construction and design of buildings and structures so as to enhance the value of property and the physical environment of the city.

(9) To consider applications pertaining to conditional use permits, amendments to these land development regulations, change of zoning district boundaries and comprehensive plan amendments and future land use map changes.

(10)

To promote reduced crime and fear of crime through the use of crime prevention through environmental design guidelines and strategies.

(11) To review the sale, exchange, conveyance or lease of ten years or longer of certain city-owned property, as provided in City Charter, subsection 1.03(b)3, entitled, "Alienability of property," which requires approval by a majority (four-sevenths) vote of all members of the planning board. In reviewing such an application, the planning board shall consider the following review criteria, when applicable:

a. Whether or not the proposed use is in keeping with city goals and objectives and conforms to the city comprehensive plan.

b. If a sale, a determination as to whether or not alternatives are available for the acquisition of private property as an alternative to the proposed disposition or sale of city-owned properties, including assembly of adjacent properties, and impact of such assemblage on the adjacent neighborhood and the city in general.

c. The impact on adjacent properties, including the potential positive or negative impacts such as diminution of open space, increased traffic, adequate parking, noise level, enhanced property values, improved development patterns, and provision of necessary services.

d. Determination as to whether or not the proposed use is in keeping with the surrounding neighborhood, blocks views or creates other environmental intrusions, and evaluation of design and aesthetic considerations of the project.

e. A traffic circulation analysis and plan that details the impact of projected traffic on the immediate neighborhood and how this impact is to be mitigated.

f. Determination as to whether or not the proposed use is in keeping with a public purpose and community needs, and improving the community's overall quality of life.

g. If a lease is proposed, the duration and other nonfinancial terms of the lease.

(Ord. No. 89-2665, § 17-1, eff. 10-1-89; Ord. No. 2006-3521, § 1, 7-12-06)

Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

Section 35.131 Illegal Use of Drugs

Section 35.131 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Section 35.131 does not affect use of controlled substances pursuant to a valid prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by §35.131 (although alcoholics are individuals with disabilities, subject to the protections of the statute).

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in §35.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 64 (1990) (hereinafter "Conference report"), is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

Paragraph (a)(2)(i) specifies that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. A health care facility, such as a hospital or clinic, may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.

Some commenters pointed out that abstention from the use of drugs is an essential condition of participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings. The Department believes that this comment is well-founded. Congress clearly intended to prohibit exclusion from drug treatment programs of the very individuals who need such programs because of their use of drugs, but, once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or treatment program may prohibit illegal use of drugs by individuals while they are participating in the program.

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to

assistance of interested persons, including handicapped persons or organizations representing handicapped persons, and

(3) Otherwise consult with interested persons, including handicapped persons or organizations representing handicapped persons, in achieving compliance with section 504.

§41.6 Interagency cooperation.

(a) Where each of a substantial number of recipients is receiving assistance for similar or related purposes from two or more agencies or where two or more agencies cooperate in administering assistance for a given class of recipients, the agencies shall:

(1) Coordinate compliance with section 504, and

(2) Designate one of the agencies as the primary agency for section 504 compliance purposes.

(b) Any agency conducting a compliance review or investigating a compliant of an alleged section 504 violation shall notify any other affected agency upon discovery of its jurisdiction and shall inform it of the findings made. Reviews or investigations may be made on a joint basis.

§41.7 Coordination with sections 502 and 503.

(a) Agencies shall consult with the Architectural and Transportation Barriers Compliance Board in developing requirements for the accessibility of new facilities and alterations, as required in §41.58, and shall coordinate with the Board in enforcing such requirements with respect to facilities that are subject to section 502 of the Rehabilitation Act of 1973, as amended, as well as to section 504.

(b) Agencies shall coordinate with the Department of Labor in enforcing requirements concerning employment discrimination with respect to recipients that are also federal contractors subject to section 503 of the Rehabilitation Act of 1973, as amended.

Subpart B—Standards for Determining Who Are Handicapped Persons

§41.31 Handicapped person.

(a) *Handicapped person* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(b) As used in paragraph (a) of this section, the phrase:

(1) *Physical or mental impairment* means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major

Substance-Related and Addictive Disorders

In the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), the revised chapter of "Substance-Related and Addictive Disorders" includes substantive changes to the disorders grouped there plus changes to the criteria of certain conditions.

Substance Use Disorder

Substance use disorder in DSM-5 combines the DSM-IV categories of substance abuse and substance dependence into a single disorder measured on a continuum from mild to severe. Each specific substance (other than caffeine, which cannot be diagnosed as a substance use disorder) is addressed as a separate use disorder (e.g., alcohol use disorder, stimulant use disorder, etc.), but nearly all substances are diagnosed based on the same overarching criteria. In this overarching disorder, the criteria have not only been combined, but strengthened. Whereas a diagnosis of substance abuse previously required only one symptom, mild substance use disorder in DSM-5 requires two to three symptoms from a list of 11. Drug craving will be added to the list, and problems with law enforcement will be eliminated because of cultural considerations that make the criteria difficult to apply internationally.

In DSM-IV, the distinction between abuse and dependence was based on the concept of abuse as a mild or early phase and dependence as the more severe manifestation. In practice, the abuse criteria were sometimes quite severe. The revised substance use disorder, a single diagnosis, will better match the symptoms that patients experience.

Additionally, the diagnosis of dependence caused much confusion. Most people link dependence with "addiction" when in fact dependence can be a normal body response to a substance.

Addictive Disorders

The chapter also includes gambling disorder as the sole condition in a new category on behavioral addictions. DSM-IV listed pathological gambling but in a different chapter. This new term and its location in the new manual reflect research findings that gambling disorder is similar to substance-related disorders in clinical expression, brain origin, comorbidity, physiology, and treatment.

Recognition of these commonalities will help people with gambling disorder get the treatment and services they need, and others may better understand the challenges that individuals face in overcoming this disorder.

While gambling disorder is the only addictive disorder included in DSM-5 as a diagnosable condition, Internet gaming disorder will be included in Section III of the manual. Disorders listed there require further research before their consideration as formal disorders. This condition is included to reflect the scientific literature on persistent and recurrent use of Internet games, and a preoccupation with them, can result in clinically significant impairment or distress. Much of this literature comes from studies in Asian countries. The condition criteria do not include general use of the Internet, gambling, or social media at this time.

Other Disorders of Interest

DSM-5 will not include caffeine use disorder, although research shows that as little as two to three cups of coffee can trigger a withdrawal effect marked by tiredness or sleepiness. There is sufficient evidence to support this as a condition, however it is not yet clear to what extent it is a clinically significant disorder. To encourage further research on the impact of this condition, caffeine use disorder is included in Section III of DSM-5.

DSM is the manual used by clinicians and researchers to diagnose and classify mental disorders. The American Psychiatric Association (APA) will publish DSM-5 in 2013, culminating a 14-year revision process. For more information, go to www.DSM5.org.

APA is a national medical specialty society whose more than 36,000 physician members specialize in the diagnosis, treatment, prevention and research of mental illnesses, including substance use disorders. Visit the APA at www.psychiatry.org and www.healthyminds.org. For more information, please contact Eve Herold at 703-907-8640 or press@psych.org.

The Florida Senate

2016 Florida Statutes

Title XXX SOCIAL WELFARE	Chapter 413 EMPLOYMENT AND RELATED SERVICES FOR PERSONS WITH DISABILITIES Entire Chapter	**SECTION 08** **Rights and responsibilities of an individual with a disability; use of a service animal; prohibited discrimination in public employment, public accommodations, and housing accommodations; penalties.**

413.08 Rights and responsibilities of an individual with a disability; use of a service animal; prohibited discrimination in public employment, public accommodations, and housing accommodations; penalties.—

(1) As used in this section and s. 413.081, the term:

(a) "Housing accommodation" means any real property or portion thereof which is used or occupied, or intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more persons, but does not include any single-family residence, the occupants of which rent, lease, or furnish for compensation not more than one room therein.

(b) "Individual with a disability" means a person who has a physical or mental impairment that substantially limits one or more major life activities of the individual. As used in this paragraph, the term:

1. "Major life activity" means a function such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

2. "Physical or mental impairment" means:

a. A physiological disorder or condition, disfigurement, or anatomical loss that affects one or more bodily functions; or

b. A mental or psychological disorder that meets one of the diagnostic categories specified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association, such as an intellectual or developmental disability, organic brain syndrome, traumatic brain injury, posttraumatic stress disorder, or an emotional or mental illness.

(c) "Public accommodation" means a common carrier, airplane, motor vehicle, railroad train, motor bus, streetcar, boat, or other public conveyance or mode of transportation; hotel; a timeshare that is a transient public lodging establishment as defined in s. 509.013; lodging place; place of public accommodation, amusement, or resort; and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons. The term does not include air carriers covered by the Air Carrier Access Act of 1986, 49 U.S.C. s. 41705, and by regulations adopted by the United States Department of Transportation to implement such act.

(d) "Service animal" means an animal that is trained to do work or perform tasks for an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work done or tasks performed must be directly related to the individual's disability and may include, but are not limited to, guiding an individual who is visually impaired or blind, alerting an individual who is deaf or hard of hearing, pulling a wheelchair, assisting with mobility or balance, alerting and protecting an individual who is having a seizure, retrieving objects, alerting an individual to the presence of allergens, providing physical support and assistance with balance and stability to an individual with a mobility disability, helping an individual with a psychiatric or neurological disability by preventing or interrupting impulsive or destructive behaviors, reminding an individual with mental illness to take prescribed medications, calming an individual with posttraumatic stress disorder during an anxiety attack, or doing other specific work or performing other special tasks. A service animal is not a pet. For purposes of subsections (2), (3), and (4), the term "service animal" is limited to a dog or miniature horse. The crime-

deterrent effect of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for purposes of this definition.

(2) An individual with a disability is entitled to full and equal accommodations, advantages, facilities, and privileges in all public accommodations. A public accommodation must modify its policies, practices, and procedures to permit use of a service animal by an individual with a disability. This section does not require any person, firm, business, or corporation, or any agent thereof, to modify or provide any vehicle, premises, facility, or service to a higher degree of accommodation than is required for a person not so disabled.

(3) An individual with a disability has the right to be accompanied by a service animal in all areas of a public accommodation that the public or customers are normally permitted to occupy.

(a) The service animal must be under the control of its handler and must have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control by means of voice control, signals, or other effective means.

(b) Documentation that the service animal is trained is not a precondition for providing service to an individual accompanied by a service animal. A public accommodation may not ask about the nature or extent of an individual's disability. To determine the difference between a service animal and a pet, a public accommodation may ask if an animal is a service animal required because of a disability and what work or tasks the animal has been trained to perform.

(c) A public accommodation may not impose a deposit or surcharge on an individual with a disability as a precondition to permitting a service animal to accompany the individual with a disability, even if a deposit is routinely required for pets.

(d) An individual with a disability is liable for damage caused by a service animal if it is the regular policy and practice of the public accommodation to charge nondisabled persons for damages caused by their pets.

(e) The care or supervision of a service animal is the responsibility of the individual owner. A public accommodation is not required to provide care or food or a special location for the service animal or assistance with removing animal excrement.

(f) A public accommodation may exclude or remove any animal from the premises, including a service animal, if the animal is out of control and the animal's handler does not take effective action to control it, the animal is not housebroken, or the animal's behavior poses a direct threat to the health and safety of others. Allergies and fear of animals are not valid reasons for denying access or refusing service to an individual with a service animal. If a service animal is excluded or removed for being a direct threat to others, the public accommodation must provide the individual with a disability the option of continuing access to the public accommodation without having the service animal on the premises.

(4) Any person, firm, or corporation, or the agent of any person, firm, or corporation, who denies or interferes with admittance to, or enjoyment of, a public accommodation or, with regard to a public accommodation, otherwise interferes with the rights of an individual with a disability or the trainer of a service animal while engaged in the training of such an animal pursuant to subsection (8), commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083 and must perform 30 hours of community service for an organization that serves individuals with disabilities, or for another entity or organization at the discretion of the court, to be completed in not more than 6 months.

(5) It is the policy of this state that an individual with a disability be employed in the service of the state or political subdivisions of the state, in the public schools, and in all other employment supported in whole or in part by public funds, and an employer may not refuse employment to such a person on the basis of the disability alone, unless it is shown that the particular disability prevents the satisfactory performance of the work involved.

(6) An individual with a disability is entitled to rent, lease, or purchase, as other members of the general public, any housing accommodations offered for rent, lease, or other compensation in this state, subject to the conditions and limitations established by law and applicable alike to all persons.

(a) This section does not require any person renting, leasing, or otherwise providing real property for compensation to modify her or his property in any way or provide a higher degree of care for an individual with a disability than for a person who is not disabled.

(b) An individual with a disability who has a service animal or who obtains a service animal is entitled to full and equal access to all housing accommodations provided for in this section, and such a person may not be required to pay extra compensation for such animal. However, such a person is liable for any damage done to the premises or to another person on the premises by the animal. A housing accommodation may request proof of compliance with vaccination requirements.

(c) This subsection does not limit the rights or remedies of a housing accommodation or an individual with a disability that are granted by federal law or another law of this state with regard to other assistance animals.

(7) An employer covered under subsection (5) who discriminates against an individual with a disability in employment, unless it is shown that the particular disability prevents the satisfactory performance of the work involved, or any person, firm, or corporation, or the agent of any person, firm, or corporation, providing housing accommodations as provided in subsection (6) who discriminates against an individual with a disability, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(8) Any trainer of a service animal, while engaged in the training of such an animal, has the same rights and privileges with respect to access to public facilities and the same liability for damage as is provided for those persons described in subsection (3) accompanied by service animals.

(9) A person who knowingly and willfully misrepresents herself or himself, through conduct or verbal or written notice, as using a service animal and being qualified to use a service animal or as a trainer of a service animal commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083 and must perform 30 hours of community service for an organization that serves individuals with disabilities, or for another entity or organization at the discretion of the court, to be completed in not more than 6 months.

History.—s. 1, ch. 25268, 1949; s. 1, ch. 61-217; s. 361, ch. 71-136; s. 1, ch. 71-276; s. 1, ch. 73-110; s. 1, ch. 74-286; s. 1, ch. 77-174; s. 19, ch. 77-259; s. 178, ch. 79-400; s. 1, ch. 82-111; s. 73, ch. 83-218; s. 60, ch. 85-81; s. 1, ch. 87-312; s. 1, ch. 89-317; s. 1, ch. 90-8; s. 1, ch. 91-94; s. 1, ch. 93-18; s. 57, ch. 97-103; s. 1, ch. 98-19; s. 3, ch. 2002-176; s. 1, ch. 2005-63; s. 1, ch. 2015-131.

Jeffrey O. v. City of Boca Raton

United States District Court for the Southern District of Florida

February 26, 2007, Decided

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

Reporter

511 F. Supp. 2d 1339; 2007 U.S. Dist. LEXIS 12983

JEFFREY O. et al., Plaintiffs, vs. CITY OF BOCA RATON, Defendant.

Subsequent History: Related proceeding at *United States v. City of Boca Raton, 2008 U.S. Dist. LEXIS 20088 (S.D. Fla., Mar. 12, 2008)*

Prior History: *Jeffrey O. v. City of Boca Raton, 511 F. Supp. 2d 1328, 2007 U.S. Dist. LEXIS 3226 (S.D. Fla., 2007)*

Core Terms

individuals, Provider, recovering, Ordinance, housing, addiction, handicapped, residents, zoning, reasonable accommodation, residential, facilities, discriminatory, neighborhood, disability, licensed, residential area, apartment building, relapse, residential character, services, service provider, no evidence, impairment, dwelling, drug testing, alcohol, requires, substance abuse treatment, handicapped individual

Case Summary

Procedural Posture

Plaintiffs, recovering substance abuse individuals, and housing providers, alleged defendant city violated the Fair Housing Act (FHA), *42 U.S.C.S. § 3601 et seq.*, by passing Boca Raton, Florida, Ordinance 4649, and Boca Raton, Florida, Code § 28-2, limiting their ability to reside in residential areas. A non-jury trial was held.

Overview

The ordinance required that substance abuse treatment facilities as defined by the ordinance or in *Fla. Stat. § 397.311(18)* be located in a medical center district, or with approval, in a motel/business district, thus treating recovering individuals (RI) differently from non-RIs. There was no evidence of an impact on surrounding residential areas. The RIs testified as to the importance of living in a residential area. A city council meeting transcript did not support a safety justification. Nothing showed a sober living arrangement provided by a third party destroyed the residential character of a neighborhood more than one organized by the residents themselves. While using the definition of *Fla. Stat. § 397.311(18)* did not violate the FHA, the rest of the ordinance

did. Zoning Code § 28-2's occupancy limitation impacted RIs more than non-RIs, making no exception for a group home for RIs who merely wanted to live in a single family home and would not impact a neighborhood's character. There was no evidence a reasonable accommodation was available to comply with *42 U.S.C.S. § 3604(f)(3)(B)*. Injunctions were warranted, but speculative damages evidence required only nominal damages.

Outcome

Judgment entered in favor of plaintiffs. The city was enjoined from enforcing the second section of Boca Raton, Florida, Ordinance 4649, and was enjoined from enforcing Boca Raton, Florida, Code § 28-2, as to recovering individuals until such time as the city passed a reasonable accommodation procedure. Monetary damages were awarded in favor of plaintiffs against the city in the amount of $ 1 as to each plaintiff.

LexisNexis® Headnotes

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN1 The Fair Housing Act defines handicap with respect to an individual as having (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (c) being regarded as having such an impairment. *42 U.S.C.S. § 3602(h)*. The existence of such handicap must be examined on a case-by-case basis. Major life activities include walking, learning, performing manual tasks, getting an apartment, being unable to perform a class of jobs, and caring for oneself. To substantially limit means a long-term, permanent restriction, or considerable.

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN2 The definitions under the Americans with Disability Act, *42 U.S.C.S. § 12131 et seq.*, and the Fair Housing Act, *42 U.S.C.S. § 3601 et seq.*, one of disability and the other using the term handicap, are "almost verbatim."

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Civil Rights Law > ... > Protection of Disabled Persons > Federal Employment & Services > Scope

Business & Corporate Compliance > ... > Public Health &

Welfare Law > Housing & Public Buildings > Fair Housing

HN3 Alcoholism, like drug addiction, is an "impairment" under the definitions of a disability set forth in the Fair Housing Act, *42 U.S.C.S. § 3601 et seq.*, the Americans with Disability Act, *42 U.S.C.S. § 12131 et seq.*, and the Rehabilitation Act. Congress intended to treat drug addiction as a significant impairment constituting a handicap unless excluded, such as by current drug use in accordance with *42 U.S.C.S. § 3602(h)*. A per se rule is appropriate in circumstances where the court's obligation is to do a case-by-case evaluation to determine if an individual is handicapped.

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Civil Rights Law > ... > Protection of Disabled Persons > Federal Employment & Services > Scope

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN4 *28 C.F.R. § 35.104(4)(1)(iii)* specifically references drug addiction and alcoholism as one meaning of physical or mental impairment in regards to nondiscrimination on the basis of disability in state and local government services. The Code of Federal Regulations also directly addresses individuals who have successfully completed a rehabilitation program. *28 C.F.R. § 35.131(a)(2)* states that a public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in the current use of drugs and who is participating in a supervised rehabilitation program or successfully completed a rehabilitation program.

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN5 In order to demonstrate that an individual is handicapped due to having had a record of an impairment, the individual must have satisfied the first definition at some point.

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN6 For cases brought under the Fair Housing Act, *42 U.S.C.S. § 3601 et seq.*, standing is to be as broad as the United States Constitution permits.

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Rights Law > ... > Fair Housing Rights > Protected

Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN7 *42 U.S.C.S. § 3602(i)* talks about who may bring a suit under the Fair Housing Act as an aggrieved person which is defined to include any person who believes that such person will be injured by a discriminatory housing practice that is about to occur.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN8 Fair Housing Act, *42 U.S.C.S. § 3601 et seq.*, cases are often brought by a provider of housing on behalf of the residents it seeks to house.

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Amendments Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN9 *42 U.S.C.S. § 3604(f)* of the Fair Housing Act (FHA) prohibits a public entity from discriminating against disabled persons by denying such persons the ability to live in a dwelling. The amendments to the FHA, which added handicapped individuals, were a statement by Congress of the commitment to end the unnecessary exclusion of individuals with disabilities from American mainstream where such exclusion was often based on generalizations and stereotypes of people's disabilities and the attendant threats of safety that often accompanied these generalizations. Congress intended for the FHA to apply to zoning ordinances. However, the FHA does not pre-empt or abolish a municipality's power to regulate land use and pass zoning laws. Land use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard." 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.

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN10 There are two ways to prove a violation of the Fair

Housing Act, 42 U.S.C.S. § 3601 et seq. The first is by showing that the defendant was motivated by a discriminatory intent against the handicapped. The second is where a defendant's actions are neutral, but have a discriminatory effect, thus having a disparate impact on the handicapped.

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Governments > Local Governments > Ordinances & Regulations

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN11 An ordinance facially discriminates against the handicapped where it singles them out and applies different rules to them.

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Governments > Local Governments > Ordinances & Regulations

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN12 A rational relation test on a challenge to an ordinance is not appropriate where the individuals bringing a Fair Housing Act (FHA), 42 U.S.C.S. § 3601 et seq., claim are the direct object of its protection, the protection of which appears to have been intended to be greater than that provided by the rational relation test. The presence of either (1) legitimate public safety concerns or (2) that the restriction benefits the protected class as a justification would allow a facially discriminatory statute to survive an FHA challenge. However, this test may not include all possible justifications.

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN13 See 42 U.S.C.S. § 3604(f)(9).

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN14 Generalized perceptions of threats to safety should not support discrimination in the context of the Fair Housing Act, 42 U.S.C.S. § 3601 et seq.

Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > General Overview

HN15 Fla. Stat. § 397.311(18) defines "licensed service provider" as a public agency under Fla. Stat. ch. 397, a private for-profit or not-for-profit agency under ch. 397, a physician or any other private practitioner licensed under ch. 397, or a

hospital that offers substance abuse impairment services through one or more of the listed licensable service components.

Governments > Local Governments > Ordinances & Regulations

Business & Corporate Compliance > ... > Real Property Law > Zoning > Local Planning

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN16 The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds. A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Governments > Local Governments > Ordinances & Regulations

Business & Corporate Compliance > ... > Real Property Law > Zoning > Local Planning

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN17 The ability to protect the residential nature of a neighborhood is not limited to controlling the negatives that obviously do not conform with the area, but includes the ability to set apart areas where people make their home from the rest of the city.

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN18 A disparate impact analysis should be employed where a facially neutral section of the city code is examined to determine its differential impact on a protected group under the Fair Housing Act, *42 U.S.C.S. § 3601 et seq.* To succeed on a disparate impact theory, a plaintiff must provide evidence that the neutral practice had a disproportionate impact on the protected class.

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > General Overview

HN19 *Fla. Stat. § 419.001* requires community residential homes to be licensed by the Agency for Health Care Administration or that the handicapped residents of such a home be a client of one of four different state agencies.

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN20 Once a plaintiff establishes a disproportionate impact

on the handicapped under the Fair Housing Act, 42 U.S.C.S. § 3601 et seq., the burden is shifted to the defendant to prove that the action furthered a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect.

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN21 Discrimination under the Fair Housing Act includes denying or making a dwelling unavailable because of a handicap, including refusing to make reasonable accommodation in rules, policies, practices, or services such that would be necessary to afford such person the opportunity to use and enjoy a dwelling. 42 U.S.C.S. § 3604(f)(3)(B).

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Disability Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN22 The United States Supreme Court has held that "the family-defining kind" of limitation is not exempted from the Fair Housing Act by 42 U.S.C.S. § 3607(b)(1). Instead, the exemption only applies to total occupancy limits, i.e., numerical ceilings that serve to present overcrowding in living quarters.

Civil Procedure > Remedies > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Remedies

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN23 Precedent supports a narrow tailoring of a remedy under the Fair Housing Act, 42 U.S.C.S. § 3601 et seq. Invalidating a state or local statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.

Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > General Overview

HN24 Fla. Stat. § 397.311(18) details various licensable service components and defines an entity as a licensed service provider if it offers substances abuse impairment services through one or more such licensable service components.

Civil Procedure > Remedies > General Overview

Governments > Courts > Authority to Adjudicate

HN25 Courts should not determine to whom a statute should apply where a legislature has cast its net widely because this would put the judiciary in the legislature's role.

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

Civil Procedure > Remedies > General Overview

HN26 Misconduct by a plaintiff which impacts the relationship between the parties as to the issue brought before the court to be adjudicated can be the basis upon which a court can apply the maxim of unclean hands. The maxim of he who comes into equity must come with clean hands has been said to close the door of equity to a litigant tainted by inequitableness as to the matter about which the litigant seeks relief. This principle requires the litigant to act fairly and without fraud or deceit as to the controversy in issue.

Civil Procedure > Remedies > Damages > General Overview

HN27 A damage award must be based on substantial evidence, not speculation.

Civil Procedure > Remedies > Damages > Compensatory Damages

HN28 Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or breach of the defendant's duty, or in case where, although there has been a real injury, the plaintiff's evidence fails to show its amount. While the United States Court of Appeals for the Eleventh Circuit has stated that merely a violation of a purely statutory right does not mandate an award of nominal damages for such statutory violation, it has not precluded such an award where the district court finds it appropriate.

Civil Procedure > Remedies > Damages > Compensatory Damages

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Remedies

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN29 At a minimum an award of nominal damages would be appropriate where a plaintiff proved a violation of the Fair Housing Act, *42 U.S.C.S. § 3601 et seq.*, and that he suffered a non-quantifiable injury as a result.

Counsel: [**1] For Jeffrey O, Michael Doe, William F, Peter B, Regency Properties of Boca Raton, Inc., a Florida corporation, Awakenings of Florida, Inc., a Florida corporation, Plaintiffs: William King Hill, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod, Miami, F

For Todd C, Doug B, Bobby Hoover, Plaintiffs: James Kellogg Green, LEAD ATTORNEY, James K. Green, West Palm Beach, FL.

For City of Boca Raton, a Florida municipal corporation, Defendant: Diana Grub Frieser, LEAD ATTORNEY, City of Boca Raton, Boca Raton, FL; Jamie Alan Cole, Matthew Harris Mandel, LEAD ATTORNEYS, Weiss Serota Helfman Pastoriza et al, Fort Lauderdale, FL.

Judges: DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE.

Opinion by: DONALD M. MIDDLEBROOKS

Opinion

[*1341] **FINAL ORDER**

This cause came before the Court for final disposition during a non-jury trial from January 22, 2007 through January 29, 2007. Plaintiffs brought suit against the Defendant City of Boca Raton in March 2003, alleging that it violated the Fair Housing Act, *42 U.S.C. § 3601 et seq.* (FHA), Title II of the Americans with Disabilities Act, *42 U.S.C. § 12131, et seq.* **[*1342]** (ADA), and the *14th Amendment* to **[**2]** the United States Constitution by passing Ordinance 4649, as amended by Ordinance 4701, and Section 28-2. Primarily, Plaintiffs allege that the City's actions discriminate against them based on their handicapped status where these two zoning provisions limit the ability of Plaintiffs to reside in residential areas of the City. Pursuant to *Federal Rule of Civil Procedure 52(a)*, I make the following findings of fact and conclusions of law.

Facts

Plaintiffs are individuals who are recovering alcoholics and drug addicts ("Individual Plaintiffs"), as well as corporate entities ("Provider Plaintiffs") which provide housing and additional services to approximately 390 recovering individuals in areas zoned for residential use within the Defendant City of Boca Raton ("City"). Steve Manko is the president of Provider Plaintiffs who own a number of apartment buildings which are marketed to recovering individuals as sober housing. In their sober housing, Provider Plaintiffs provide different levels of oversight to their residents, including, but not limited to drug testing, curfews, room checks, medication controls, and group meetings.

In 2002, the City was faced with the dilemma **[**3]** of how to regulate sober houses, such as Provider Plaintiffs'. Ordinance Number 4649 was proposed to deal with the issue. At the city council meeting where the council took up this ordinance, many residents of the City spoke specifically about Provider Plaintiffs' facilities and their impact on the neighborhood. Provider Plaintiffs served approximately 390 individuals in 14 apartment buildings, all of which are within a quarter of a mile of each other. The residents of the City expressed many concerns, including the way in which Provider Plaintiffs operated their business. Specifically, residents spoke to Provider Plaintiffs' policy of evicting individuals who relapse while keeping the person's deposit [1] and kicking individuals out with no where to go when they relapsed. The residents were also concerned about the changing dynamic of their neighborhood where the individuals living in Provider Plaintiffs' buildings frequently loitered in front of the apartment buildings, did not stay for more than a few months, and were often from out of town. There were also a lot of broad generalizations made by residents at the meeting, regarding the negative impact a high concentration of recovering **[**4]** individuals had on their neighborhood. One resident testified that he was able to purchase drugs at Boca House. At that meeting, the city council passed Ordinance Number 4649. The city council later passed Ordinance 4701 which amended Ordinance 4649. Ordinance Number 4649, as amended by Ordinance Number 4701 ("Ordinance 4649")

[1] Residents of Provider Plaintiffs paid rent by the week, rather than on a monthly basis. There was testimony that at least one individual relapsed multiple times in a one-month span, allowing Manko to keep the individual's deposit each time. This testimony was further supported by Provider Plaintiffs' damage expert who when calculating lost profits included over ten percent of Provider Plaintiff's total income as that derived from lost deposits.

states:

> Substance Abuse Treatment Facility shall mean a service provider or facility that is: 1) licensed or required to be licensed pursuant to *Section 397.311(18)*. Fla. Stat. or 2) used for room and board only and in which treatment and rehabilitation activities are provided at locations other than the primary residential **[*1343]** facility, whether or not the facilities used for room and board and for treatment and rehabilitation are operated under the auspices of the same provider. For the purposes of this subparagraph (2), service providers or facilities which require tenants or occupants to participate in treatment or rehabilitation activities, or perform testing to determine whether tenants or occupants are drug and/or alcohol free, as a term or condition of, or essential component of, the tenancy or occupancy shall be deemed to satisfy the "treatment and **[**5]** rehabilitation activities" component of the definition contained in this section.

The Ordinance requires that Substance Abuse Treatment Facilities as defined above be located in the City's Medical Center District, or with approval, in a Motel/Business district.

The City put forth evidence to establish that in passing Ordinance 4649 it was attempting to group together compatible uses and separate non-compatible uses. For example, the City's Mayor testified that Provider Plaintiffs engaged in commercial and medical uses, therefore making them appropriately **[**6]** placed in medical or commercial zones. The City's planning and zoning director testified that Provider Plaintiffs' facilities which offered a "unique recovery program" were different from normal apartment buildings. The planning and zoning director also explained that the services provided by Provider Plaintiffs were not residential in character. Therefore, where the services provided were not residential in character, Provider Plaintiffs' facilities should not be located in a residential area according to the planning and zoning director.

Provider Plaintiffs' buildings are located in an area with other multi-family residences. In addition, the area in which Provider Plaintiffs' buildings are located is very close to commercial areas. The appearance of Provider Plaintiffs' buildings does not stand out in the area. There was no evidence at trial as to how Provider Plaintiffs' facilities impacted the surrounding residential area, including but not limited to additional cars in the area, additional foot traffic in the area, a burden on public resources, or even an appearance that was out of character with the area.

Also involved in this case, is a provision of the City Code, Section **[**7]** 28-2, which defines the term family as:

> 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. The persons thus constituting a family may also include gratuitous guests and domestic servants. Any person under the age of 18 years whose legal custody has been awarded to the state department of health and rehabilitative services or to a child-placing agency licensed by the department, or who

> is otherwise considered to be a foster child under the laws of the state, and who is placed in foster care with a family, shall be deemed to be related to a member of the family for purposes of this chapter. Nothing herein shall be construed to include any roomer or boarder as a member of a family.

The City requires a residential dwelling unit be occupied by one family. Therefore, this provision limits the amount of unrelated people who can live in a residential dwelling unit in the City.

[*1344] Individual Plaintiffs and the **[**8]** current residents of Provider Plaintiffs who testified were all recovering alcoholics or drug addicts. Because of their addiction, these individuals lost jobs and families, and some were unable to keep a roof over their head during their active addiction. One Plaintiff testified that personal hygiene was the first ability he lost during a relapse. He did not take care of himself, including self-grooming and eating. A current resident of Provider Plaintiffs testified that during her active addiction she was homeless. Each of the recovering individuals testified as to the difficulties they were faced with as addicts, including an inability to possess large amounts of money, have an intimate relationship with another person, or be around people consuming alcohol or using drugs. Recovery from alcohol or drug addiction is an ongoing process, which for many individuals can be a lifelong process. At one time each of the Individual Plaintiffs lived in Provider Plaintiffs' apartment buildings. They also testified that if they relapsed they would return to live in Provider Plaintiffs' residences. The restrictions imposed by Provider Plaintiffs during the residents' early stages of recovery aided **[**9]** these individuals as they advanced through their recovery.

Plaintiffs' expert, Riley Regan, testified as to the impact addiction has on one's life, not just during active addiction, but also for the rest of his or her life. It is common for recovering individuals to need to live in an environment that is drug and alcohol free in order to further their recovery. Regan stated that without drug testing there is no way for everyone to be sure that the living environment is drug and alcohol free. This testimony was also supported by the recovering individuals who testified that drug testing kept them motivated to stay sober and kept them safe. Regan also testified about the need for recovering individuals not to live alone because loneliness can trigger a relapse and living with other individuals imposes an accountability to other people. This testimony was in line with that of the recovering individuals who testified where they described loneliness and boredom as possible triggers to relapses. This is not to say that some of the individuals wanted to live alone and did live alone, but many acknowledged the benefits they had and could reap from living with other recovering individuals.

[10]** Provider Plaintiffs provided many tools to recovering individuals to aid in their recovery. It is more than just housing, it was also characterized as a treatment model. While this is arguably a laudable endeavor on Manko's behalf, his business model did not always appear to be so altruistic. Manko's positions regarding what services he provided and what legal arrangement he had with his residents shifted depending on the implications of such for his business model, more than for the therapeutic needs of his residents. For

example, prior to this litigation, recovering individuals executed a license agreement with Provider Plaintiffs in what may have been an effort to escape traditional landlord/tenant laws. However, such individuals now execute a lease. This change in terminology coincides with Manko's current suit which seeks protection from the Fair Housing Act and his attempt at differentiating himself from the commercial use that concerned the City. Instead, Manko is attempting to focus on the housing aspect of the services he provides. Provider Plaintiffs continue to market themselves in the recovering community as a provider of a "unique recovery program." Provider Plaintiffs' **[**11]** marketing literature uses terms like "Three-Phase Transitional **[*1345]** Recovery Program." All of these facts support the conclusion that Provider Plaintiff is providing more than housing.

Manko's history with the City and his shifting position is also exemplified by his agreement with the City to comply with Section 28-2, but failing to do so. In 1996, Manko was cited for violating the occupancy limitation of the City code. That same year Manko entered in a stipulation with the City agreeing not to have more than three unrelated persons occupying a single unit. Again in 2001, Manko was cited with the same violation and again informed the City that he was seeking to comply with Section 28-2, although occasionally violated the limitation because of unexpected events. At trial it became clear that Manko never consistently limited his units to three individuals. Furthermore, at trial Manko argued that having more than three individuals in a unit [2] was essential to the residents' recovery. However, Manko's decision to continue to put more than three individuals in a unit could reasonably have been based on economics. Provider Plaintiffs charged $ 170 a week for each recovering individual. With **[**12]** four people in a unit, Provider Plaintiffs grossed approximately $ 2,720 a month per unit. Manko testified that the same unit rented to a family of four would go for approximately $ 1,200, less than half of what Provider Plaintiffs made by placing more than three recovering individuals in each unit. This calculation may have played into Manko's continued violation of Section 28-2. Provider Plaintiffs' continued profitability is exemplified by their ability to acquire a significant number of apartment buildings in the area.

Manko's questionable business practices aside, the evidence at trial did demonstrate that the two provisions Plaintiffs challenge limit the ability of recovering individuals to obtain housing within the residential areas **[**13]** of the City. The recovering individuals testified about the importance of living in a residential area because there are many more temptations in commercial zones, such as bars and hotels which recovering addicts would frequent during their active addition. Therefore, it would be more difficult for them to maintain their sobriety while living in such areas. As discussed above many recovering individuals need, at least at one point during their recovery, to live in a substance-free environment and their recovery is further supported by group living arrangements, both for the practicality of day-to-day living, as well as, the economic viability of such housing

[2] Manko's position at trial was that each bedroom needed to have two people in it to be most therapeutically effective. This position made Section 28-2 applicable to most of Manko's units where most of the apartments in his apartment buildings had more than one bedroom.

arrangements.

Plaintiffs' claims include a claim for a reasonable accommodation. The City put forth evidence that its Petition for Special Case Approval form was the form an individual would use to request a reasonable accommodation. This form makes no mention of a reasonable accommodation or a disability. The City attorney testified that this form is how a person or entity would request a reasonable accommodation. The form lists five different options for which it is a petition for, none of which is a reasonable accommodation. **[**14]** The City attorney testified that an applicant would check the sixth box which states Other (specify), with a blank line. The City's zoning code made no provision for individuals to request a reasonable accommodation from zoning and land use restrictions based on disability.

Law

[*1346] Plaintiffs bring claims under the Fair Housing Act, *42 U.S.C. § 3601 et seq.*, the American with Disabilities Act, *42 U.S.C. § 12131 et seq.*, and the *14th Amendment to the United States Constitution*. I begin with Plaintiffs' Federal Fair Housing Act claim because I think that is where the crux of this case lies.

Standing

Plaintiffs assert they have standing to bring a claim under the FHA because they are disabled due to their recovering status. The City disagreed asserting, amongst other things, that the evidence supported the position that the recovering individuals could complete all major life activities. ***HN1*** The FHA defines handicap with respect to an individual as having "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (c) being **[**15]** regarded as having such an impairment." *42 U.S.C. § 3602(h)*. The existence of such handicap must be examined on a case-by-case basis. *See Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 566, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999)*. [3] Major life activities include walking, learning, performing manual tasks, getting an apartment, being unable to perform a class of jobs, and caring for oneself. *Rossbach v. City of Miami, 371 F.3d 1354, 1357-59 (11th Cir. 2004)*; *U.S. v. S. Mgmt. Corp., 955 F.2d 914, 919 (4th Cir. 1992)*. To substantially limit means a long-term, permanent restriction, or considerable. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 196, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002)*(speaking to the definition of substantial as including considerable); *Rossbach, 371 F.3d at 1357*. The recovering individuals testified about the negative impact their addiction had on their lives, including preventing them from caring for themselves or keeping a home at times, and losing jobs and families. All of these things impacted their everyday lives in a significant way. All Individual Plaintiffs and current residents of Provider Plaintiffs **[**16]** testified, that at one time, they had because of their addiction been unable to perform one of these major life activities. For some the deprivation was long-term.

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[3] While the *Kirkingburg* case dealt with the American with Disability Act, as courts have noted ***HN2*** the definitions under the two acts, one of disability and the other using the term handicap, are "almost verbatim." *Bragdon v. Abbott, 524 U.S. 624, 631, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998)*. Accordingly, I will use the terms and applicable analyses interchangeably.

For others the deprivation may have been short-term, but repeated itself with frequency when he or she would relapse and again find themselves without their family, their home, their job, or ability to care for his or herself. The evidence established that the individuals involved suffered an impairment which qualified them as disabled under the FHA.

The position that recovering individuals can be considered disabled is supported both in case law and legislative history. [4] **[*1347]** "As a medical matter, addiction **[**17]** is a chronic illness that is never cured but from which one may nonetheless recover." *S. Mgmt. Corp., 955 F.2d at 920*. ***HN3*** "Alcoholism, like drug addiction, is an 'impairment' under the definitions of a disability set forth in the FHA, the ADA, and the Rehabilitation Act." *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 46 (2d Cir. 2002)*("*RECAP*"). Congress intended to treat drug addiction as a significant impairment constituting a handicap unless excluded, such as by current drug use in accordance with *42 U.S.C. § 3602(h)*. *See Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Township, 455 F.3d 154, 156 n.5 (3d Cir. 2006)*; *RECAP, 294 F.3d at 46*; *MX Group, Inc. v. City of Covington, 293 F.3d 326, 338-39 (6th Cir. 2002)*; *S. Mgmt. Corp., 955 F.2d at 919*. The Fourth Circuit specifically spoke to the need for addicts to be given equal access to housing, instead of being denied housing on the basis of their constant craving and its accompanying dangers. *S. Mgmt. Corp., 955 F.2d at 922*. I do not pass on the question **[**18]** of a *per se* disability for recovering alcoholics or drug addicts. As a matter of fact I do not think a *per se* rule is appropriate in these circumstances where the court's obligation is to do a case-by-case evaluation to determine if an individual is handicapped. However, that does not preclude these individuals from satisfying the definition. Their testimony was moving and credible.

[19]** The definition of disability includes two other possibilities by which Plaintiffs can demonstrate their standing under the FHA, having had a record of the type of impairment discussed above, or being regarded as having such an impairment. *42 U.S.C. § 12102(2)*. ***HN5*** In order to demonstrate that an individual is handicapped due to having had a record of an impairment, the individual must have satisfied the first definition at some point. *See Burch v. Coca-Cola Co., 119 F.3d 305, 321 (5th Cir. 1997)*. All the individuals who testified at trial had experienced active drug or alcohol addiction at one point in their lives. As discussed above, the Individual Plaintiffs and current residents had been homeless, unable to hold down a job, or take care of themselves during their active addiction. Active addiction and its recovery are not short-term problems. They are long-term and for many require permanent diligence to maintain their sobriety. Their addiction particularly in its active stages substantially limited major life activities. This evidence supported these individuals having met the first definition, at

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[4] This position is also supported by ***HN4*** *28 C.F.R. § 35.104(4)(i)(iii)* which specifically references drug addiction and alcoholism as one meaning of physical or mental impairment in regards to nondiscrimination on the basis of disability in state and local government services. This section of the Code of Federal Regulations also directly addresses individuals who have successfully completed a rehabilitation program. *28 C.F.R. § 35.131(a)(2)* states "[a] public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in the current use of drugs and who - -" is participating in a supervised rehabilitation program or successfully completed a rehabilitation program.

the very least during their active addiction. **[**20]** Therefore, even if the above analysis is incorrect as to the individuals currently satisfying the first definition, where during their active addiction they satisfied the first definition, Individual Plaintiffs have a record of such an impairment making them handicapped under the second definition of the FHA.

There are two additional points I would like to make regarding the matter of standing in this case. First, is that the Individual Plaintiffs are not current residents of Provider Plaintiffs. However, they did testify that if they were to relapse they would return to Provider Plaintiffs' residences for some period of time during their recovery after they completed detoxification. ***HN6*** For cases brought under the FHA, standing is to be as broad as the Constitution permits. *See Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1537 (11th Cir. 1994)*. *Jackson* involved a plaintiff's **[*1348]** challenge to the site selection process regarding a public housing project. *Id.* Plaintiff was wait-listed for the project and stated her intention to probably move in once it was built. *Id.* In this case, Individual Plaintiffs stated their intention to return to Provider Plaintiffs' **[**21]** residences should they relapse, which is a constant significant risk for recovering individuals. This is a similar position to that of the plaintiff in *Jackson*. Given Individual Plaintiffs' stated intention to return upon the happening of a certain likely event and the broad policy of standing under the FHA, I conclude the Individual Plaintiffs have standing to challenge the City's action. [5]

[5] This is also supported by ***HN7*** the statute which talks about who may bring a suit under the FHA as an aggrieved person which is defined to include any person who "believes that such person *will be* injured by a discriminatory housing practice that is about to occur." *42 U.S.C. § 3602(i)*(emphasis added).

The other point I want to make involves the propriety of Provider Plaintiffs' standing. ***HN8*** FHA cases are often brought by a provider of housing on behalf of the residents it seeks to house. *See Brandt v. Vill. of Chebanse, Ill., 82 F.3d 172, 173 (7th Cir. 1996)*; *Smith & Lee Assocs., Inc. v. City of Taylor, Mich., 102 F.3d 781 (6th Cir. 1996)*. **[**22]** Moreover, Provider Plaintiffs' status as a profit enterprise does not negate such standing. *See Brandt, 82 F.3d at 173*(case brought by residential housing developer); *Smith & Lee Assocs., Inc., 102 F.3d at 781* (suit brought by profit owner of group home). Accordingly, all parties to this action have standing to bring their FHA claims.

Merits of Plaintiffs' claims under the Fair Housing Act

This case tests the limits of the protection provided by the FHA and a municipality's ability to legislate in an effort to preserve the character of its residential neighborhoods. Legally this is a difficult case where Plaintiffs are protected by the FHA, but exactly how that protection impacts the City's acts is unclear. The case is made more difficult by its facts where the City claims it was attempting to do something that while possibly permissible under the law, is not what it did by passing the Ordinance. My conclusion in this case is that the City's actions challenged here are limited by the FHA, the question is how limited.

Plaintiffs argued that the City's ordinances are discriminatory and thus, in violation of the FHA. The City responded that **[**23]** it was merely trying to move commercial/medical uses out of residential areas. ***HN9*** *42 U.S.C. § 3604(f)* of the

FHA prohibits a public entity from discriminating against disabled persons by denying such persons the ability to live in a dwelling. The amendments to the FHA, which added handicapped individuals, were a statement by Congress of the commitment to end the unnecessary exclusion of individuals with disabilities from American mainstream where such exclusion was often based on generalizations and stereotypes of people's disabilities and the attendant threats of safety that often accompanied these generalizations. *See* *Elliot v. City of Athens, GA, 960 F.2d 975, 978 (11th Cir. 1992)*(discussing the House Report on the *Fair Housing Amendments Act*) *abrogated by*, *City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 115 S. Ct. 1776, 131 L. Ed. 2d 801 (1995)*. Congress intended for the FHA to apply to zoning ordinances. *See* *Larkin v. State of Mich. Dep't of Soc. Servs., 89 F.3d 285, 289 (6th Cir. 1996)*(discussing **[*1349]** the explicit intent of Congress to have the FHA apply to zoning laws). However, the FHA does not pre-empt or abolish a municipality's power to **[**24]** regulate land use and pass zoning laws. *See* *Hemisphere Bldg. Co., Inc. v. Vill. of Richton Park, 171 F.3d 437, 440 (7th Cir. 1999)*; *Bryant Woods Inn, Inc. v. Howard County, Md., 124 F.3d 597, 603 (4th Cir. 1997)*. "Land use restrictions aim to prevent problems caused by the 'pig in the parlor instead of the barnyard.'" *City of Edmonds, 514 U.S. at 732* (quoting *Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926)*. 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." H.R.Rep. No. 100-711, 100th Cong., 2d Sess 24 (1988), U.S. Code Cong. & Admin. News 1988, pp. 2173, 2185. The intersection between these two principles is where this case meets.

It is against this backdrop that I address Plaintiffs' claims. Plaintiffs challenge two provisions of the City's zoning code, Ordinance 4649 and Section 28-2. Plaintiffs' argument is that each ordinance on its own, and the two in combination effectively limit the ability of recovering individuals to live in residential areas of the City **[**25]** in violation of the FHA. ***HN10*** There are two ways to prove a violation of the FHA. *See* *Larkin, 89 F.3d at 289*. First is by showing that the defendant was motivated by a discriminatory intent against the handicapped. *Id.* The second is where a defendant's actions are neutral, but have a discriminatory effect, thus having a disparate impact on the handicapped. *Id.* Plaintiffs argued they have proven a violation of the FHA under both avenues. This case does implicate both avenues. Plaintiffs' claim as to Ordinance 4649 is best analyzed under the discriminatory intent theory while Plaintiffs' claim as to Section 28-2 is most appropriately analyzed under the disparate impact theory. Accordingly, I will address them separately.

Ordinance 4649

I begin with Plaintiffs' challenge to Ordinance 4649. Ordinance 4649 defines substance abuse treatment facilities and requires them to be in the City's medical district or with a conditional permit in a motel/business district. ***HN11*** An ordinance facially discriminates against the handicapped where it singles them out and applies different rules to them. *Bangerter v. Orem City Corp., 46 F.3d 1491, 1500 (10th Cir.*

1995); **[**26]** Marbrunak, Inc. v. City of Stow, 974 F.2d 43, 46-47 (6th Cir. 1992). As applied to this case, the question is not whether the City was specifically intending to discriminate against Plaintiffs, but rather whether the ordinance on its face treats recovering drug addicts and alcoholics different from non-handicapped individuals. *See* Larkin, 89 F.3d at 290 (discussing how a defendant's benign motive does not prevent a statute from being discriminatory on its face); *see also* Alexander v. Choate, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985)(discussing how discrimination against the handicapped is often the result of thoughtlessness, not particular offensive anger). The language of the Ordinance singles out recovering individuals where they are the individuals who would be residing in a substance abuse treatment facility. *See* McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992)(discussing how discrimination against an individual because of his or her handicap is often aimed at an effect of the handicap rather than the handicap itself). While this does not mean that all recovering individuals live in a **[*1350]** substance abuse treatment facility, there **[**27]** was no evidence, nor did anyone argue that non-recovering individuals live in substance abuse treatment facilities. Accordingly, Ordinance 4649 treats recovering individuals differently from non-recovering individuals where it requires the individuals who live in substance abuse treatment facilities, recovering individuals, to live in the City's medical zone or with conditional approval in a motel/business zone. This is sufficient to establish a prima facie case of discrimination. However, my analysis does not end here.

Next, I must determine if the City's differential treatment of recovering individuals is justified such that it is not in violation of the FHA. The Eleventh Circuit has not addressed the standard a governmental defendant must meet to justify disparate treatment under the FHA. [6] Therefore, I look to other circuits for guidance on what the City is required to prove to establish that this distinction is not discriminatory under the FHA. *See* McAbee v. City of Fort Payne, 318 F.3d 1248, 1252 (11th Cir. 2003)(looking to other circuits for guidance as to what standard to apply where the Eleventh Circuit had not adopted one yet). Four United States Courts **[**28]** of Appeals have addressed this issue. Cmty. House, Inc. v. City of Boise, Idaho, 468 F.3d 1118 (9th Cir. 2006); Larkin, 89 F.3d 285; Bangerter, 46 F.3d 1491; Familystyle of St. Paul, Inc. v. City of St. Paul, Minn., 923 F.2d 91 (8th Cir. 1991). The Eighth Circuit was the first to develop a test to be used in these situations, but none of the other circuits confronted with the issue have chosen to follow the Eighth Circuit's analysis. In *Familystyle*, the Eighth

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In a recent unpublished opinion, the Eleventh Circuit employed the test from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) in an FHA context. *See* Boykin v. Bank of Am. Corp., 162 Fed. Appx. 837 (11th Cir. 2005). However, the facts of *Boykin* are substantially different than those in the present case. In *Boykin*, the plaintiff was challenging a bank's treatment of her loan application. Therefore, the case involved a discriminatory act during a residential real-estate related transaction against an individual being established through circumstantial evidence. This case involves two pieces of legislation passed by a City and a facial discrimination challenge. Plaintiffs' claims do not rely on circumstantial evidence, but instead relied on the City's legislation and its impact on handicapped individuals. Therefore, the instant situation is not sufficiently analogous to the facts of *Boykin* to cause me to determine that the Eleventh Circuit would employ a *McDonnell Douglas* test here. *See* Cmty. House, Inc. v. City of Boise, Idaho, 468 F.3d 1118, 1124 (9th Cir. 2006)(discussing how the *McDonnell Douglas* test is inapplicable to facial discrimination challenges under the FHA).

Circuit adopted the rational relation test finding no FHA violation where a defendant demonstrated that its action was rationally related to a legitimate governmental interest. Two of the other three circuits which have addressed this issue determined that once a plaintiff has established an ordinance is facially discriminatory, a defendant can present one of two possible justifications for the discriminatory ordinance: (1) legitimate public safety concerns; or (2) that the restriction benefits the protected class. *Cmty. House, Inc., 468 F.3d at 1125 (9th Cir.)*; *Bangerter, 46 F.3d at 1503-04 (10th Cir.)*. In refusing to use **[**29]** the rational relation test employed in *Familystyle*, the Tenth Circuit discussed how an equal protection analysis is misplaced where in an FHA claim a handicapped plaintiff is bringing a claim based on a statute of which he or she is the "direct object of the statutory protection." *Bangerter, 46 F.3d at 1503*. The Ninth Circuit adopted the Tenth Circuit **[*1351]** test arguing a similar distinction. It discussed how those protected by the FHA were not necessarily protected classes for constitutional purposes, thereby not making the rational relation test appropriate. *Community House, Inc., 468 F.3d at 1125* (discussing how this standard is also more in line with the Supreme Court's analysis in *Int'l Union, United Auto., etc. v. Johnson Controls, 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991)*). The Sixth Circuit did not adopt either the *Bangerter* or the *Familystyle* test, but instead stated that "in order for facially discriminatory statutes to survive a challenge under the FHAA, the defendant must demonstrate that they are 'warranted by the unique and specific needs and the abilities of those handicapped persons' to whom **[**30]** the regulations apply." *Larkin, 89 F.3d at 290* (quoting *Marbrunak, Inc., 974 F.2d at 47*). I agree that ***HN12*** a rational relation test is not appropriate where the individuals bringing this statutory claim are the direct object of its protection, the protection of which appears to have been intended to be greater than that provided by the rational relation test. I agree that the presence of either of the *Bangerter* justifications would allow a facially discriminatory statute to survive an FHA challenge.

[31]** However, I am not sure that the *Bangerter* test includes all possible justifications. As discussed below, I recognize a municipality's interest in protecting the residential character of a neighborhood, as was argued strenuously here, and its ability to legislate such protection. While I agree with the City that this is a legitimate interest, I also recognize that this protection must be legislated with the needs of those protected by the FHA in mind.

Having articulated possible justifications that would allow Ordinance 4649 to survive Plaintiffs' FHA challenge, this issue becomes whether such justifications are present in this case. This is a difficult analysis where the City's primary justification was grouping compatible uses together, which is not one of the *Bangerter* justifications, nor is it a justification recognized by any of the other circuits that have addressed this issue. That being said, I will evaluate all justifications the City put forth for Ordinance 4649 in an effort to determine whether, even if in combination, they support the Ordinance and allow it to withstand Plaintiffs' challenge. There was some evidence at trial regarding public safety concerns [7] **[**32]** the City had about Provider Plaintiffs' residences. In

[7] The evidence consisted of a memorandum from the Chief of Police of the City detailing cases involving fatalities at the subject

Bangerter, the court pointed out that the statute itself states that ***HN13*** "[n]othing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." *Bangerter, 46 F.3d at 1503* (quoting *42 U.S.C. § 3604(f)(9)*). The legislative history indicates that ***HN14*** generalized perceptions of threats to safety should not support discrimination. *See* H.R. Rep. No. 100-711, 1988 U.S. Code Cong. Admin News at p. 2179. The residents spoke at the city council meeting about their fears that stemmed from Provider Plaintiffs' residences. However, the transcript and video tape of the meeting admitted at trial did not support of a finding that any safety **[*1352]** justification for this Ordinance was supported by a direct threat to the safety and health of others more so than generalized perceptions. The City did not put forth any evidence regarding the relationship between the crime involved at the halfway houses and crime occurring **[**33]** at other non-halfway house residences in the area. Accordingly, this evidence did not support a finding that Provider Plaintiffs' residences, or others that would fit the definition of substance abuse treatment facility, posed a direct threat to the health or safety of other individuals.

The City's main justification was that the Ordinance was passed to group together compatible uses, a common use of zoning ordinances. Specifically, the City's argument was that service providers or facilities that would meet the definition of a substance abuse treatment facility under the Ordinance, were commercial and medical in nature and therefore did not belong in a residential area. However, the only activity required to bring a service provider or facility within the purview of the Ordinance **[**34]** is that the service provider or facility require tenants to perform testing to determine if they are drug and alcohol free as a term of their tenancy. The language of the Ordinance [§] **[**36]** goes to a service provider or facility "used for room and board only and in which treatment and rehabilitation activities are provided at locations other than the primary residential facility, whether or not the facilities used for room and board and for treatment and rehabilitation are operated under the auspices of the same provider. For purposes of this subparagraph (2), service providers or facilities which require tenants or occupants to participate in treatment and rehabilitation activities, or perform testing to determine whether tenants or occupants are drug and/or alcohol free, as a term or condition of, or essential component of, the tenancy or occupancy shall be deemed to satisfy the 'treatment and rehabilitation activities' component of the definition contained in this section." It is not clear how this condition of tenancy turns a dwelling into a commercial facility, or at least more of a commercial facility than any residence rented or leased to occupants which would be by

properties in a year and a half period and a list of incidents involving halfway houses in the City.

[§] The Ordinance also includes in its definition of substance abuse treatment facilities a service provider or facility that is "[l]icensed or required to be licensed pursuant to F.S. *§ 397.311(18)*." ***HN15*** ***Florida Statute Section 397.311(18)*** defines "Licensed service provider" as "a public agency under this chapter, a private for-profit or not-for-profit agency under this chapter, a physician or any other private practitioner licensed under this chapter, or a hospital that offers substance abuse impairment services through one or more of the following licensable service components" and then goes on to list such components. As discussed in further detail in the remedies section of this order, I conclude that this section of the Ordinance can remain.

definition a commercial [**35] facility where it is viewed with regard to a profit. The condition of tenancy would make no change to the outward appearance of the residence, be it a single family home or an apartment building. The City put forth no evidence that an apartment building that required its tenants to be drug tested would somehow negate the fact that those individuals were living in the apartment building, making it their home. [9] Instead, the City put forth evidence to establish that the residences offered by Provider Plaintiffs were more of a profit driven enterprise than a place where people actually lived.

[*1353] I do not disagree with the City's position on this point. However, Ordinance 4649 did not capture the use it was attempting to segregate. The City was looking at Provider Plaintiffs and the services they provided to recovering addicts, including a program with three different phases, drug testing on site, transportation, group therapy meetings, medication control, money control, Alcoholic Anonymous and Narcotics Anonymous meetings on site, curfews, room inspections, bed checks, and individual therapy. Recovering individuals spent limited time in each phase, requiring them to move from building to building. The City also looked at Provider Plaintiffs' business model where they were marketing themselves as unique recovery programs, had a large office use in the main facility, charged individuals by the week with no regard for what unit they were in or how many individuals were living in the unit, and kept deposits from individuals who relapsed regardless [**37] of how many times they had previously relapsed while staying with Provider Plaintiffs. The City found the combination of these uses and Provider Plaintiffs' business practices commercial in nature. As I expressed at trial and earlier in this order, some of Provider Plaintiffs' business practices give me pause, particularly where Provider Plaintiffs are seeking protection from a statute which protects handicapped individuals, because many of the business practices employed by Provider Plaintiffs do not appear to serve the therapeutic needs of these handicapped individuals. However, questionable business practices aside, the Ordinance does not capture the commercial and medical uses that underlie the City's justification, nor did the City prove either of the *Bangerter* factors justified the passage of the Ordinance.

Instead, the Ordinance, which hinges the location of a housing provider in a residential zone to whether that housing provider requires its residents to be subjected to drug testing as part of his or her occupancy, substantially limits the housing options for recovering individuals in the City. Recovery from substance abuse is an ongoing struggle for many, which for a [**38] large number of such individuals may require at least some period of time living in a drug and alcohol free environment. Regan's testimony established the substantial risk of relapse recovering individuals face and their need to be in a supportive drug and alcohol free environment to decrease such risk. Regan testified that one can not absolutely determine if a living environment is drug and alcohol free unless its residents are drug tested. There was also testimony at trial, by Regan, and the recovering individuals, as to the role a group living arrangement plays in their recovery.

[9] Even the City's planning and zoning director testified that Provider Plaintiffs' apartment buildings look just like an apartment building.

including helping to keep them clean because of the transparency, but also providing them with less opportunities for loneliness, a major trigger for relapse. Other courts have acknowledged the role a group living arrangement plays in the recovery of substance abusers. *See Corp. of the Episcopal Church in Utah, 119 F.Supp.2d 1215, 1217-18 (D. Utah 2000)*; *Oxford House, Inc. v. Town of Babylon, 819 F.Supp. 1179, 1183 (E.D. NY 1993)*; *U.S. v. Borough of Audubon, N.J., 797 F.Supp. 353, 358-59 (D. NJ 1991)*. The need for handicapped people to live in group arrangements **[**39]** for support or to pool caretaker staff has been described as essential. *Brandt, 82 F.3d at 174*; *see also Smith & Lee Assocs., Inc., 102 F.3d at 795-96* (discussing the need to allow group homes for the elderly to have at least nine residents in them for economic viability). Such group living arrangements which are drug and alcohol free, thus necessitating drug testing, at the very least off site, fall **[*1354]** within the purview of the Ordinance. Based on this evidence the restriction that a housing provider who requires drug testing as an essential part of a tenant's occupancy only provide housing in a medical district or possibly in a motel/business district cannot be seen as a restriction that benefits recovering individuals. Thereby, the City has limited the opportunities for recovering individuals to live in residential areas of Boca Raton.

As discussed above, the City argued the Ordinance was aimed at commercial and medical uses. The City's list of such uses is much longer than just drug testing. However, the Ordinance includes none of these other uses. The City argued the Ordinance did not capture a mere housing provider that required drug testing where **[**40]** the Ordinance only captured "service providers or facilities." The Ordinance does use this language, however the distinction between who imposes the requirement, the residents of the group living arrangement or their landlord appears to be without significance to the impact on the residential character of the neighborhood. For example, a entity which wanted to provide substance free housing to twenty recovering individuals in ten one-bedroom apartments complete with drug testing as part of their lease to insure the substance free component of their environment, and AA and/or NA meetings in the building's common area would have to provide such housing in the medical district or apply for a conditional use in a motel/business district. Yet, under the City's distinction a building housing 90 people in 30 apartments subject to the same drug testing requirement discussed above and having the same AA and/or NA meetings, could be in the residential zone so long as the residents themselves got together and agreed to put the restrictions on themselves and arrange for the AA and/or NA meetings themselves. It is not clear that the difference of who imposes the requirements on residents is significant **[**41]** to the analysis of whether the use is a commercial one. [10] **[**42]** The City put forth no evidence which demonstrated that a sober living arrangement provided by a third party destroys the residential character of a

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[10] As discussed in the Joint Statement of the Department of Justice and the Department of Housing and Urban Development, group homes are often provided by an organization that provides housing and various services for individuals in the group homes. *See* Joint Statement of the Department of Justice and the Department of Housing and Urban Development, Group Homes, Local Land Use, and the Fair Housing Act *available at* http://www.usdoj.gov/crt/housing/final8_1.htm.

neighborhood more than a sober living arrangement organized by the residents themselves. [11] Based on the evidence presented, the City's distinction does not cure the Ordinance's discriminatory impact. This is not to say that the City is precluded from attempting to separate the commercial from the residential. As I stated earlier, Provider Plaintiffs' residences include a lot more services than drug testing, and perhaps more than is therapeutically necessary.

Therefore, my ruling regarding the Ordinance is not intended to limit the City's ability to regulate what it sees, and what I saw as well from the evidence, as a commercial operation. My concerns are similar to those discussed by the Supreme Court in *Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974)* where it stated:

> ***HN16*** The regimes of boarding houses, fraternity houses, and the like present urban **[*1355]** problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Boraas, 416 U.S. at 9. The sheer volume of **[**43]** individuals Provider Plaintiffs are housing within a small geographic location contributes to setting Provider Plaintiffs' housing opportunities apart from the residences that surround it. This is in addition to the transitory nature of the housing where residents are shifted through different buildings depending on what phase of the program they are in. I recognize that Provider Plaintiffs' facilities are apartment buildings amidst other apartment building and therefore to the naked eye one may not see Provider Plaintiffs' buildings as the pig in the parlor. However, because of the congregation of Provider Plaintiffs' facilities and the multitude of services offered by Provider Plaintiffs, a closer examination would bring to light the difference between Provider Plaintiffs' facility and an average residential apartment building. As discussed in *Boraas, **HN17*** the ability to protect the residential nature of a neighborhood is not limited to controlling the negatives that obviously do not conform with the area, but includes the ability to set apart areas where people make their home from the rest of the City. While I agree that recovering individuals need to be given the opportunity to **[**44]** 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. Once again the City's Ordinance does not directly address this concern. Even though I agree with the City's ability to protect the residential character of the neighborhood and Provider Plaintiffs' possible impact on that character in this case, the link between the Ordinance and the protection of the residential character of the neighborhood is not a direct one.

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[11] *See supra* n. 9.

The City did not present sufficient evidence to justify the Ordinance based on legitimate public safety concerns or to demonstrate that the restriction imposed benefitted the recovering individuals. In this case, neither of the *Bangerter* justifications are present. In addition, the City's justification of grouping like uses together is not a sufficient justification where protecting the residential character of its neighborhoods could have been legislated in a less discriminatory way such that it did not substantially limit the availability of residential housing to recovering individuals.

Section 28-2

I must now turn to Section 28-2 of **[**45]** the City Code, the City's definition of family. The analysis regarding this Section is different than that of the Ordinance. Section 28-2 by its own terms does not refer to recovering individuals or substance abuse. Instead, Section 28-2 treats all individuals, handicapped and non-handicapped, provided they are unrelated or not within the Section's two exceptions, foster children and domestic servants, alike. Four non-handicapped non-related people **[*1356]** cannot live in a single dwelling, just as four recovering individuals cannot live in a single dwelling. Therefore, this Section is more appropriately examined for its disparate impact on handicapped individuals. *See RECAP, 294 F.3d at 52*. ***HN18*** A disparate impact analysis should be employed where a facially neutral section of the city code is examined to determine its differential impact on a protected group under the FHA. *See RECAP, 294 F.3d at 52*. To succeed on a disparate impact theory, plaintiffs must provide evidence that the neutral practice had a disproportionate impact on the protected class. *RECAP, 294 F.3d at 52-53*; *2922 Sherman Ave. Tenants' Ass'n v. D.C., 370 U.S. App. D.C. 328, 444 F.3d 673, 681 (D.C. Cir. 2006)*. **[**46]** The question in this case is whether limiting the occupancy of a single dwelling in the City to three unrelated people has a disproportionate impact on recovering individuals.

Plaintiffs' argument at trial was that it did where recovering individuals often require the availability of group living arrangements as part of their recovery. The City argued that this provision does not violate the FHA where there are other possibilities for a group home of recovering individuals in a residential area of the City. The evidence at trial supported the conclusion that recovering individuals often need group living arrangements as part of their recovery for a variety of reasons. Two of the reasons, as discussed by Regan, are decreasing the possibility of relapse by decreasing the feelings of loneliness and increasing the supervision due to the accountability present when people live together. Regan's testimony has previously supported such findings. *See Town of Babylon, 819 F.Supp. at 1183*. The last reason, as discussed earlier in this order, is the economic viability of providing housing to handicapped people. This reason has also been recognized in the law. *Brandt, 82 F.3d at 174*; **[**47]** *Smith & Lee Assocs., Inc., 102 F.3d at 795-96*. Plaintiffs' position is further bolstered by an examination of the Oxford House model. Oxford Houses, the work of a non-profit organization which helps recovering individuals establish group sober homes, require a minimum of six residents to receive a charter for the proposed home. The Oxford House Manual, *available at http://www.oxfordhouse.org*. The City argued that groups of

recovering individuals could live together under other provisions of the City Code. For example, the City pointed to the community residential homes allowed for by the City Code and detailed in *Florida Statute Section 419.001*. However, ***HN19*** the Florida statute requires community residential homes to be licensed by the Agency for Health Care Administration or that the handicapped residents of such a home be a client of one of four different state agencies. *Fla. Stat. § 419.001*. Limiting the possibility of recovering individuals to live in a residential area only if they become licensed or are clients of a state agency limits their housing options. Based on the foregoing, I agree with Plaintiffs that Section 28-2 impacts recovering individuals more **[**48]** than non-recovering individuals.

HN20 Once Plaintiffs establish this disproportionate impact on the handicapped, the burden is shifted to the City to prove that the action furthered "a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988)*; *See Town of Babylon, 819 F.Supp. at 1183*. The City argued that this definition of family furthered a variety of governmental interests, including controlling population density **[*1357]** and preserving the single family character of the City's residential areas. I agree that the preservation of a residential character is a legitimate governmental interest. However, in this case the City did not demonstrate that there was no less discriminatory alternative means to accomplish this goal. Section 28-2 makes no exception for a group home for recovering individuals who merely want to live in a single family home and would not impact the residential character of the neighborhood. Section 28-2 provides two other exceptions and the City put forth no evidence to explain why allowing **[**49]** a similar exception for recovering individuals would destroy the residential character of the neighborhood.

The no less discriminatory means is further exemplified by the City's lack of any established procedure by which handicapped individuals could request a reasonable accommodation to the occupancy limitation. ***HN21*** Discrimination under the FHA includes denying or making a dwelling unavailable because of a handicap, including refusing to make reasonable accommodation in rules, policies, practices, or services such that would be necessary to afford such person the opportunity to use and enjoy a dwelling. *See 42 U.S.C. § 3604(f)(3)(B)*. There was no evidence that a reasonable accommodation to Section 28-2 was available. The City put forth evidence of a Petition for Special Case Approval form which it argued an individual would use to request for reasonable accommodation. Neither reasonable accommodation, nor disability were mentioned on the form. There was no evidence of such form having been used historically by handicapped individuals to request a reasonable accommodation. There was no evidence that the form was referenced anywhere else in the City Code that **[**50]** dealt with reasonable accommodation requests. Where Section 28-2 itself provides no exception for handicapped individuals and the City's Code has no clearly established procedure that would allow a handicapped individual, group of individuals, or provider of group homes, to request a reasonable accommodation of the occupancy

limitation, the City has not demonstrated that no less discriminatory alternative to Section 28-2 would serve the same interest. Therefore, Section 28-2 as written violates the FHA.

This is not to say that the City's occupancy limitation of three unrelated people is not permitted should the City legislate it in a less discriminatory fashion. The Plaintiffs argued that *City of Edmonds* suggests that such caps violate the FHA. I do not read *City of Edmonds* to make such suggestion. *City of Edmonds, 514 U.S. 725, 115 S. Ct. 1776, 131 L. Ed. 2d 801*. ***HN22*** *City of Edmonds* held that the type of limitation used here, "the family-defining kind," is not exempted from the FHA by *42 U.S.C. § 3607(b)(1)*. *Id. at 728*. Instead, the Court held, the exemption only applies to "total occupancy limits, i.e., numerical ceilings that serve to present overcrowding **[**51]** in living quarters." *Id.* The question before me is not whether Section 28-2 falls within *42 U.S.C. § 3607(b)(1)*'s purview.

I do not think the FHA is violated merely by having a cap on the number of unrelated individuals who can live in a single family dwelling. Furthermore, I find nothing wrong with the number three that the City has chosen. A city must draw a line somewhere. The number chosen is in line with the average occupants per unit within the City. The number of individuals per unit on average was less than three. As eloquently stated by Justice **[*1358]** Holmes, "[n]either are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." *Irwin v. Gavit, 268 U.S. 161, 45 S.Ct. 475, 476, 69 L. Ed. 897, 1925-1 C.B. 123, T.D. 3710*; *see Borgas, 416 U.S. at 8* (stating that every line a legislature draws leaves out some that might as well have been included, the use of such discretion is a legislative function); *see also Smith & Lee Assocs., Inc., 102 F.3d at 797 n. 13* (discussing the fine line drawn between a group home of nine residents not substantially altering the residential character of a single-family **[**52]** neighborhood while a twelve resident group home would more likely do so). While I find no legal problem with the cap of three unrelated individuals per se, the limitation without any exception for handicapped individuals or an established reasonable accommodation procedure violates the FHA.

This is not to say that recovering individuals should have a blanket exemption from a cap on the number of unrelated people that can live in a dwelling in a residential district of the City. Nor is it to say that the City cannot limit Provider Plaintiffs' units to three unrelated people per unit. There was testimony at trial that Provider Plaintiffs could be profitable and have therapeutic success with only three people per apartment. All of this can be considerations in attempting legislate a capacity limitation that complies with the FHA.

My ruling here is not intended to limit the City's ability to regulate the residential character of its neighborhoods. As discussed above, I agree with the City that preservation of the residential character of its neighborhoods is a legitimate governmental interest. However, the impact of these two zoning sections limits the ability of recovering individuals **[**53]** to obtain housing in residential areas of Boca Raton. They did not with little, if any, evidence as to how the presence of recovering individuals destroys the residential character. The City may regulate the residential

character of its neighborhoods, so long as they devise a means to protect the ability of recovering people to live in the residential neighborhoods in a meaningful way which takes in mind their need for a group living substance free environment.

Remedies

At the conclusion of the bench trial, I asked each of the parties, and the Department of Justice, who has a related case pending against the City, to submit recommendations as to an appropriate remedy in this case. I told the parties "I would like to accomplish the purpose but do it as narrowly [12] as possible." Despite this request, both parties essentially argued their positions again, including suggesting the broadest remedy available to each of them. I decline to adopt any of the positions offered given the facts of the case and the precedent on the issue of remedies.

[54]** Having found that the Ordinance and Section 28-2 violate the FHA, the question before me is whether they should both be stricken, as Plaintiffs suggest, or if I should more narrowly tailor the relief as I alluded to at the conclusion of the bench **[*1359]** trial. The ***HN23*** precedent supports a narrow tailoring. *See Ayotte v. Planned Parenthood of N. New England, et al., 546 U.S. 320, 126 S.Ct. 961, 163 L. Ed. 2d 812 (2006)*. In *Ayotte*, Justice O'Connor addressed a similar predicament. The Court specifically held "that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief." *Ayotte, 126 S.Ct. at 964*. In this case I attempt to achieve the result I think is necessary as narrowly as possible.

As to Ordinance 4649, the primary difficulties with this Ordinance involve the second definition and its subsection. I find no violation of the FHA by the City's first definition, those service providers or facilities that are "licensed or required to be licensed pursuant to ***HN24*** *Section 397.311(18) Fla. Stat.*" This statute details various licensable service components and defines an entity as a licensed **[**55]** service provider if it offers substances abuse impairment services through one or more such licensable service components. Nothing in the statute indicates that by not allowing a licensed service provider to be located in a residential area, the City is precluding recovering individuals from living in residential areas where recovering individuals can reasonably live in residential areas of the City without needing two or more of the licensable service components listed in *Section 397.311(18)*. Accordingly, section one of Ordinance 4649 shall remain in effect. While I have ideas, some of which are expressed herein and others of which were discussed at trial, about how section two of the Ordinance could be written to better serve the City's justification and comply with the FHA, I decline to re-write the Ordinance. My decision is based on the roles of the legislature and judiciary, but also on a principle Justice O'Connor discussed in *Ayotte*. ***HN25*** Courts should not determine to whom a statute should apply where a

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[12] I went further to explain that "It doesn't help me to say just strike everything and enjoin everything. . . . I need something better than that. And the same thing goes for the city. You know, the more specificity --in fact, even -- if you were going to deal with the ordinances, specific excisements, if that's how we would handle it. And if there's procedure that you would suggest I order, a specific language. You know, concepts aren't as much helpful at this point to me as language."

legislature has cast its net widely because this would put the judiciary in the legislature's role. *See Ayotte, 546 U.S. 320, 126 S. Ct. at 968*. Therefore, I decline to parse **[**56]** the second definition or to add my own words to it. The City is enjoined from enforcing section two of Ordinance 4649.

Section 28-2 is not susceptible to parsing either. However, given my discussion above, I am going to temporarily enjoin enforcement of section 28-2 against recovering addicts until such time as the City passes a reasonable accommodation procedure. The City must provide a process by which a request for reasonable accommodation on the basis of one's disability could be requested. [13] Accommodations are to give consideration for the limitations caused by the disability. This remedy does not enjoin the City against enforcing this provision of the City Code against Provider Plaintiffs. I reach this conclusion not only because of my position that while recovering individuals need an accommodation to allow for group living situations, I found no evidence which persuaded me that this maxim requires Provider Plaintiffs to have more than three individuals in each of their units. As discussed above there was evidence that Provider Plaintiffs' facilities can be therapeutically **[*1360]** successful and profitable with three individuals per unit.

[57]** My position as to Provider Plaintiffs being excluded from this temporary enjoinment is also based on Provider Plaintiffs' unclean hands where they previously agreed to comply with section of the City Code demonstrating their ability to do so and continue to offer housing to recovering individuals. ***HN26*** Misconduct by a plaintiff which impacts the relationship between the parties as to the issue brought before the court to be adjudicated can be the basis upon which a court can apply the maxim of unclean hands. *See Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 863 (11th Cir. 1979)*. The maxim of 'he who comes into equity must come with clean hands' has been said to close the door of equity to a litigant tainted by inequitableness as to the matter about which the litigant seeks relief. *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 552 (1945)*. This principle requires the litigant to act "fairly and without fraud or deceit as to the controversy in issue." *Id. at 814-15*. Where Provider Plaintiffs can continue to provide housing to recovering individuals while complying with Section 28-2 and they **[**58]** previously agreed to, I find it unnecessary to enjoin enforcement against them.

Damages

As to damages, the Individual Plaintiffs asserted that their injury included the humiliation of community disdain, the compromise of their anonymity as to their recovering status, and the stress of possibly losing their sober housing. I do not doubt the humiliation the Individual Plaintiffs felt as they listened to the city council meeting where the Ordinance was addressed. However, many of them did not even attend the meeting. Their testimony regarding their emotional harm was conclusory and was not specific such that it convinced me of

[13] As discussed in the Joint Statement, local governments should 'make efforts to insure that the availability of [reasonable accommodation request] mechanisms is well known within the community.' Joint Statement at page 4. There was no evidence that the Petition for Special Case Approval form was well known as the avenue to a reasonable accommodation. Instead, the testimony was that the Petition for Special Case Approval form was a catch all application.

the nature and extent of their emotional harm. *See, e.g., Bailey v. Runyon, 220 F.3d 879, 880-81 (8th Cir. 2000)* (discussing how a plaintiff's own testimony can be sufficient but is not necessarily the sine qua non to establishing evidence of emotional harm). Plaintiffs did not put forth any evidence of ramifications of their emotional distress. *See, e.g., Price v. City of Charlotte, N.C., 93 F.3d 1241, 1254-56 (4th Cir. 1996)*. The City was required to hold the public meeting and allow members of the public to speak to **[**59]** the Ordinance. *See Fla. Stat. § 166.041*. In this case, I find the statements made at a democratic function were not sufficient to establish injury. The City delayed application of the Ordinance until 18 months after the rendition of a final non-appealable order in this case. The Individual Plaintiffs did not have to suffer the loss of sober housing and have had ample opportunity to address such a possibility where this lawsuit has been pending for over three years. I do not find Individual Plaintiffs established a concrete injury sufficient to sustain a compensatory damage award.

Similarly, the damages claimed by Provider Plaintiffs are unwarranted where they are speculative. ***HN27*** A damage award must be based on substantial evidence, not speculation. *See Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 457 (5th Cir. 1979)*. [14] Provider Plaintiffs claimed lost revenues where they were **[*1361]** unable to grow their business due to the uncertainty of this litigation, mainly premised on their inability to obtain financing for another apartment building due to this litigation. Provider Plaintiffs presented a damages expert. However, he relied on an appraisal price of the building **[**60]** with no evidence to establish Provider Plaintiffs could have bought the building at that price. There was no evidence regarding the listing price of the building and the seller's agreement to Provider Plaintiffs' price. There was also no evidence regarding the increased demand for the type of housing Provider Plaintiffs provided such that they would be able to fill another building. In sum, the evidence was speculative that Provider Plaintiffs would have made the profits articulated, but for the Ordinance and Section 28-2.

Despite not having found sufficient evidence to establish a need for compensatory damages, I do think that Plaintiffs are entitled to an award of nominal damages. ***HN28*** "Nominal damages are a trifling sum awarded to **[**61]** a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or breach of the defendant's duty, or in case where, although there has been a real injury, the plaintiff's evidence fails to show its amount." BLACK'S LAW DICTIONARY 392 (6th ed. 1990). While the Eleventh Circuit has stated that merely a violation of a purely statutory right does not mandate an award of nominal damages for such statutory violation, it has not precluded such an award where the district court finds it appropriate. *See Walker v. Anderson Elec. Connectors, 944 F.2d 841, 845 (11th Cir. 1991)*. The Supreme Court has recognized the role that nominal damages play in cases where there is no concrete damage to compensate, but it is important to observe an individuals' rights. *Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299,*

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[14] Decisions of the United States Court of Appeals for the Fifth Circuit that as existed on September 30, 1981 are binding on the United States Court of Appeals for the Eleventh Circuit. *See Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981)*.

308 n. 11, 100 S. Ct. 2537, 91 L. Ed. 2d 249 (1980). The Sixth Circuit has stated that ***HN29*** at a minimum an award of nominal damages would be appropriate where a plaintiff proved a violation of the FHA and that he suffered a non-quantifiable injury as a result. *See Homod v. Woodcrest Condo. Ass'n, 328 F.3d 224 (6th Cir. 2003)*; **[**62]** *see also Baltimore Neighborhoods, Inc. v. LOB, Inc., 92 F.Supp.2d 456, 464 (D. Md. 2000)*(finding an award of nominal damages appropriate in a violation of the FHA case where plaintiff failed to show actual damage). Plaintiffs did not present evidence sufficient to sustain a damage award. However, this should not detract from the finding that the City violated the FHA. This is particularly true where as discussed above the statutory claim which Plaintiffs bring entitles them to greater protection than their constitutional rights would provide to a similar claim and nominal damages are required for a violation of constitutional rights. *See Walker, 944 F.2d at 515*(discussing how *Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)* applies only to violations of constitutional magnitudes). In order to not take away the importance of such violation, I conclude that an award of nominal damages is appropriate.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Judgment is entered in favor of Plaintiffs as to their Federal Fair Housing Act claims. Judgment is entered in favor of Plaintiffs against Defendant in the amount of $ 1.00 as to **[*1362]** each Plaintiff. **[**63]** It is FURTHER ORDERED AND ADJUDGED that the City is enjoined from enforcing section 2 of Ordinance 4649 and is enjoined from enforcing Section 28-2 as to recovering individuals until such time as the City passes a reasonable accommodation procedure. Plaintiffs' remaining claims are dismissed. Judgement shall be entered in accordance with this Order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 26th day of February, 2007.

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

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Nicoll v. Baker

Supreme Court of Florida

February 29, 1996, Decided

No. 85,493

Reporter

668 So. 2d 989; 1996 Fla. LEXIS 278; 21 Fla. L. Weekly S 96

MARGARET L. NICOLL, Petitioner, v. FRANKLIN G. BAKER, Circuit Judge, etc., and FRANK S. NICOLL, JR., Respondents.

Prior History: [**1] Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance Second District - Case No. 94-02684.

Core Terms

alimony, district court, awards

Case Summary

Procedural Posture

Petitioner ex-wife sought review of a decision of the Second District Court of Appeal (Florida), which issued a writ of prohibition barring, under the Uniform Reciprocal Enforcement of Support Act, the circuit court from proceeding with petitioner's claim for alleged alimony arrearages of $ 1.9 million.

Overview

Nearly 30 years after their divorce, petitioner ex-wife sought under the Uniform Reciprocal Enforcement of Support Act (URESA) to collect $ 1.9 million in unpaid alimony. Respondent husband moved to dismiss, claiming that Florida's version of URESA was limited to the enforcement of child support obligations and was inapplicable to claims involving only alimony. The circuit court found the issue cognizable, and respondent then successfully petitioned the district for a writ of prohibition barring the circuit court from proceeding with petitioner's claim. Petitioner sought review, arguing that the court had previously found that "support" under URESA included alimony. On review, the court found that the legislature, by enacting Fla. Stat. ch. 88.031(20), had abrogated the court's prior holding in *State ex rel. Quigley v. Quigley, 463 So. 2d 224 (Fla. 1985)*, removing alimony orders from the jurisdiction of URESA unless they were accompanied by child support.

Outcome

The decision was affirmed. Petitioner's alimony arrearage claim was barred under the Uniform Reciprocal Enforcement of Support Act (URESA), because the legislature enacted the

statute removing alimony orders from the jurisdiction of URESA unless such orders were accompanied by child support.

LexisNexis® Headnotes

Family Law > Child Support > General Overview

Family Law > Child Support > Support Obligations > General Overview

Family Law > ... > Support Obligations > Enforcement > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Enforcement > General Overview

Family Law > ... > Spousal Support > Obligations > General Overview

Family Law > Parental Duties & Rights > Duties > Support of Children

HN1 See Fla. Stat. ch. 88.031(20).

Governments > Legislation > Enactment

Governments > Legislation > Interpretation

HN2 When the words of a statute are plain and unambiguous and convey a definite meaning, courts have no occasion to resort to rules of construction, they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power. Further, the legislature is presumed to be cognizant of the judicial construction of a statute when contemplating making changes in the statute.

Counsel: Owen L. Luckey, Jr., LaBelle, Florida, for Petitioner.

Frank C. Alderman, III, of Alderman & Ahlbrand, P.A., Fort Myers, Florida; and John Jay Watkins of Watkins & Ramunni, P.A., LaBelle, Florida, and Gerald W. Pierce of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, Florida, on behalf of Frank S. Nicoll, Jr., for Respondents.

Judges: SHAW, J. GRIMES, C.J., and KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur. OVERTON, J., concurs with an opinion, in which GRIMES, C.J., concurs.

Opinion by: SHAW

Opinion

[*989] SHAW, J.

We have for review *Nicoll v. Baker, 652 So. 2d 417 (Fla. 2d DCA 1995)*, wherein the district court certified the following question:

> Whether the legislature, by enacting section 88.031(20), Florida Statutes (1993), has abrogated the Supreme Court's holding in *State ex rel. Quigley v. Quigley, 463 So. 2d 224 (Fla. 1985)*, and removed alimony orders from the jurisdiction of URESA unless they are accompanied by child support?

*Nicoll [**2]*, 652 So. 2d at 419. We have jurisdiction. *Art. V, § 3(b)(4), Fla. Const.* We answer in the affirmative and approve *Nicoll*.

The Nicolls were divorced in Maryland in 1965. Nearly thirty

years later, in 1994, the wife filed a petition in circuit court in Hendry County, Florida, under the Uniform Reciprocal Enforcement of Support Act (URESA) [1] to collect $ 1.9 million in unpaid alimony. The husband filed a motion to dismiss, claiming that Florida's version of URESA is limited to the enforcement of child support obligations and is inapplicable to claims involving only alimony.

[*990] The court determined that the claim was cognizable under URESA, and the husband petitioned the district court for a writ of prohibition barring the circuit court from proceeding. The district court granted the writ, reasoning that although this Court held in *State ex rel. Quigley v. Quigley, 463 So. 2d 224 (Fla. 1985)*, that alimony awards standing alone can be enforced under URESA, the legislature via **[**3]** a 1992 amendment has since defined "support" to exclude such awards. The court certified the above question.

The wife argues that when the 1992 amendment is viewed in its entirety it is clear the legislature did not remove alimony from URESA's purview. The public policy underlying *Quigley*, she claims, still controls. We disagree.

The legislature adopted the original Uniform Reciprocal Enforcement of Support Act in 1955 and amended it in 1979 to make it consistent with the 1968 version of the Reciprocal Enforcement of Support Act passed by the National Conference of Commissioners of Uniform State Laws. *See* ch. 79-383, Laws of Fla; ch. 29901, Laws of Fla. (1955). The 1979 amendment included a section entitled "Legislative intent," which provided in part:

> It is declared to be the public policy of this state that this act shall be construed and administered to the end that children residing in this or some other state shall be maintained from the resources of responsible parents, whether the responsible parents live in this or some other state, thereby relieving, at least in part, the burden borne by the custodial parent or the general citizenry through public assistance **[**4]** programs.

Ch. 79-383, § 2, at 1912, Laws of Fla.

The above language played a key role in *State ex rel. Quigley v. Quigley, 463 So. 2d 224 (Fla. 1985)*. Orneta Quigley filed a petition under URESA in circuit court in Michigan to enforce a Michigan alimony order against her former husband, who was residing in Lee County, Florida. After the State of Florida, as the responding jurisdiction, processed and served the petition on Mr. Quigley, the circuit court in Lee County dismissed the petition, ruling that pure alimony orders are unenforceable under Florida's URESA. The district court affirmed based on the above statement of "Legislative intent," which did not mention alimony.

This Court recognized the logic of the district court's reasoning but declined to read so much into the 1979 amendment. We quashed the decision for two reasons: 1) Florida case law had included alimony awards within URESA's purview for years, and 2) the broad definition of "support order" in section 88.031(19) referred to "any" order of support:

> (19) "Support order" means any judgment, decree, or order of support in favor of a petitioner, whether

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[1] Ch. 88, Fla. Stat. (1993).

temporary or final or subject to modification. [**5] revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

§ 88.031, Fla. Stat. (1985). We reasoned as follows:

> If the legislature had meant to distinguish between child support and alimony [in the 1979 amendment], it should have redefined this term, especially in light of the previous application of URESA to alimony awards.

Quigley, 463 So. 2d at 226. Seven years after *Quigley*, the legislature apparently did just that.

The legislature in 1992 amended the definitions in section 88.031 to include the term "support" immediately following the above definition of "support order," and the new definition conspicuously fails to include alimony obligations standing alone:

> ***HN1*** (20) "Support" includes:
>
> (a) Support for a child, or child and spouse, or former spouse who is living with the child or children, but only if a support obligation has been established for that spouse and the child support obligation is being enforced under Title IV-D of the Social Security Act; or
>
> (b) Support for a child who is placed under the custody of someone other than the parent pursuant to s. 39.41.

§ 88.031, [**6] Fla. Stat. (1993).

A basic rule of law controls: ***HN2*** When the words of a statute are plain and unambiguous and convey a definite meaning, courts [*991] have no occasion to resort to rules of construction--they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). Further, we must presume that when the legislature amended the statute in 1992 it knew of our ruling in *Quigley*: "The legislature is presumed to be cognizant of the judicial construction of a statute when contemplating making changes in the statute . . . ." *Quigley*, 463 So. 2d at 226.

Thus, our holding in *Quigley* has been superseded by the 1992 amendment. Alimony obligations standing alone are no longer enforceable under Florida's version of URESA.

Based on the foregoing, we answer the certified question in the affirmative and approve *Nicoll*.

It is so ordered.

GRIMES, C.J., and KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

OVERTON, J., concurs with an opinion, in which GRIMES, C.J., concurs.

Concur by: OVERTON

Concur

OVERTON, J., concurring.

I regrettably must agree with the majority that actions seeking only to enforce [**7] alimony awards under Florida's Uniform Reciprocal Enforcement of Support Act (URESA) are no longer allowed under the present statutory provisions. This change is the result of amendments made in 1992 to URESA by the Florida Legislature. The 1992 amendments create a

new minimum threshold. An action to enforce a child-support order must be an integral part of any claim proceeding under URESA. The majority opinion does not directly address whether URESA may still be invoked to enforce an alimony-support order if such an action is filed in conjunction with a petition to enforce a child-support order. The district court opinion, however, clearly envisions that a dual action is still justiciable under URESA.

I write only to suggest that the legislature should reexamine these URESA amendments and make clear whether it truly intended to prohibit actions seeking only to enforce alimony orders. Instead of reducing the amount of domestic litigation, today's statutory construction will increase the number of individual claims filed. Instead of smoothing the path to an efficient and just resolution of domestic matters, today's statutory construction could result in the inconvenient filing of multiple **[**8]** actions, in separate states, between the same parties. In my view, this type of multiple litigation does not conform to the original purpose of URESA.

GRIMES, C.J., concurs.

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North Miami v. Margulies

Court of Appeal of Florida, Third District

January 22, 1974

No. 73-1191

Reporter

289 So. 2d 424; 1974 Fla. App. LEXIS 8080

CITY OF NORTH MIAMI, a municipal corporation, et al., Appellants, v. Martin Z. MARGULIES, Appellee

Core Terms

zoning, building permit, conditional, plans, per acre, density

Case Summary

Procedural Posture

Appellant city challenged the judgment of the Circuit Court for Dade County (Florida) that ordered appellant to issue a building permit to appellee builder.

Overview

Appellee builder was issued a conditional use permit by appellant city's zoning board. Appellee spent a substantial amount of money fulfilling the requirements for a building permit. Appellant's newly elected city council halted approval of appellee's permit. Nonetheless, appellee fulfilled all the necessary requirements to obtain the building permit and tendered the fees required for issuance of a building permit. Appellant refused to issue the building permit and instituted proceedings to change the zoning on appellee's property. Appellee sought declaratory and injunctive relief. The trial court ruled that appellant was equitably estopped from denying a building permit to appellee. Appellant sought review of the judgment. The court found that the evidence established that appellee acted with good faith in his dealings with appellant and complied with every request made by appellant. The court affirmed the judgment because appellant was equitably estopped from denying a building permit to appellee since appellee had incurred extensive financial obligations and expense, all in reliance upon the rezoning of his property and the issuance of a conditional use permit.

Outcome

The court affirmed the judgment that required appellant city to issue a building permit to appellee builder because appellant was equitably estopped from denying a building permit to appellee because appellee had incurred large financial obligations in reliance upon the earlier issuance of a conditional use permit and the rezoning of his property.

LexisNexis® Headnotes

Environmental Law > Land Use & Zoning > Equitable &

Statutory Limits

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Finance

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN1 The doctrine of equitable estoppel may be invoked against a municipality as if the city were an individual. Equitable estoppel applies to a local government exercising its zoning power where a property owner: (1) in good faith; (2) upon some act or omission of the government; (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.

Counsel: **[**1]** Arthur J. Wolfson, City Atty., and John G. Fletcher, Asst. City Atty., for Appellants.

Frates, Floyd, Pearson, Stewart, Proenza & Richman, Miami, for Appellee.

Judges: Carroll, Hendry and Haverfield, JJ.

Opinion by: HENDRY

Opinion

[*424] Appellant, defendant in the trial court, seeks review of an adverse final judgment ordering the city to issue a building permit to the plaintiff.

The plaintiff currently owns 25 acres of land located within the City of North Miami. The property is bordered on the north by a boat manufacturing plant and other industrial property; on the east by the F.E.C. railroad track; and on the west by Arch Creek. Plaintiff wishes to construct a multi-family apartment facility on the property.

At the time of purchase, the land was zoned I-B1, Industrial use, which permitted 75 units per acre. Plaintiff originally submitted plans conforming to this zoning. Thereafter, in July, 1972 the city declared a moratorium on highrise construction within the city. While this moratorium was in effect, plaintiff participated in a citizen's advisory committee study of new multi-family zoning. As a result the city enacted a new Planned Unit Development (P.U.D.) zoning ordinance, **[**2]** and plaintiff resubmitted his plans. The property was rezoned R.P.U.D., for residential use, in accordance with the new law, and plaintiff was issued a conditional use permit.

The new zoning ordinance provided that in order to obtain a conditional use permit, a developer must first submit plans for development, a detailed landscaping and irrigation plan, and an impact analysis, which includes a cost-benefit feasibility study, and a school, traffic and utility impact study. This information then is subject to public hearing before both the city planning **[*425]** and zoning board and the city council, and if approved, the developer is issued a conditional use permit. The permit is different from a building permit in that it is subject to certain expressed conditions. When these conditions are fulfilled, a building permit will issue.

The new zoning classification upon plaintiff's property established a maximum density of 50 units per acre. Plaintiff's final plan called for only 33.2 units per acre. The plaintiff then undertook to fulfill the requirements of the permit.

including filing a precise set of plans, preparing a new plat of the property, performing various pre-building [**3] tests and receiving governmental agency approvals. The trial judge found that the plaintiff expended $50,000 in complying with the conditions imposed by the permit and became obligated to expend another $600,000. [1]

However, on May 8, 1973, the city held an election and a new city council majority was elected. In addition, a charter amendment was approved by the North Miami electorate which imposed a limitation upon the maximum density of 25 units per acre. [2] At the city council's next meeting on May 22, 1973, this new majority voted to table approval of plaintiff's tentative plat. As of this date, according [**4] to the plaintiff, all that was necessary in order to qualify for the building permit was pollution control approval (eventually obtained) and plat approval.

On June 22, 1973, plaintiff tendered all necessary fees required [**5] by the city for issuance of a building permit. This followed a June 12 council meeting wherein plaintiff attempted to gain approval of both its tentative and final plats. The city council instead instructed its building and zoning director not to issue any building permits, and instituted proceedings to change the zoning on plaintiff's property. The plaintiff on June 26 filed the instant action seeking temporary relief from the efforts to rezone the property and also seeking declaratory and injunctive relief. The trial court permitted a public hearing on rezoning of plaintiff's land scheduled for July 17, 1973 to proceed. Following the hearing, the city planning and zoning board recommended no change in zoning on plaintiff's property.

However, on August 13 and on September 5, the city council imposed a temporary and then a permanent moratorium on plaintiff's property. Up until the final hearing in this cause, the zoning on the property remained R.P.U.D. In the final judgment the learned trial judge made the following observation:

> "All governments derive their power from the people. In return for vesting that power in the government the people should be able to expect [**6] stability and fair play from their government. The evidence in this case shows that the Petitioner (plaintiff) at all times acted fairly and straightforward in his dealings with the Respondent CITY and complied with every request made of him by the CITY. He, as any citizen, has the right to rely [*426] upon actions of the CITY and to expect that the CITY will conform to and comply with its regulations, procedures and representations."

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[1] The trial court stated that the items for which plaintiff became obligated included the architects' fees for the preparation of all plans required, engineering fees for testing of the sub-surface, for preparation of plans for sewage disposal, for all surveying and for preparation of engineering data which the city required to be submitted to the Central and Southern Florida Flood Control District.

[2] The charter amendment reads as follows:

"Section 9. Powers.

"(a) All powers of the City and the determination of all matters of policy shall be vested in the Council. Without limitation of the foregoing, the Council shall have power to:

"(9) Regulate and restrict the height and number of stories of buildings and other structures, the size of yards and courts, the density of populations and the location and use of buildings for trade, industry, business, residence or other "purposes, provided, however, that the density of populations in every instance shall be limited to a maximum density of twenty-five (25) residential units per acre, and further that no building or structure, except Public buildings, shall be authorized which exceeds forty (40) feet in height or four (4) stories."

The court thereupon found that the city was equitably estopped from denying a building permit to the plaintiff. We have considered the voluminous record, all points in the briefs and arguments of counsel in the light of the controlling principles of law, and have concluded that the trial court's findings are supported by substantial competent evidence.

Our Supreme Court has stated that ***HN1*** the doctrine of equitable estoppel may be invoked against a municipality as if the city were an individual. *Texas Co. v. Town of Miami Springs, Fla., 1950, 44 So.2d 808*; *Sakolsky v. City of Coral Gables, Fla.1963, 151 So.2d 433*. Recently, the Fourth District Court of Appeal, citing Sakolsky v. City of Coral Gables, stated that equitable estoppel applied [**7] to a local government exercising its zoning power where a property owner "(1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." *City of Hollywood v. Hollywood Beach Hotel Company, Fla.App.1973, 283 So.2d 867*.

The record in the cause sub judice demonstrates that the plaintiff had incurred extensive financial obligations and expense, all in reliance upon the rezoning of his property as R.P.U.D. and the issuance of a conditional use permit. The record supports the trial court's conclusion that it would be inequitable to deny plaintiff a building permit. See *Bregar v. Britton, Fla.1954, 75 So.2d 753*; *City of Gainesville v. Bishop, Fla.App.1965, 174 So.2d 100*.

Therefore, for the reasons stated and upon the authorities cited, the judgment appealed is affirmed.

Affirmed.

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