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REPLY TO TENNESSSEE

October 21, 2021

City of Waterloo Zoning Board of Appeals
505 East Bulldog Boulevard
Waterloo, IL 62298

Re: BZA rehearing of Martinezes/Cornerstone Laine Recovery's petition for special use permit to operate a recovery residence at 228 Mueller Lane

Dear City of Waterloo Board of Zoning Appeals,

The Martinezes, together with Cornerstone Laine Recovery (hereinafter "Cornerstone"), have retained the American Center for Law and Justice ("ACLJ") to represent them with regards to the City's consideration of the second petition for special use permit (SUP) scheduled to be heard this evening, October 21, 2021 by the BZA. We are aware of the events leading up to the BZA's hearing of the first SUP as well as the unlawful denial of the first SUP. The purpose of this letter is to make the BZA aware of the federal laws that apply to protect the Martinezes throughout the zoning process, as legal requirements are an important consideration for the BZA in its review. *See* Section 40-9-4; 40.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.[1] In addition, ACLJ continues to work with the Department of Justice (DOJ), municipalities and religious organizations to ensure that violations of federal law, including the Fair Housing Act

[1] *See Pleasant Grove City v. Summum*, 129 S. Ct. 1523 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

(FHA), Americans With Disabilities Act (ADA) and the Equal Protection Clause of the Fourteenth Amendment, do not occur during the zoning approval process.[2] State law also applies here.

I. The Fourteenth Amendment Applies Here and Prohibits Unequal Treatment of the Martinezes/Cornerstone.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. The Supreme Court has stated that this provision is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In the zoning context, a violation of the Equal Protection Clause occurs where similarly situated property owners are treated differently and there is no rational basis for the different treatment. *Campbell v Rainbow City*, 434 F.3d 1306, 1313-1314 (11th Cir. 2006).

Time and again, government entities have been held liable for violating the Equal Protection Clause because of their different treatment of similarly situated people or organizations in the zoning context. For example, in *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 978 (N.D. Ill. 2003), the court found the city's zoning decision to be unlawful and in violation of the equal protection clause. There, the city sought to require a religious institution to obtain a special permit while permitting other similar uses, including cultural facilities, by right. To support its decision to treat churches differently, the city cited concerns relating to traffic and parking, as well as the need to increase commercial uses to raise tax revenue. The court deemed the reasons to be disingenuous and found that the zoning regulations, as applied to the church, did not advance these goals, and thus, failed the rational basis test. *Id*. at 977. Similarly, in *Society of American Bosnians & Herzegovinians v. City of Des Plaines*, 2017 U.S. Dist. LEXIS 26542, at *42 (N.D. Ill. Feb. 26, 2017), the court held that evidence was sufficient to lead a fact finder to conclude that a City denied equal treatment to a Muslim organization where it applied a different parking standard to the organization – one above or more stringent than that articulated in the zoning ordinance.

In the present case, we hope that the BZA's consideration of the Martinezes' SUP will be fair and in compliance with the law.[3] Their desired use of the property isn't just similar to that of the prior owner's; it is practically identical. The location and zoning are the same because the property is the same. Further, and as was already established during the prior zoning hearing, the existing exterior of the building will not be altered by the Martinezes. The intensity of the use is also similar and, in fact, less intensive than other uses permitted by right such as hotels and motels in the same zoning district. And no major alterations are proposed for the interior. Further,

[2] One such example is ACLJ's collaboration with the United States Department of Justice to file suit in federal court against the Metropolitan Government of Nashville for violations of the FHA, ADA, and RLUIPA after it attempted to use its zoning ordinances in a discriminatory manner and prevent Teen Challenge Nashville from obtaining a zoning permit. The City was ordered to pay Teen Challenge Nashville over $950,000 in damages for FHA and ADA violations. *Teen Challenge Int'l Nashville Headquarters v. Metropolitan Government of Nashville and Davidson County*, Case No. 3:07-0668 (M.D. Tenn. 2008); *United States of America v. Metropolitan Government and Davidson County* (M.D. Tenn. Sept. 29, 2008).

[3] Notably, ZBA members can be held individually liable for violations of the Equal Protect Clause. *See Vision Warriors Church, Inc. v. Cherokee County*, Case No. 1:19-cv-03205, Dkt. 57.

residents are not permitted to have cars at Cornerstone, eliminating any traffic and parking concerns.

We respectfully remind the BZA that any considerations of unfounded fears such as decreased property values, increases in crime and the like will not serve as a rational basis for denying the Martinezes a special use permit. First, there is absolutely no evidence to support such assertions. In fact, the BZA has been provided with information and statistics that contradict these assertions. Second, a hotel/motel, dram shop (tavern, lounge or bar) or retail liquor store could occupy this same property without special permission from the City at any time. Accordingly, it would be difficult for the BZA to support any assertion that these permitted uses would have less impact on and/or are more compatible with the surrounding area than the quiet and less intensive residential use proposed by the Martinezes.

Similarly, any conditions placed on the approval of the Martinezes' SUP must be neutral and consistent with those imposed on other, similar uses. No special requirements for a privacy fence, or for additional parking were placed on the prior owner. Privacy fences and extensive shrubbery have not been required of other recovery residences in the County. Accordingly, any such requirements as applied to Cornerstone would be highly suspect pursuant to an equal protection challenge.

II. The Fair Housing Act and Title II of the Americans With Disabilities Act Also Apply Here to Protect the Martinezes/Cornerstone.

The FHA and the ADA prohibit housing discrimination by governmental entities against handicapped persons or persons with disabilities. Specifically, the FHA makes it unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). Similarly, the ADA, 42 U.S.C. § 12101 *et seq*., prohibits discrimination by public entities based on disability and provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. Both statutes apply to municipal zoning decisions, see *Tennessee v. Lane*, 124 S. Ct. 1978, 1989 (2004) (citing *Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432 (1985)), and the legal analysis under both statutes is the same and, thus, considered together. *Caron Foundation of Florida, Inc. v. City of Delray Beach*, 879 F. Supp.2d 1353, 1364 (S.D. Fla. 2012) (due to "the similarity of the ADA and the FHA's protections of individuals with disabilities in housing matters, courts often analyze the two statutes as one.").

It is without dispute that individuals protected under the FHA and ADA include those recovering from drug or alcohol addiction. *See* H.R. Rep. No. 101-485(II), at 51, as reprinted in 1990 U.S.C.C.A.N. 303, 333 ("physical or mental impairment" includes "drug addiction and alcoholism"). *See also Schwartz v. City of Treasure Island*, 544 F.3d 1210, 1212-13 (11th Cir. 2008). Entities associated with disabled individuals are also accorded the same protections. *Id.; A Helping Hand, LLC v. Balt County*, 515 F.3d 356, 363 (4th Cir. 2007) ("These regulations explicitly prohibit local governments from discriminating against entities because of the disability

of individuals with whom the entity associates"). The Martinezes/Cornerstone is a protected organization under the FHA and ADA.

There are three claims available to a disabled individual or an organization associated with disabled individuals: (1) intentional discrimination [or disparate treatment]; (2) discriminatory impact; and (3) a refusal to make a reasonable accommodation. *Schwartz*, 544 F.3d at 1213. Here, the City's original ordinance initially excluded recovery residences altogether from its zoning ordinance while permitting similarly situated uses such as senior living facilities. While the City may have rectified the disparate treatment on the face of the ordinance, the BZA's subsequent denial of a special use permit constitutes disparate treatment *as applied*, as well as a denial of a request for reasonable accommodation.

A. The BZA's Decision to Deny Cornerstone Laine's Application for a Special Use Permit Constitutes Disparate Treatment in Violation of the FHA and ADA.

Like an equal protection claim, disparate treatment in violation of the FHA and ADA occurs when a disabled person, as defined under the statutes, is treated differently than similarly situated non-disabled people. *Schwartz*, 544 F.3d at 1216. *See also Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002); *United Farmworkers of Florida Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974) (noting that the plaintiff presented a *prima facie* case of racial discrimination because "minority citizens' requests [for government services] were refused while white citizens' requests were granted"). Discrimination for purposes of a disparate treatment claim occurs where a decision-making body acts with improper motive. One such example is for the purpose of effectuating the desires of private citizens – especially where those desires are based on unfounded fears. *Bonasera*, 342 F. App'x at 584 (citing *Hallmark Dev., Inc.*, 466 F.3d at 1284; *United States v. Yonkers*, 837 F.2d 1181, 1225 (2d Cir. 1987)).

B. The BZA's Decision to Deny Cornerstone Laine's Application for a Special Use Permit Constitutes Denial of A Reasonable Accommodation.

The FHA and ADA's reasonable accommodation provision prohibits a government entity from "[1] refus[ing] to make [2] reasonable accommodations in rules, policies, practices, or services, when such accommodations [3] may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]' 42 U.S.C. § 3604(f)(3)(B)."[4] Simply put, the FHA and ADA "require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 333 (2d Cir. 1995). Thus, where the requested accommodation is necessary and reasonable, a government entity will violate federal law if it refuses the request.

Courts have recognized, time and again, the necessity of group living situations for individuals recovering from drug and alcohol addiction. For example, the court in *Oxford House, Inc. v Township of Cherry Hill* noted:

[4] Importantly, the legislative history of the provision actually notes that "[a] discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." H.R. Rep. No. 10-711, 100th Cong., 2d Sess., 25, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186.

> Addiction to illegal drugs or alcohol places severe limitations on people's lives, disrupting personal relationships, and impairing one's ability to advance in school or employment. These limitations continue to have a significant impact on an alcoholic's or drug addict's life even after the process of recovery has begun. After completion of a rehabilitation program, it is crucial for recovering alcoholics and substance abusers to have a supportive, drug and alcohol-free living environment. The support obtained by being in a group of other recovering addicts substantially increases an individual's chances for recovery.

*7*99 F. Supp. 450, 462 (D.N.J. 1992); *Oxford House, Inc. v. Town of Babylon,* 819 F. Supp. 1179, 1183 (E.D.N.Y. 1993) ("Recovering alcoholics or drug addicts require a group living arrangement in a residential neighborhood for support during recovery").

Once more, an accommodation is deemed "reasonable" if it neither poses undue financial[5] and administrative burdens nor requires a fundamental alteration in the zoning scheme. *Schwartz*, 544 F.3d at 1220. A fundamental alteration occurs where the proposed use would be incompatible with surrounding land uses. *Id*. at 1221 (citing *Bryant Woods Inn, Inc. v. Howard Cty.*, 124 F.3d 597, 604 (4th Cir. 1997)). If the proposed use is similar to surrounding uses permitted by the zoning code, the more difficult it is to show that a waiver of the rule would cause a "fundamental alteration" sufficient to deny the request. *Id*. as 1221. The *Schwartz* court provided the following relevant example:

> In *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996), a developer wanted to construct a nursing home in a residential area, but the municipality's zoning code forbade nursing homes in each of its fifteen residential zones. "Planned residential retirement communities," however, were permitted uses as of right. *Id*. at 1099. The Third Circuit concluded that allowing the developer to build a nursing home in a residential zone would not be a "fundamental alteration" of the zoning code because the proposed facility was "similar to that of the local planned residential retirement communities[.]" *Id*. at 1105.

Id. at 1222.

In the instant case, and for all the reasons described above, the Martinezes' request is reasonable. A recovery residence is a use permitted by special permission and is perfectly suited for the property at issue here because it is similar to the prior use on the same property *and* is less intensive than uses permitted by right (such as a hotel/motel). No fundamental alterations to the zoning code would occur with the grant of a special use permit to the Martinezes/Cornerstone.

[5]Courts have held that governmental defendants can be expected, however, to incur reasonable costs. *Shapiro*, 51 F.3d at 334-35).

CONCLUSION

In sum, the BZA's review and decision this evening is governed by federal law and we are hopeful that, in accordance with these laws, the petition for SUP to operate a recovery residence at 228 Mueller Lane will be approved.

Sincerely,

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