IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

HAND IN HAND/MANO EN MANO, INC.	)	
Plaintiff,	)	NO: 1:09-cv-287
v.	)	
TOWN OF MILBRIDGE, MAINE, et al.	)	
Defendants.	)	

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States of America, by its undersigned counsel, hereby submits this Memorandum as amicus curiae in connection with Plaintiff's Motion for Preliminary Injunction (Docket Entry No. 5), currently scheduled for a hearing on October 2, 2009. In order to obtain a preliminary injunction, plaintiff must show this Court that it has a probability of success on the merits of its claims. One of plaintiff's claims is based on the Fair Housing Act (FHA), which the Department of Justice has statutory authority to enforce. In this memorandum, we set out our understanding of the law applicable to the FHA claim.

Specifically, we draw the Court's attention to the standards set out by the Supreme Court in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), for evaluating evidence as to whether a land-use decision was motivated by discrimination; we discuss the caselaw regarding the relationship between the actions of municipal officials and discriminatory opinions expressed by their constituents; and we provide authority demonstrating that the issue of whether the Town of Milbridge violated the FHA is independent of the legality of its actions under Maine law, and that plaintiffs' familial status and national origin discrimination claims should be evaluated under the same standards. Because the Court's decision will depend on its assessment of evidence to be presented at the October 2 hearing, which will include live testimony, we express no view as to what the outcome should be.

INTEREST OF THE UNITED STATES

The United States, through litigation by the Attorney General and administrative enforcement by HUD, has important enforcement responsibilities under the FHA. See 42 U.S.C. §§ 3610-3614. In view of the limited resources available to the United States for enforcement of the statute, however, private actions such as the present one play an important role in the implementation of the national policy to provide for fair housing. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972). Accordingly, the United States has a substantial interest in ensuring that such cases are decided in accordance with the Congressional mandate "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

I. BACKGROUND

This Memorandum focuses on legal issues rather than the facts in this case. Therefore, we summarize only briefly the factual background of the action as described in the Complaint (Docket Entry 1). Defendant Town of Milbridge ("Town") is a municipality in Washington County, Maine. (Id. ¶ 5). Plaintiff Hand in Hand/Mano En Mano ("Mano En Mano") is a nonprofit corporation which provides services to Hispanic residents of Washington County (Id. ¶¶ 11-12), many of whom are recent immigrants working in agriculture (Id. ¶ 14). Having concluded that there was a lack of safe and affordable housing available to those workers (Id. ¶¶ 15-16), Mano En Mano formulated a plan to build some. In 2008, it sought and received a grant from the U.S. Department of Agriculture for the development of a six-unit apartment complex for low-income agricultural workers, to be located in a residential district of Milbridge (Id. ¶¶ 23-24).

The Town officials were initially supportive of the project, and committed grant funds to its support (Id. ¶ 21). Some Town residents, however, signed a petition opposing the project; among the stated reasons for opposition was that "We wish to protect any jobs they [those employed in the lobster industry] may need in the future, not to be given out to minorities that

may move into these units." (Id. ¶ 32)

Under the Town's land use regulations, Mano En Mano's project required approval as a "Major Subdivision" (Id. ¶ 27). In April of 2009, the Town held an informational meeting on the proposed project. Many of the residents in attendance expressed opposition to the project, and some of the opposition was explicitly based on the Hispanic ethnicity of the prospective residents, the possibility that they would have children who would burden the schools, or both. (Id. ¶¶ 33-36).

Immediately following this meeting, the Town Manager drafted a six-month Moratorium for approval of Major Subdivisions, which was voted into effect at a special Town Meeting on June 16, 2009. (Id. ¶¶ 37-38, 44).

Mano en Mano filed its complaint in this action on July 1, 2009, and simultaneously moved for the entry of a temporary restraining order and a preliminary injunction (D.E. 5). The Complaint (1) seeks a declaratory judgment to the effect that the Town's adoption of the Moratorium was not authorized by Maine law; (2) alleges that the Town discriminated on the basis of national origin and familial status in adopting the Moratorium, in violation of the FHA; and (3) alleges, pursuant to 42 U.S.C. 1983, that the Town's actions deprived it of equal protection of the law. As noted above, the United States has important enforcement responsibilities for the FHA. Therefore, in this Memorandum, we discuss only the second of these causes of action.

On July 7, 2009, the court entered by Consent Order a Temporary Restraining Order ("TRO") (D.E. 12), which requires the town to continue to process Mano en Mano's permit applications, pending the court's decision on the motion for a preliminary injunction. That hearing is scheduled for October 2, 2009.

II. LEGAL DISCUSSION

A. The Test for Entry of a Preliminary Injunction

As set forth by the Court of Appeals for this Circuit, the test for a preliminary injunction

has four factors:

1) a likelihood of success on the merits;

2) irreparable harm to the plaintiff should preliminary relief not be granted;

3) whether the harm to the defendant from granting the preliminary relief exceeds the harm to the plaintiff from denying it; and

4) the effect of the preliminary injunction on the public interest.

Rio Grande Community Health Center, Inc. v. Rullan, 397 F.3d 56, 75 (1st Cir. 2005).

With regard to the fourth of these factors, it is presumptively in the public interest to redress a violation of a federal statute, such as the FHA. CoxCom, Inc. v. Chaffee, 536 F.3d 101, 110 (1st Cir. 2008). The Court's balancing of the relative harm to the parties will necessarily depend on evidence to be presented at the hearing. In this Memorandum, we focus on the prospect that plaintiff will succeed on the merits by examining the applicable caselaw under the FHA.

B. The FHA Prohibits Zoning Discrimination on the Basis of a Protected Status

Plaintiff relies on section 804(a) of the FHA, which makes it illegal:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, **or otherwise make unavailable or deny**, a dwelling to any person because of race, color, religion, sex, **familial status**, or **national origin**.

42 U.S.C. 804(a) (emphasis added). It is well established that the phrase "otherwise make unavailable" prohibits municipalities from using their zoning or land use laws to prevent the construction of housing because members of a protected category are expected to reside there. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 735 (1995); Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 257 n.6 (1st Cir. 1993) ("The phrase 'otherwise make unavailable or deny' encompasses a wide array of housing practices, and specifically targets the

discriminatory use of zoning laws and restrictive covenants") (citations omitted).[1]

C. Criteria to Be Used in Evaluating Claims of Intentional Discrimination

The Supreme Court has recognized that the evaluation of evidence of discrimination may present triers of fact with a “sensitive and difficult” task. U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, (1983). As one court stated: “If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the [FHA] offers little solace to those seeking its protection.” Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970). "Municipal officials . . . seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetration in the public record." Smith v. Town of Clarkton, 682 F.2d at 1064. "To the contrary, it is well-established that the intent of collective actions can, and often must, be established circumstantially." United States v. Yonkers Bd. of Educ.,624 F. Supp. 1276, 1372 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987).

In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Supreme Court held that discriminatory intent may be proved through consideration of the following objective factors: (1) the impact of an official action; (2) the historical background of the decision; (3) the sequence of events leading up to the decision, including departures from normal procedures and usual substantive norms; and (4) the legislative or administrative history of the decision. 429 U.S. at 266-67.[2] These tests are to be applied

---

[1] Among the extensive caselaw in this area, there are at least three cases in which a municipality was found to have adopted a zoning moratorium for discriminatory reasons: Kennedy Park Homes v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); Greater New Orleans Fair Housing Action Center v. St. Bernard Parish, ___ F.Supp.2d ___, 2009 WL 2399999 (E.D. La. Mar. 25, 2009); Epicenter of Steubenville, Inc. v. City of Steubenville, 924 F. Supp. 845 (S.D. Ohio 1996);

[2] Although Arlington Heights was litigated under the Equal Protection Clause and did not directly address the FHA, courts examining exclusionary zoning cases under the statute have consistently followed the analysis in deciding such cases. See, e.g., United States v. Yonkers Bd.
(continued...)

flexibly, rather than mechanically, because no two cases are alike, and each must be evaluated on its own merits. Stewart B. McKinney Foundation, Inc. v. Town Plan & Zoning Comm'n of the Town of Fairfield, 790 F. Supp. 1197, 1211 (D. Conn. 1992).

The factual allegations of the Complaint in this action clearly present issues for the court to assess through the lens of each of the Arlington Heights factors. First, with regard to the impact of the Moratorium, Mano En Mano alleges that its project, which was specifically to be marketed to Hispanic agricultural workers,[3] was the only one affected. Complaint, ¶ 46. Second, with regard to the historical background, plaintiff alleges that Hispanic immigration to Washington County is a recent phenomenon (id., ¶ 14) and that some community residents have expressed concern that "minorities" will take their jobs (id., ¶ 32). Third, plaintiff alleges that the April 8, 2009 informational meeting was a departure from normal procedures (id., ¶¶ 36-35). Finally, with regard to the administrative or legislative history of the decision to impose the Moratorium, plaintiff alleges that the Town's abrupt reversal of its prior support of the Mano En Mano project followed closely after the April 8 meeting, at which widespread opposition based on national origin and familial status is alleged to have been expressed (id., ¶¶ 36-38).

D. The Relationship Between the Motivations of Residents and the Actions of Municipal Officials

Where municipal decisionmakers take action in response to community sentiment in which discriminatory viewpoints are a significant factor, discriminatory intent is established. In considering whether an official action was taken for discriminatory reasons, a court is not restricted to considering the motives of the official decisionmakers themselves. "[A] governmental body may not escape liability . . . merely because its discriminatory action was

[2](...continued)
of Educ., 837 F.2d 1181, 1216-17 (2d Cir. 1987); United States v. City of Birmingham, 727 F.2d. 560, 565-566 (6th Cir. 1985); Atkins v. Robinson, 545 F. Supp. 852, 870-71 (E.D. Va. 1982), aff'd, 733 F.2d 318 (4th Cir. 1984).

[3] Both section 804(a) of the FHA and the Department of Agriculture's regulation implementing Title VI of the 1964 Civil Rights Act, 7 C.F.R. § 15.1 et seq., forbid Mano En Mano to restrict occupancy to Hispanics. We assume that it has no intention of doing so.

undertaken in response to the desires of a majority of its citizens." United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1224 (2d Cir. 1987); accord, Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997) (Americans with Disabilities Act); Smith v. Town of Clarkton, 682 F.2d 1055, 1063 (4th Cir. 1982) (City withdrew from low-income housing authority "solely because a majority of persons voting in the poll opposed it"); Community Services, Inc. v. Heidelberg Twp, 439 F.Supp.2d 380, 396 (M.D. Pa. 2006); Pathways Psychosocial v. Town of Leonardtown, 133 F.Supp.2d 772, 783-84 (D. Md. 2001).

Plaintiff need not establish that each Selectman, and each Town resident who voted for the Moratorium acted with discriminatory intent, only that the national origin or familial status of the prospective residents, or both, was a motivating factor in the Town's decisions. See, e.g., United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 811 (11th Cir. 1974) (discriminatory statements of one city councilwoman combined with other inconsistencies in city's actions and location of low income housing in segregated areas constituted intentional discrimination).

Defendants point out that a municipal action is not necessarily tainted with discrimination because of discriminatory statements by a few constituents. Response in Opposition (D.E. 17) at p.5, citing City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003). While this is true, any evidence that decision makers acted based on discriminatory motives – whether their own or those of their constituents – must be considered:

> [I]n the ordinary course of events a decisionmaker is not to be saddled with every prejudice and misapprehension of the people he or she serves and represents. On the other hand, a decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decisionmaking process. A racially discriminatory act would be no less illegal simply because it enjoys broad political support. Likewise, if an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter.

Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., supra, 740 F. Supp. 95, 104 (D.P.R. 1990) (emphasis in original). See also Community Housing Trust

v. Dep.'t of Consumer and Reg. Affairs, 257 F.Supp.2d 208 (D.D.C. 2003) ("the law is quite clear that even where individual members of government are found not to be biased themselves, plaintiffs may demonstrate a violation of the FHAA if they can show that 'discriminatory governmental actions are taken in response to significant community bias'"); United States v. City of Birmingham, 538 F. Supp. 819, 830 (E.D. Mich. 1982), aff'd as modified, 727 F.2d 560 (6th Cir. 1984) (plaintiff "need not prove that the governing body itself intended to discriminate; it is sufficient to show that the decision making body acted for the sole purpose of effectuating the wishes of those who opposed the project for discriminatory reasons").

This Court should determine from full consideration of all the circumstances what role discriminatory motives of town officials or town residents may have played in the town's actions.

E. The Validity of the Moratorium under Maine Law Does Not Control Whether it Violated the FHA

Mano en Mano argues that the Moratorium was not validly enacted as a matter of Maine law. The United States expresses no view on this issue. However, this Court's conclusion with regard to this state law issue does not determine whether the Moratorium violated the FHA. "If a defendant's acts are undertaken with an improper discriminatory motive, the Act is violated even though those acts may have otherwise been justified under state law." United States v. Borough of Audubon, 797 F. Supp. 353, 360 (D.N.J. 1991), aff'd mem., 968 F.2d 14 (3rd Cir. 1992); accord, LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995); Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 790 (6th Cir. 1996) ("Although Taylor had no duty to approve Smith & Lee's zoning petition . . . . the City could not lawfully deny the petition because of . . . discriminatory animus toward the [disabled]"). See also 42 U.S.C. § 3615 ("any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.").

Thus, the FHA claim is independent of plaintiff's state law claim.

F. The Same Standards Apply to Allegations of Discrimination Based on Familial Status

Mano En Mano's Complaint alleges that the town's adoption of the Moratorium was motivated not only by discrimination against Hispanics, but also by a desire not to house families with children who would attend public schools. Therefore, it alleges discrimination on the basis of familial status as well as national origin.[4]

Reported land use and zoning discrimination cases under the FHA generally involve discrimination based on race, national origin, or disability.[5] When Congress added the prohibition of familial status discrimination to the FHA in 1988, it directed the Secretary of the Department of Housing and Urban Development to adopt implementing regulations. 42 U.S.C. § 3614a. In doing so, HUD explicitly rejected suggestions that it should interpret the FHA as providing a lower level of protection to families with children:

> The Department believes that the legislative history of the Fair Housing Act and the development of fair housing law . . . support the position that persons with handicaps and families with children must be provided the same protections as other classes of persons.

54 Fed.Reg. 3235-36 (Jan. 23, 1989). HUD's regulations, specifically authorized by Congress, are entitled to deference. Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). It is well established that making housing unavailable on the basis of familial status violates the FHA. See, e.g., United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992); United States v. Tropic

---

[4] The FHA defines "familial status" as follows:

> "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with –
>
> (1) a parent or another person having legal custody of such individual or individuals . . .

42 U.S.C. 4202(k)

[5] The United States has filed one action involving allegations of both national origin and familial status in connection with proposed housing for agricultural workers: Home Nursery & United States v. Clinton County, C.A. No. 92-118 (S.D. Ill.). That case was settled by the entry of a consent decree without a decision on the merits; copies of the complaint and consent decree are at Attachments A and B.

Seas, Inc., 887 F. Supp. 1347 (D. Hawaii 1995); United States v. Grishman, 818 F. Supp. 21 (D. Me. 1993).

CONCLUSION

The United States submits this memorandum to assist the Court in assessing plaintiff's motion for preliminary injunction. In making its determination as to whether plaintiff will succeed on the merits on its FHA claim, we request the Court to apply the framework set forth in this brief.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

Electronically filed

/s/Harvey L. Handley
____
HARVEY L. HANDLEY
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section
950 Pennsylvania Ave. N.W. – 1800 G St.
Washington, D.C. 20530
(202) 514-4756
harvey.l.handley@usdoj.gov