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Brief of the John Marshall Law School Fair Housing Clinic as Amici Curiae in Support of Plaintiffs-Appellants Good Shepherd Manor Foundation, Inc., Good Shepherd Manor Group Homes, Inc., and Good Shepherd Manor, Inc., Good Shepherd Manor Foundation, Inc. v. City of Momence, 323 F.3d 557 (Seventh Circuit Court of Appeals 2003) (No. 02-3536)

John Marshall Law School Fair Housing Legal Clinic

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No. 02-3536

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GOOD SHEPHERD MANOR FOUNDATION, INC., an Illinois not-for-profit Corporation, GOOD SHEPHERD MANOR GROUP HOMES, INC., an Illinois not-for-profit corporation, and GOOD SHEPHERD MANOR, INC., an Illinois not-for-profit corporation,

Plaintiffs-Appellants,

v.

CITY OF MOMENCE, a Municipal Corporation, and WILLIAM PETERSON, JAMES SAINDON, CHERYL HESS, JAMES VICKERY, GERALD DENTON, STANLEY JENSEN, DONNA STUDER, JOHN METZ, JAMES MOODY in their official capacities as Mayor and Aldermen of the City of Momence,

Defendants-Appellants.

Appeal From The United States District Court For The Central District Of Illinois
Case No. 01-CV-2105
The Honorable Judge Michael McCuskey

BRIEF OF THE JOHN MARSHALL LAW SCHOOL FAIR HOUSING LEGAL CLINIC AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS GOOD SHEPHERD MANOR FOUNDATION, INC., GOOD SHEPHERD MANOR GROUP HOMES, INC., and GOOD SHEPHERD MANOR, INC.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 02-3536

Short Caption: Good Shepherd v. City of Momence

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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The John Marshall Law School FAir Housing Legal Clinic

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

F. Willis Caruso, Esq.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: F. Willis Caruso Date: 12/04/02

Attorney's Printed Name: F. Willis Caruso

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

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AMICUS CURIAE STATEMENT OF INTEREST

The John Marshall Law School Fair Housing Legal Clinic is a legal clinic of The John Marshall Law School in Chicago, Illinois. The Clinic provides litigation and dispute resolution training for law students and litigation and dispute resolution assistance to persons who complain of housing discrimination in violation of federal, state, and local laws.

The Fair Housing Legal Clinic addresses the following issue in its brief:

> Whether the trial court below erred by limiting the trial to a single theory of intentional discrimination under Federal Fair Housing Act, 42 USC 3601 et seq., and thus refusing to permit plaintiffs to make a case as to defendant's failure to reasonably accommodate.

The District Court's failure to recognize a cause of action for a local government's failure to reasonably accommodate handicapped persons is a significant error, which operates to frustrate an important policy objective of the Federal Fair Housing Act and this case should be remanded for trial on this issue.

ARGUMENT

Congress amended the Federal Fair Housing Act, 42 USC 3604 et seq. (hereinafter FHA), in 1988 to extend the protections previously afforded to other persons already protected by the Act to persons with a disability. Of all the 1988 amendments to the Act, this was the least controversial because the need to prohibit housing-related discrimination against persons with a disability was uniformly regarded as necessary. See Schwemm, Housing Discrimination Law and Litigation, West Publ. 2001, §11.13, page 11-69.

The FHA makes it illegal: "(1) 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 of ... that buyer or renter ..." and "(2) to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities[1] in connection with such dwelling, because of a handicap of that person." 42 U.S.C. § 3604(f)(1)-(2). Congress explicitly made the FHA applicable to local governmental zoning, as well as other land use regulations and policies that would restrict housing opportunities for persons with a disability. . H.R. Rep. No. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185 (stating that the amendments "would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps"); see also *Oconomowoc Residential Programs, Inc. v. City of Milwaukee,* 300 F3d 775 (7th Cir. 2002); *Dadian v. Village of Wilmette*, 269 F3d 381 (7th Cir. 2001) and *Hemisphere Bldg. Co. v. Village of Richton Park*, 171 F.3d 437, 438 (7th Cir. 1999),

[1] Although the ADA does not explicitly define "services, programs, or activities," the regulations promulgated pursuant to the Act state that "Title II applies to anything a public entity does." 28 C.F.R. pt. 35, App. A. The courts to have considered the issue have held that the ADA clearly encompasses land use control decisions by local government entities. *Regional Econ. Comty. Action Program, Inc. v. City of Middletown*, 281 F.3d 333, 2002 U.S. App. LEXIS 1769, 12 Am. Disabilities Cas. (BNA) 1317 (2d Cir. N.Y. 2002) *petition for cert. filed*, No. 01-1624 (May 3, 2002); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999).

citing *Larkin v. Michigan Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996) (noting that Congress intended for the FHAA to apply to zoning ordinances that restrict the placement of group homes).

The way Congress legislated with respect to the protected class of persons with a handicap, however, was unlike the mandates of the same law with respect to every other covered class of individuals. Not only does the Act forbid discrimination against persons with a disability, 42 USC 3604(f)(2), but a completely separate section of the Act, 42 USC 3604(f)(3)(B) affirmatively requires that "reasonable accommodations" must be made in "rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling."42 USC 3604(3)(3)(b). This Court has expressly recognized, therefore, that:

> A violation of either act[2] can be established by showing that the plaintiff was a qualified individual with a disability, and the defendant either failed to reasonably accommodate the plaintiff's disability or intentionally discriminated against the plaintiff because of her disability. *Dadian v. Wilmette*, 269 F3d 831 (7th Cir 2001), citing *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 846-48 (7th Cir. 1999).

Good Shepherd attempted to assert both these theories of the City's violation of the FHA, but the District Court concluded that a reasonable accommodation claim was simply unavailable. (Order of April 15, 2002, pp. 11-12). The District Court below twice erred with respect to Good Shepherd's reasonable accommodation claim: first by completely refusing to permit the argument and secondly (which logically followed once the first error was committed) by refusing to admit evidence on the defendant's land use control and/or planning practices and policies. This was no small error: refusal to recognize a separate cause of action for the City's denial of a reasonable

[2] The reference to "either" is to either the Americans With Disabilities Act or the Federal Fair Housing Act, as applied to a person with a disability.

accommodation effectively eviscerates this additional protection that Congress expressly provided for in the 1988 amendments to the FHA.

The Federal Fair Housing Act requires that an accommodation be made for a person with a disability as long as the accommodation is (1) reasonable and (2) necessary (3) to provide a person with a handicap an equal opportunity to use and enjoy housing. 42 U.S.C. § 3604(f)(3)(B); *see also*: *Oconomowoc*, supra, *Dadian v. Wilmette, 269 F.3d at 838; Howard v. City of Beavercreek, 276 F.3d 802, 806 (6th Cir. 2002); Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 457 (3d Cir. 2002); Bryant Woods Inn, Inc. v. Howard County, Maryland, 124 F.3d 597, 603 (4th Cir. 1997); Smith & Lee Assocs. v. City of Taylor, Michigan, 102 F.3d 781, 794 (6th Cir. 1996).* As this Court explained in *Dadian*, a public entity must provide a reasonable accommodation to a qualified individual with a disability by making changes in rules, policies, practices or services, when necessary, under either Title II of the Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12131 et seq., or the Fair Housing Amendments Act of 1988, 42 U.S.C.S. § 3601 et seq., codified, respectively, at 42 U.S.C.S. § 12131(2); 42 U.S.C.S. § 3604.

> Whether a requested accommodation is reasonable is highly fact-specific, and determined on a case-by-case basis by balancing the cost to the defendant and the benefit to the plaintiff. Whether the requested accommodation is necessary requires a showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability. The overall focus should be on whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change. 269 F3d at 838.

See also *Jankowski Lee & Associates. v. Cisneros*, 91 F3d 891 (7th Cir. 1996), citing *United States v. California Mobile Home Park Management Co.,* 29 F.3d 1413, 1418 (9th Cir. 1994).

The burden is on the plaintiffs to show that the accommodation it seeks is reasonable on its face. That is, that the plaintiff must demonstrate that the requested accommodation is "necessary" to

afford "equal opportunity" because "...a plaintiff is in the best position to show what is necessary to afford ... (a person with a disability) ... an equal opportunity to use and enjoy housing." *Oconomowoc,* citing *U S Airways, Inc. v. Barnett*, 535 U.S. 391, 152 L. Ed. 2d 589, 122 S. Ct. 1516, 1523 (2002). Once the plaintiffs have made this prima facie showing, the defendant must come forward to demonstrate unreasonableness or undue hardship in the particular circumstances because "a defendant municipality is in the best position to provide evidence concerning what is reasonable or unreasonable within the context of the zoning[3] scheme." *Id.; see also Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995).

This Court has further clearly explained the burden shifting analysis that the district court should employ below:

> We begin by focusing on the definitions of the three key elements of a reasonable accommodation: "reasonable," "necessary," and "equal opportunity." Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry ...(to determine)... if it is both efficacious and proportional to the costs to implement it. *Vande Zande*, 44 F.3d at 543. An accommodation is unreasonable if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program. *Erdman v. City of Fort Atkinson*, 84 F.3d 960, 962 (1996)(internal citations omitted). In assessing costs, the court may look at both financial and administrative costs and burdens. *Bryant Woods Inn, Inc.*, v. *Howard County, MD, et al.,* 124 F.3d 597, 604 (1997). A zoning waiver is unreasonable if it is so "at odds with the purposes behind the rule that it would be a fundamental and unreasonable change." *Dadian v. Vill. Of Wilmette*, 269 F.3d 831, 838-39 (2001).
>
> Whether the requested accommodation is necessary requires a 'showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability.' " *Dadian*, 269 F.3d at 838 (citing *Bronk*, 54 F.3d at 429). In other words, the plaintiffs must show that without the required accommodation they will be denied the equal opportunity to live in ....(the residential neighborhood where they seek to reside).

As to the first prong of necessity, the Court requires a direct linkage between the proposed accommodation and the equal opportunity to be afforded the handicapped person. *Bryant Woods*

[3] In the instant case, Good Shepherd's case concerning water service and land development policies is apart from "zoning" strictly defined, but there are not substantive reasons to distinguish these varieties of land use regulations.

Inn, Inc., 124 F.3d 597, 604 (4th Cir 1997) . In this case, the requested accommodation is necessary, and the City indisputably knew that supplying water to the group home was a condition precedent to the habitability of the group home because water supply is a basic requirement for a residential Certificate of Occupancy. Even if Good Shepherd's request that the water not be turned off (or that it be turned back on immediately) had not been reasonable, once Good Shepherd offered to post an escrow account with the City during the pendancy of a determination as to whether Good Shepherd did have to supply land and the water extension to their neighbors, then denying Good Shepherd's request could accomplish no legitimate public health, or safety reason much less a "significant" or "fundamental" one.

According to the next stage of the reasonable accommodation law, the Defendant must prove that the Plaintiff's request is unreasonable, i.e. that it causes undue hardship for in the particular circumstances. A "reasonable accommodation" is determined after balancing the local government's interest in the challenged regulation against its obligation to modify certain valid rules to accommodate the statutory rights of the disabled to equal housing opportunities. *Bangerter v. Orem City Corporation,* 46 F.3d 1491, 1502 (10th Cir. 1995). The burden for local government is to demonstrate that the proposed accommodation, such as the one requested by Good Shepherd today, is not reasonable, because it would "impose undue financial or administrative burdens" or require a substantial or fundamental alteration in the existing statutory scheme.[4]

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[4] Although it may be proper to condition use (as here, the water supply to the group homes was conditioned by the city on Good Shepherd supplying land to their neighbors) any such condition may not be an abrupt departure from the local government's otherwise applicable land use regulations or policies. *Goffinet v. County of Christian,* 65 Ill. 2d 40 (1976). Since, the City had no actual zoning authority, it tried to condition the use of the homes on the only power it could exert, the water service. Article 1, section 15, of the Illinois Constitution forbids governmental entities from taking for private purposes to increase profits of a private entity. *Southwestern Illinois Development Authority v. National City Environmental,* 304 Ill. App. 3d 542 (5th Dist. 1999). Similarly, the Illinois Constitution forbids taking for private purposes to limit the expenses of another private entity, as is the situation here, with the City compelling Good Shepherd to extend the

The District Court stated several times that this case was not about zoning or land use regulations. This was clear error. Local governmental regulations concerning water supply are land use regulations. If the City's land use policy required land owners to dedicate some of their land for the sole purpose of supplying property and an easement to the adjacent land owner (the Jehovah's Witnesses in this case), then the issue that the District Court should have considered was whether Good Shepherd's requested accommodation was "so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change." Without permitting evidence on what the City's policies/regulations regarding provision of land, easements and water supply were, the Court could not possibly reach the requisite factual determination of how disruptive or "at odds" with city policies or fundamental policies Good Shepherd's request was.

Oconomowoc Residential Programs, Inc., v. City of Milwaukee is instructive on this point. There, the City of Milwaukee required that group homes be spaced a certain distance from one another. When this regulation resulted in a group home for persons with a disability being prohibited on a certain parcel, this Court required the City of Milwaukee to prove both the purpose for the spacing requirement and why modifying it for the plaintiff would impose undue burdens on the City or its regulatory scheme. Absent this showing by the City, this Court held that the City had indeed failed to provide a reasonable accommodation required by the Fair Housing Act. Similarly, in this case, the City of Momence, has not demonstrated how providing this accommodation, which would allow disabled residents to live in the Good Shepherd facility during the pendancy of the dispute, would cause undue financial and administrative burdens on the City of Momence. Without demonstration of such proof, the City cannot successfully show that Good Shepherd's request is unreasonable and thus, the City's denial of Good Shepherd's request was improper.

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water and sewer to the edge of Jehovah Witnesses property purely for the benefit of the Jehovah Witnesses and merely so that they may save money.

CONCLUSION

As demonstrated above, the District Court erred by refusing to allow evidence as to how the City of Momence's failure to reasonably accommodate Good Shepherd violated the Fair Housing Act. As such, this Court should apply its reasonable accommodation analysis to this case and find that in shutting off the water supply and refusing to accept an escrow account and/or to have the water turned back on, the City of Momence denied the residents of Good Shepherd a reasonable accommodation in violation of the Fair Housing Act.

Respectfully submitted,

Amicus Curiae of Appellants

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