UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATHER FLANAGAN'S BOYS HOME, Plaintiff, v. THE DISTRICT OF COLUMBIA, *et al.*, Defendants.	:	Civil Action No. 01-1732 (JR)

MEMORANDUM

Plaintiff is a non-sectarian charitable organization headquartered in Omaha, Nebraska, that operates facilities in several states and Washington, D.C., for abused and neglected children with handicaps. It plans to build four residential homes and a dormitory on a new site in the District of Columbia and has brought this suit alleging interference with those plans in violation of due process guarantees, the Fair Housing Act, and D.C. statutes. Defendants are District officials who allegedly delayed the issuance of building permits and a group of residents who challenged the permits before the D.C. Board of Zoning Appeals (BZA). The citizen defendants move to dismiss or for summary judgment. The government defendants move to dismiss. For the reasons set forth below, the citizen defendants' motion will be granted, and the District's motion will be granted in part and denied in part.

Background

Plaintiff, known generally as Girls & Boys Town or just Boys Town, operates a facility on Sargent Road, N.E., under contract with the D.C. Child and Family Services Agency. In February 2000, it purchased a two-acre site on the 1300 block of Pennsylvania and Potomac Avenue, S.E., in a commercial C-2 zone near a Metro station, and announced plans to build four group homes, a short-stay residential facility for fifteen children, and an administrative building there. The group are to be built on contiguous lots in phase one of the project; each is designed to accommodate six children or teenagers and a married couple. All of the new facilities are expected to serve mostly African-American children who are referred from Child and Family Services because of abuse or neglect and who have mental or psychological disorders.

Soon after Boys Town purchased the property and announced its plans, nearby residents formed Southeast Citizens for Smart Development (SCSD) to voice concerns and opposition to the facility through a website, public meetings, media statements, and lobbying of public officials.[1] Ward 6 Council Member Sharon Ambrose criticized the project in council meetings

[1] Boys Town has also sued SCSD chairman Wilbert Hill and vice chairwoman Ellen Opper-Weiner individually. SCSD, Mr. Hill and Ms. Opper-Weiner are referred to in this opinion as the citizen defendants.

and media interviews. In this suit, Boys Town asserts that SCSD and Ms. Ambrose[2] went beyond general advocacy by orchestrating a campaign to prevent issuance of building permits for phase one and to harass it into reducing or abandoning the project. Boys Town also alleges that District administrators bowed to the pressure, insisting over objections from another agency that an environmental impact screening form was required and attempting to require an archaeological evaluation, to investigate police calls concerning the Sargent Road facility, and to enforce a "500-foot rule" prohibiting community based residential facilities with seven or more residents in close proximity to each other.[3]

Boys Town initiated this suit on August 14, 2001, approximately eight months after filing its initial applications. The Department of Consumer and Regulatory Affairs issued building permits for the four long-term homes a few weeks later. SCSD appealed the permit decision, arguing that the homes should be

[2] Ms. Ambrose's motion to dismiss was granted in November 2001.

[3] Boys Town has named the District of Columbia and the Department of Consumer and Regulatory Affairs as defendants, along with Planning Director Andrew Altman and Deputy Director Ellen McCarthy in both their official and individual capacities. These four defendants are referred to as the government defendants. Boys Town appears to have conceded that the Department of Consumer and Regulatory Affairs is non sui juris and should be dismissed from the case. Arnold v. Moore, 980 F. Supp. 28, 33 (D.D.C. 1997); Fields v. D.C. Dep't of Corr., 789 F. Supp. 20, 22 (D.D.C. 1992).

considered a single facility and that the 500-foot rule should apply. In May 2002, the BZA voted 4-0 with one abstention that the four group homes would be treated as a single facility serving 24 children, and that a special exception would therefore be required before construction could continue.

Analysis

Boys Town alleges that the government defendants, by delaying the issuance of permits for approximately four months beyond what it asserts the approval process should have taken, and the citizen defendants, by filing a baseless, harassing challenge to the permits, violated the Fair Housing Act by "mak[ing] unavailable or deny[ing] a dwelling" on the basis of race and handicap, 42 U.S.C. § 3604(a), (f)(1), and by "coerc[ing], intimidat[ing], threaten[ing] or interfer[ing]" with potential residents' enjoyment of their rights to fair housing, id. § 3617. It also asserts that the governmental defendants violated the D.C. Human Rights Act and substantive due process by acting arbitrarily and capriciously.[4] The claims against each set of defendants will be evaluated separately.

[4] The amended complaint also asserts that District officials violated D.C. laws, rules, and regulations relating to the issuance of building permits, but Boys Town has failed to pursue this argument in its response to the District's motion to dismiss.

1. Motion to dismiss by citizen defendants

Boys Town's claims against the citizen defendants are based entirely on their challenge to the building permits before the Board of Zoning Appeals. The First Amendment protects citizens from liability for petitioning the government for redress of their grievances. See, e.g., BE&K Constr. Co. v. NLRB, 122 S.Ct. 2390, 2395-96 (2002); Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56-60 (1993); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741-42 (1983); United Mine Workers v. Pennington, 381 U.S. 657, 620 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961). The so-called Noerr-Pennington Doctrine first articulated in antitrust and labor law cases, is applicable as well to land use challenges, see, e.g., Christian Gospel Church v. San Francisco, 896 F.2d 1221, 1226-27 (9th Cir. 1990); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 614 (8th Cir. 1980), including those alleging violations of the Fair Housing Act. See White v. Lee, 227 F.3d 1214, 1218 (9th Cir. 2000); Pathways, Inc. v. Dunne, 172 F. Supp. 2d 357, 365-66 (D. Conn. 2001); Tizes v. Curcio, Civ. No. 94-7657, 1995 WL 476675, at *3-*6 (N.D. Ill. Aug. 9, 1995); United States v. Robinson, Civ. No. 3:92-0345, 1996 U.S. Dist. LEXIS 22327 (D. Conn. Jan. 26, 1995). But cf. United States v. Wagner, Civ. No.

3:94-2540, 1996 WL 148536, at *1-*2 (N.D. Tex. Jan. 29, 1996) (declining to recognize absolute First Amendment immunity).

Boys Town's attempt to invoke the "sham" exception to the Noerr-Pennington Doctrine is not persuasive. As Boys Town itself states, the sham exception may be invoked only where a lawsuit or other governmental petition is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and the defendant has acted with an illegal subjective motive, in this case interference with the exercise of rights under the Fair Housing Act. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993); White v. Lee, 227 F.3d 1214, 12-3132 (9th Cir. 2000); see also Havoco of Am., Ltd. v. Hollobow, 702 F.2d 643, 650-51 (7th Cir. 1983) (key is whether petition constituted genuine attempt to influence government); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 614-15 (8th Cir. 1980) (petition legitimate unless intended to injure plaintiff directly rather than to influence government).[5]

[5] In the labor law context, the Supreme Court has left unresolved the question whether some reasonable but ultimately unsuccessful lawsuits could be declared an unfair trade practice by the National Labor Relations Board if they would not have been filed but for a retaliatory motive to impose litigation costs, regardless of the outcome. BE&K Constr. Co. v. NLRB, 122 S. Ct. 2390, 2402 (2002); cf. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741-43 (1983) (NLRB may not enjoin ongoing reasonable lawsuit, regardless of subjective intent of employer); Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26, 32 (D.C. Cir. 2001) (questioning why the First Amendment would provide less protection to litigants under the National Labor Relations Act), cert. denied, 122 S.Ct. 458 (2001). Because this case involves

The Board of Zoning Appeals did not find the challenge frivolous and neither does this Court. While the Department of Justice apparently has raised some question in the past about the legality of the District's 500-foot rule, the status of that challenge is unclear and the case law is split on such regulations. Compare, e.g., Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991) (upholding state licensing and local zoning requirements imposing a quarter-mile rule as supporting goal of deinstitutionalization); Avalon Residential Care Homes, Inc. v. City of Dallas, 130 F. Supp. 2d 833, 839-40 (N.D. Tex. 2000) (upholding dispersal requirement), with Larkin v. State of Mich. Dep't of Soc. Servs., 89 F.3d 285, 298-90 (6th Cir. 1996) (dispersal requirement facially discriminatory); Horizon House Developmental Servs., Inc. v. Township of Upper South Hampton, 804 F. Supp. 683, 693-94(E.D. Pa. 1992) (same), aff'd, 995 F.2d 217 (3d Cir. 1993) (table). Moreover, the term "facility" is not clearly defined in District regulations to address the question of whether four contiguous homes operated as a single campus should be considered collectively and required to obtain a special exception from the Board of Zoning Administration. The Court cannot say as a matter

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an ongoing challenge that is neither unreasonable nor unsuccessful and Boys Town itself argues that the standard cited in White v. Lee, 227 F.3d 1214, 1231-32 (9th Cir. 2000), applies, the Court will follow Bill Johnson's Restaurants and Professional Real Estate Investors.

of law that the challenge was baseless. The claims against the citizen defendants will be dismissed.

2. Motion to dismiss by government defendants

The limited record developed to date will not support a ruling on the District's motion to dismiss the two Office of Planning officials who have been sued in their individual capacities. The Court cannot yet determine whether they are entitled to qualified immunity or whether they had the authority or power "to directly effectuate the alleged discrimination." Meadowbriar Home for Children, Inc. v. Gunn, 81 F.3d 521, 531 (5th Cir. 1996); Hemisphere Building Co. v. Village of Richton Park, Civ. No. 96-1268, 1996 WL 721132, at *4 (N.D. Ill. Dec. 12, 1996).

As for whether Boys Town has stated a claim under the Fair Housing Act, the D.C. Human Rights Act,[6] and substantive due process, many of its allegations regarding the impropriety of District officials' actions (such as asserting that an environmental impact screening form was required or that the permits should have been issued in four months instead of eight) are sweeping, conclusory statements not supported by any legal citations or specific facts set out in the complaint. Legal

[6] The same factual allegations of discriminatory intent or disparate impact necessary to plead a claim under the Fair Housing Act are also required under the D.C. Human Rights Act. See Gay Rights Coalition of Georgetown Univ., 536 A.2d 1, 29 (D.C. 1987).

conclusions cast in the form of factual allegations need not be taken as true in a motion to dismiss, Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994), but a motion to dismiss must be denied unless there is no set of facts that Boys Town could prove that would entitle it to relief, Haynesworth v. Miller, 820 F.2d 1245, 1254 (D.C. Cir. 1987).

a. Fair Housing & D.C. Human Rights Act claims

The Fair Housing Act makes it unlawful to discriminate in the sale or rental of a dwelling, or "to otherwise make unavailable or deny" a dwelling to any person because of race or handicap. 42 U.S.C. § 3604(a), (f)(1). It also forbids coercion, intimidation, threats, or other interference with any person in the exercise or enjoyment of fair housing rights. Id. § 3617. The District of Columbia and local municipalities can be and have been held liable under both § 3604 and § 3617 for discriminatory zoning, selective code enforcement, permitting decisions, and other actions that deny or delay housing. Samaritan Inns v. District of Columbia, Civ. No. 93-2600, 1995 WL 405710, at *28 (D.D.C. June 30, 1995) (suspension of building permits delaying availability of housing for ninety days), aff'd in part, rev'd in part, 114 F.3d 1227 (D.C. Cir. 1997); see also Marbrunak, Inc. v. City of Stow, 974 F.2d 43, 47 (6th Cir. 1992) (denial of housing under zoning ordinance); Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hemptstead, 98 F. Supp. 2d 347,

355-56 (S.D.N.Y. 2000) (denial through selective code enforcement); Groome Resources, Ltd. v. Parish of Jefferson, 52 F. Supp. 2d 721, 724-25 (E.D. La. 1999) (three month delay in deciding upon reasonable accommodation application), aff'd 234 F.3d 192 (5th Cir. 2000); Easter Seal Soc'y of New Jersey, Inc. v. Township of North Bergen, 798 F. Supp. 228, 234-35 (D.N.J. 1992) (delays in hearing appeal of building permit rejection) (preliminary injunction ruling); Steward McKinney Found., Inc. v. Town Plan & Zoning Comm'n, 790 F. Supp. 1197, 1210 (D. Conn. 1992) (requiring special exception as means of denying or delaying project) (preliminary injunction ruling).

Determining intent is particularly difficult in cases involving municipalities, because officials must balance a number of competing considerations and in any case are unlikely to express discriminatory animus. Village of Arlington Heights v. Metro. Hous. Dev't Corp., 429 U.S. 252, 265-66 (1977); Contreras v. City of Chicago, 119 F.3d 1286, 1292-94 (7th Cir. 1997). Municipalities may be held liable, however, where they allow illegal prejudices of constituents or office holders to become a motivating factor in their decisionmaking process. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995); Tsombanidis v. City of West Haven, 129 F. Supp. 2d 136, 152 (D. Conn. 2001); Samaritan Inns v. District of Columbia, Civ. No. 93-2600, 1995 WL 405710, at *28 (D.D.C. June 30, 1995), aff'd in

part, rev'd in part, 114 F.3d 1227 (D.C. Cir. 1997); Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, 808 F. Supp. 120, 134 (N.D.N.Y. 1992); Ass'n of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 95, 104 (D.P.R. 1990); see also Johnson v. Dixon, 786 F. Supp. 1, 5 (D.D.C. 1991) ("Such collusion between electors and their elected officials has, when proven, been held to be unlawful under the Fair Housing Act.") Moreover, because Fair Housing Act claims may be brought under disparate impact theories, proof of discriminatory intent may not be crucial to Boys Town's case. Nat'l Fair Housing Alliance v. Prudential Ins. Co. of Am., Civ. No. 01-2199, 2002 WL 1483893, at *11 (D.D.C. July 9, 2002) (noting that every circuit except the D.C. Circuit has confirmed that the Fair Housing Act encompasses disparate impact claims); Brown v. Artery Org., Inc., 654 F. Supp. 1106, 1115 (D.D.C. 1987) (disparate impact claims may be brought against governmental defendants).

In this case, Boys Town alleges that District officials acted with discriminatory intent and caused a disparate impact by demanding that the project satisfy clearly inapplicable regulatory requirements and by arbitrarily stretching the building permit process out for an extra four months. Mere inquiries or assertions by subordinate departments and administrators that particular regulatory requirements might

apply to a project will not be enough to support a Fair Housing Act claim where the requirements were in fact not enforced and the applicant has not alleged that the inquiries or assertions caused it material harm affecting the availability of housing. Cf. Bangerter v. Orem City Corp., 46 F.3d 1491, 1499 (10th Cir. 1995) (plaintiff failed to show injury from having to obtain conditional use permit where process did not significantly delay or increase the price of housing).

The Boys Town assertion that the District took twice as long to approve its building permits as other projects is a closer call. Local governments have a legitimate interest in determining which regulatory schemes apply to new construction, but completely unreasonable delays without explanation could support a claim under the Fair Housing Act. Samaritan Inns v. District of Columbia, Civ. No. 93-2600, 1995 WL 405710, at *27-28 (D.D.C. June 30, 1995) (holding the District liable under both disparate impact and intentional discrimination theories where it caused a 90-day delay in the provision of housing for handicapped individuals and provided only a pretextual explanation for its actions), aff'd in part, rev'd in part, 114 F.3d 1227 (D.C. Cir. 1997); see also Johnson v. Duluth Hous. & Redev't Auth., Civ. No. 99-1156, 2001 WL 224735, at *6 (D. Minn. Jan. 9, 2001) (recommending summary judgment for defendant where plaintiff failed to rebut defendant's proffer of legitimate,

nondiscriminatory reasons for delay); cf. Arthur v. City of Toledo, 782 F.2d 565, 577 (6th Cir. 1986) (concluding that "not every denial, especially a temporary denial" of housing constitutes a violation of the Fair Housing Act because that would require municipalities to approve all projects without consideration of any other objective or appropriate factors); Oxford House, Inc. v. City of Virginia Beach, 825 F. Supp. 1251, 1262 (E.D. Va. 1993) ("The Fair Housing Act protects handicapped individuals from discrimination. It does not, and plaintiffs point to no provision of the statute suggesting otherwise, insulate such individuals from legitimate inquiries designed to enable local authorities to make informed decisions on zoning issues ....").

b. Substantive due process/42 U.S.C. § 1983

To recover under 42 U.S.C. § 1983, a plaintiff must demonstrate a constitutional deprivation arising from "action pursuant to municipal policy." Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). This requirement can be satisfied by showing that the government decision at issue was made by an official with "final policy-making authority," as determined by state law as well as the agency's custom and usage. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989). In this case, Boys Town asserts that the two leading administrators in the Office of Planning were ultimately responsible for causing

the delays in the permitting process. The District's attempt to counter this assertion with a single quote from a statute defining the Office of Planning's role in zoning cases, as compared with building permit decisions, is insufficient, particularly given that custom and usage may be relevant to the inquiry. If Boys Town's allegations are true and if it can demonstrate that the delay was "a deliberate choice to follow a course of action ... made from among various alternatives" by the planning officials in question, Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986), that would be sufficient to satisfy the municipal policy element.

As for the underlying constitutional issue, D.C. Circuit case law suggests that an extraordinarily long delay in governmental action could violate due process, at least if the government provides no reasonable explanation for its slowness. Silverman v. Barry, 845 F.2d 1072, 1084 (D.C. Cir. 1988) (citing Givens v. United States R.R. Ret. Bd., 720 F.2d 196 (D.C. Cir. 1983)). Moreover, while "[a] mere state law violation does not give rise to a substantive due process violation ... the manner in which the violation occurs as well as its consequences" should be considered in determining whether the government has committed a substantial violation of state law prompted by personal or group animus or a deliberate flouting of that law that trammels significant personal or property rights. Tri County Indus. Inc.

v. District of Columbia, 104 F.3d 455, 459 (D.C. Cir. 1997) (internal quotations and citations omitted). The question thus is not capable of resolution on a motion to dismiss, even though Boys Town's allegations suggest that its proof will fall far short of satisfying the substantiality requirement for substantive due process claims -- which will succeed only if the District's actions have been "grave[ly] unfair[]" or "genuinely drastic" in their totality. Id.

An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge