UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNDERCLIFF COTTAGE, LLC, THE PHELAN 2006 FAMILY TRUST, CHARLES & JULIE CAWLEY, PARKER S. LAITE, SR. and FRIENDS OF CAMDEN, MAINE LLC, Plaintiff, v. F.H.R.E. LLC and THE MCLEAN HOSPITAL CORPORATION, Defendants.	Civ. No. 14-cv-00110-NT

DEFENDANT FOX HILL REAL ESTATE, LLC's AND THE McLEAN HOSPITAL CORPORATION's MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Pursuant to Fed. R. Civ. P. 12(b)(6) and L.R. 7.1, defendants F.H.R.E. LLC ("Fox Hill") and The McLean Hospital Corporation ("McLean") hereby move to dismiss all counts of the Complaint.

PRELIMINARY STATEMENT

Defendants Fox Hill and McLean are seeking to create a residential, community-based treatment facility in Camden, Maine for persons suffering from drug and alcohol addiction. The neighbors oppose. Without a trace of embarrassment, they have sought to stop the project by invoking the Federal Fair Housing Act ("FHA"), a statute intended to prevent *precisely* the sort of discrimination they are now advocating. Specifically, the plaintiffs are asking this Court to declare that certain disabled people ("wealthy" ones) are not protected by the FHA – and that the

neighbors and/or the Town of Camden may therefore discriminate against them and deny them the opportunity to run a residential treatment facility. The neighbors admit that the FHA was "instituted to prevent discrimination against . . . persons utilizing small group living arrangements to rejoin society" but contend that the FHA carves out "extremely wealthy persons" or is otherwise limited to "under-privileged persons."

There is no support for this bizarre assertion. The FHA was designed to prevent discrimination against *all* disabled persons (including persons suffering from alcoholism, as every other Circuit has found), regardless of how rich or poor they are. Neither the text, nor the legislative history, nor any reported case we have found says anything about exempting "wealthy" people from the protections of the FHA. The neighbors' vague, baseless, and ironic misuse of the statute should be rejected.

FACTUAL BACKGROUND

Fox Hill is the record owner of a 13-acre property (the "Bay View Property") in Camden, Maine ("Town"), in an area zoned "Coastal Residential" under Camden's land use ordinance (Complaint ¶¶ 12, 26). The defendants plan to renovate the property and operate an eight-bed residential treatment facility on it for persons recovering from alcohol and drug addiction (the "facility"). (*Id.* ¶¶ 1, 15). The facility will employ psychiatrists, clinicians, therapists, nurses and counselors in serving these patients. (*Id.* ¶¶ 1, 14, 22). This staff will treat eight patients in a "residential neighborhood" comprised of individual estates the size of ten football fields. *See* https://www.google.com/#q= 13+acres+in+football+fields. In addition to treatment, patients will receive lodging and meals at this residential facility. (Complaint ¶¶ 1, 23, 24).

The Town of Camden has done nothing to stop the current project. *See* Complaint. An earlier bid, for a 14-bed facility, would have required a zoning change but the defendants dropped that bid (and the corresponding request for a zoning change) in favor of the current,

smaller proposal. (*Id*. ¶¶ 28-33). Since then, the Town of Camden has done nothing to stop the current proposal from going forward, apparently because it agrees with Fox Hill's conclusion that an 8-bed center constitutes a "community living arrangement" that must be treated as a single-family home for zoning purposes, *i.e.* a permitted use. (*Id*. ¶ 32).[1] Absent any contrary ruling or interference by the Town, Fox Hill and McLean are proceeding with the early stages of the project.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) tests the "legal sufficiency" of a complaint. *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 842 F. Supp. 2d 373, 376 (D.Me. 2012) (*citing Gomes v. Univ. of Me. Sys.*, 304 F.Supp.2d 117, 120 (D.Me. 2004)). The Court must accept all well-pled factual allegations but "need not credit a complaint's bald assertions or legal conclusions." *Glassman v. Computervision Corp.*, 90 F.3d 617, 628 (1st Cir. 1996). Moreover, the factual allegations must advance a claim to relief that is "plausible on its face." *Cioppa*, 842 F. Supp. 2d at 376 (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. THE PLAINTIFFS' COMPLAINT SUFFERS A NUMBER OF SERIOUS PROCEDURAL DEFECTS

The Bay View Property is located in an area zoned "Coastal Residential District" by the Town of Camden (Complaint ¶ 12, 26). The Town ordinarily permits only single-family homes

[1] The plaintiffs' assertions regarding the Town's other zoning rules in the fact section (Complaint ¶¶ 26-27) are irrelevant and in any event need not be credited. *Glassman v. Computervision Corp.*, 90 F.3d 617, 628 (1st Cir. 1996) (trial court need not credit legal conclusions).

in such areas. Ordinance Art. VIII § 5B.[2] The Town is subject to State law, however, and Maine mandates that towns may not discriminate against "community-based living arrangements" for disabled persons. Specifically:

> In order to implement the policy of this State that persons with disabilities are not [to be] excluded by municipal zoning ordinances from the benefits of normal residential surroundings, a community living arrangement is deemed a single-family use of property for the purposes of zoning.

30-A M.R.S.A. § 4357-A(2). Maine law defines "community living arrangement" as a licensed "housing facility for 8 or fewer persons with disabilities… . [and] may include a group home, foster home, or intermediate care facility." *Id. at* § 4357-A(1)(A). The term "disability," in turn, "has the same meaning as the term "handicap" in the federal Fair Housing Act [42 U.S.C. §3602(h)]." *Id. at* § 4357-A(1)(B). The State has essentially borrowed a federal definition in the course of implementing a parallel State policy that disabled persons ought not to be excluded from neighborhoods and neighborhood-based treatment facilities.[3]

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[2] Excerpts of the Town's Zoning Ordinance are attached as Exhibit A. "Under First Circuit precedent, when 'a complaint's factual allegations are expressly linked to — and admittedly dependent upon — a document (the authenticity of which is not challenged),' then the court can review it upon a motion to dismiss." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 34 (1st Cir. 2001) (*quoting Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir.1998)); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 19 (1st Cir. 2003) ("[M]atters of public record are fair game in adjudicating Rule 12(b)(6) motions."). The Town permits other uses that are irrelevant to the present case.

[3] This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1331 because it involves an embedded federal question, "that is, [a] suit[] in which the plaintiff pleads a state-law cause of action, but that cause of action necessarily raises a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Rhode Island Fishermen's Alliance, Inc. v. Rhode Island Dep't Of Envtl. Mgmt.*, 585 F.3d 42, 48 (1st Cir. 2009) (*citing Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)). *See also One and Ken Valley Housing Group v. Maine State Housing*, 716 F.3d 218, 224-25 (1st Cir. 2013) ("federal jurisdiction is favored in cases that present a nearly pure issue of law that could be settled once and for all and thereafter would govern numerous cases.").

In sum, if the patients living at the Fox Hill and McLean facility meet the FHA's definition of "handicap[ped]," the facility will be deemed a community living arrangement and thus a single-family home for zoning purposes.

A. **The Plaintiffs Claim is a Non-Justiciable "Enforcement Action"**

To the extent there is a case or controversy here, it is between the neighbors and the Town. The neighbors are unhappy with the Town's decision not to stop the defendants' project from going forward. They apparently believe that the Town has misread State and Federal law and is failing to enforce its own zoning ordinance governing Coastal Residential Zones. They are seeking, in effect, a judicial review of the Town's decision – a private enforcement action dressed up as a declaratory judgment action.[4]

That claim is not justiciable. Municipal enforcement (declination) decisions are not subject to judicial review. *See generally Herrle v. Town of Waterboro*, 763 A.2d 1159, 1161 (Me. 2001) (courts do not have jurisdiction to review enforcement decisions); *Eliot Shores, LLC v. Town of Eliot*, 9 A.3d 806, 808-09 (Me. 2010) (selectmen retain exclusive jurisdiction to initiate enforcement proceedings). The Town's municipal officers ("Select Board") has wide discretion in making enforcement decisions. The Town's decision not to enforce its own zoning rules as the plaintiffs would like – even assuming *arguendo* the Town could do so legally – is not reviewable. *See, e.g., Herrle, 763 A.2d at 1161 (same); Farrell v. City of Auburn*, 3 A.3d 385, 390 (Me. 2010) (same); *Pepperman, II v. Town of Rangeley*, 659 A.2d 280, 282-83 (Me. 1995) (same, where the ordinance made no provision for judicial review); *cf. also Freidman v. Board of*

[4] The plaintiffs' request for relief underscores this point. They have sought a declaration of the "improper usage of the Bay View Property . . . in a residential neighborhood" (Complaint ¶ 40) and sought an injunction preventing the defendants from operating their facility in a particular zoning district. (*Id*. ¶ 26, 44).

Envt'l Protection, 956 A.2d 97, 100 (Me. 2008) (environmental agency's order was "not subject to judicial review because it reflected a decision committed to the sole discretion" of the agency).

Herrle is illustrative. In that case, the Board of Selectmen of Waterboro "declined to take enforcement action against [the plaintiffs' neighbor]" on the ground that the disputed use was permitted by law. *Herrle*, 763 A.2d at 1160. The neighbors persuaded the trial court to issue a declaratory judgment that the use was not permitted. *Id*. The Law Court reversed, holding that the Town's decision was entirely discretionary and not subject to judicial review. *Id*. at 1161. "Even if we were to affirm the Superior Court's . . . legal analysis, the board of Selectmen could still decide in their discretion not to bring an enforcement action against Foglio." *Id*. at 1161-62.

Here, as in *Herrle*, the Town's ordinances state that if there is a violation of the zoning ordinance the Town *may* bring an action in Maine Superior Court to enforce the ordinance. Ordinance Art. V, § 6. The Town's municipal officers are "authorized" but not required to institute any action or proceeding to enforce the ordinance. *Id*. at § 7. As in *Herrle*, this language simply gives the Select Board "discretion in deciding whether to institute an enforcement action." [5] *Herrle*, 763 A.2d at 1161. This Court may not revisit the Town's refusal to enforce.

B. **The Plaintiffs Lack Standing**

The Complaint contains another defect. The Town expressly invoked 30-A M.R.S.A. § 4452 in its zoning ordinance, which provides that "[a]ll proceedings arising under locally administered laws and ordinances shall be brought in the name of the municipality." Private

[5] State law also reflects this discretionary authority, stating that "[a] municipal official…who is designated by ordinance or law with the responsibility to enforce a particular law or ordinance," including land use laws enacted under 30-A M.R.S.A. Section 3001, "may" take enforcement action. 30-A M.R.S.A. § 4452(1).

plaintiffs do not have standing to bring a suit to enforce a local ordinance "even if it was determined that [the defendants] [were] in violation of the ordinance." *Herrle*, 763 A.2d at 1162 (identifying standing in a separate defect).

The case of *Charlton v. Town of Oxford*, 774 A.2d 366 (Me. 2001) is on point. In *Charlton*, the plaintiffs brought a nuisance suit against their neighbors on the theory that the neighbor's house, garage and breezeway violated multiple land use ordinances. *Id*. at 368. The Law Court agreed with the trial court's conclusion that the violations existed, but that "section 4452 gives a municipality, *and only a municipality*, the authority to enforce land use regulations. Accordingly, only municipalities may bring an action for violations of such regulations." *Id.* at 373 *(citing Herrle) (emphasis added).* Neither the statute nor the legislative history granted an explicit or implicit private right of action. *Id.* at 372. Here, as in *Charlton*, the plaintiffs lack standing to bring an enforcement action that rightly belongs to the Town (if the Town were inclined to enforce its zoning rules as the plaintiffs want, which it manifestly is not).

C. **The Relief Sought is Indefinite, Incoherent, and Unenforceable**

In addition to the foregoing, the plaintiffs' request for relief is insolubly ambiguous.[6] The plaintiffs say they are seeking a "finding that the proposed Bay View Property facility does not constitute a 'community living arrangement'." (Complaint ¶ 42) But the plaintiffs' Complaint does not define the "proposed Bay View Property facility," and it is unclear which aspects of the facility the plaintiffs want the Court's order to address. The plaintiffs characterize the facility as catering to "extremely wealthy persons." (*Id.* ¶ 39; *see also id*. at ¶¶ 16 (similar), 17 (similar), 19 (similar)). Would the Court's order therefore address and preclude the facility

[6] *Cf. Ernst & YOUNG V. Depositors Economic Protection Corp*., 45 F.3d 530, 536 (1995) (court may consider "pragmatic" aspects of relief sought).

only to the extent it houses "extremely wealthy persons"? At what point would patients qualify as "extremely wealthy"? Elsewhere the plaintiffs define the facility in terms of the $60,000 service fee. (*Id.* ¶ 41). Would the Court's order preclude the facility if it charged only $55,000? Elsewhere the plaintiffs say the FHA is limited to "under-privileged persons." (*Id.* ¶ 38). Are they asking for an order limiting the facility to under-privileged persons? Elsewhere the plaintiffs define the facility in terms of it serving patients that are "well-educated," (*id.* ¶ 19), from "intact families," (*id.*), and not from Maine, (*id.* ¶ 20). Are those the objectionable features? If so, it is unclear whether the Court's order would apply to patients who are poor (which is good) but from Massachusetts (which is bad); or patients who are Mainers (good) but educated (bad); or patients who are underprivileged (good) but from intact families (bad). The plaintiffs' rambling description of the "proposed Bay View Property facility" suggests that what they really don't want – behind all the talk of wealth – is recovering alcoholics or drug addicts of *any* kind in their neighborhood. That, of course, is precisely the kind of prejudice that the FHA prohibits.

II. ON THE MERITS, THE FHA DOES NOT CARVE OUT OR DENY "WEALTHY" DISABLED PERSONS PROTECTION FROM DISCRIMINATORY ZONING

A. **The Court Should Reach the Merits of the FHA Dispute**

The Court could dismiss the Complaint on any one of the foregoing grounds (*i.e.* the case was filed by the wrong party, on a non-justiciable claim, seeking incoherent relief). The Court should nevertheless go further and dismiss on the merits as well. To dismiss on lesser grounds would invite the plaintiffs to cure one or more of their procedural defects and re-file the same claim on the same meritless argument.

A decision on the merits would also prevent future litigation *by the defendants*. The plaintiffs here are motivated and, on information and belief, extremely wealthy. If they succeed

in convincing the Town to interfere with the Fox Hill/McLean project, the defendants will have a direct FHA claim against the Town under precisely the same statute. Resolution of the federal question embedded in this case, now, will efficiently and effectively resolve the dispute and prevent future litigation. We therefore turn to the merits.

B. **The FHA is a Broad Remedial Statute that Protects *All* Disabled Persons**

The FHA makes it unlawful "[t]o 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 in connection with such dwelling, because of a handicap." 42 U.S.C. § 3604(f)(2); *see generally* 42 U.S.C. §§ 3604-3606. It defines discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). It defines handicap to mean a "physical or mental impairment which substantially limits one or more…major life activities." 42 U.S.C. § 3602(h). "Physical or mental impairment," in turn, has been defined to include drug addiction and alcoholism. 24 C.F.R. § 100.201(a)(2). The "reasonable accommodation" requirement imposes an affirmative duty on municipalities to modify local land use and zoning requirements when they would otherwise have the effect of discriminating against those protected by the FHA.[7] *See, e.g., Liddy v. Cisneros*, 823 F. Supp. 164, 176 (S.D. N.Y. 1993).

Unsurprisingly, courts have held that "[p]articipation in a supervised drug rehabilitation program, coupled with non-use, meets the definition of handicapped" and is protected by the FHA. *City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 804 (9th Cir.*

[7] The FHA also has a preclusive effect on 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…." 42 U.S.C. § 3615.

1994) aff'd sub nom. City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) *citing* 42 U.S.C. § 3602(h); *United States v. Southern Mgmt. Corp.* 955 F.2d 914, 918 (4th Cir. 1992) (individuals recovering from drug or alcohol are handicapped under the FHA, citing *inter alia* the attitudes of others towards this impairment). The First Circuit has addressed alcoholics in the context of the Rehabilitation Act (29 U.S.C. § 794 *et seq.*), which employs the same underlying definition, and consistently found alcoholics to be protected. *See, e.g., Leary v. Dalton*, 58 F.3d 748, 752 (1st Cir. 1995) ("It is well settled that alcoholism is a disability [*i.e*. handicap] within the meaning of the Act;" finding against the plaintiff on other grounds).[8] *Cf. also Sullivan v. City of Pittsburgh*, 811 F.2d 171, 182 (3rd Cir. 1987) (alcoholics meet the definition of handicap under the Rehabilitation Act); *Rogers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989) (alcoholism is a handicapping condition under the Rehabilitation Act); *Crewe v. U.S. Office of Personnel Mgmt*., 834 F.2d 140, 141-42 (8th Cir. 1987) ("alcoholism is a handicap for purposes of the [Rehabilitation] Act"). And Maine's own implementing statute protects community living arrangements. 30-A M.R.S.A. § 4357-A(2). Maine and federal law protect such programs.

C. **The Plaintiff's Proposed Carve-Out has No Basis in the Text of the FHA**

The plaintiffs do not challenge the foregoing. They admit that that the FHA was "instituted to prevent discrimination against . . . persons utilizing small group living arrangements to rejoin society." (Complaint ¶ 38).

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[8] *See also Leary*, 58 F.3d at n.1 ("In 1992, the Rehabilitation Act was amended to substitute the term 'disability' for 'handicap.' The regulations promulgated under the Act, however, continue to employ the term 'handicap'.") Post 1992, when courts use the term "disability" under the Act, it is essentially a synonym for the term "handicap." *Cf. U.S. v. Southern Mgmt*., 955 F.2d at 918 n. 1 ("The term 'handicap' has the same meaning in both the FHA and the 1973 Recovery Act."); *Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450, 459 (D.N.J. 1992) ("the definition of handicap in the Fair Housing Act was taken directly from § 504 of the Rehabilitation Act, 29 U.S.C. § 794, which has consistently been interpreted by the courts to cover alcoholics and drug addicts.").

Instead, they contend the FHA carves out an exception for wealthy people. As noted above, the plaintiffs' description of the proposed facility and the plaintiffs' request for declaratory judgment both focus on various aspects of the patients' "wealth." The plaintiffs are asking the court to find an FHA carve-out for wealthy people, one that would allow the neighbors and/or the Town to discriminate against such people.[9]

The FHA does not support this notion. It says nothing about well-educated persons or wealthy persons or persons from in-tact families being exempt from the FHA. Nothing in 42 U.S.C. §§ 3604-3606 even approaches the plaintiffs' construction. The FHA does make several exemptions, *e.g.* for certain religious organizations, private clubs, persons that have been convicted of illegally manufacturing or distributing controlled substances, and for appraisals. *See* 42 U.S.C. §§ 3603(b)(1); 3605(c); 3607(a), (b)(4). The FHA includes no exemption for "wealthy persons." *Id.*[10]

D. The Plaintiff's Proposed Rule has No Basis in the Legislative History of the FHA

Even if there were some of ambiguity in the text of the FHA (there is none), the legislative history of the FHA cuts against the plaintiffs' proposed construction.

Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act of 1968, Pub.L. 90–284, 82 Stat. 81. It initially prohibited discrimination on the basis of race, color,

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[9] We note that, in this sense, the case is ripe for adjudication. The plaintiffs' proposed statutory construction is erroneous regardless of which patients actually show up on day one. There will be no need to examine their finances or bank statements; the plaintiffs' construction fails now.

[10] Even if the plaintiffs could posit a correlation between a defined exemption and wealth (we see none), any exemption must be read narrowly in the FHA, a "broad remedial statute." *City of Edmonds*, 18 F.3d at 804.

religion, or national origin. Congress extended protection to handicapped persons in the Fair Housing Amendments Act of 1988, Pub.L. 100–430, 102 Stat. 1619. The House Report states:

> Just like any other person with a disability, such as cancer or tuberculosis, former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery.

H.R.Rep. No. 711, 100th Cong., 2d Sess. 22 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2183 *available at* 1988 WL 169871. The legislative history is completely silent as to wealth. The words "wealth," "wealthy," and "rich" appear nowhere in the House Report. *See id*. The word "poor" appears once, but in connection with a different bill, not the FHA. 1988 U.S.C.C.A.N. at 2173-74. The word "money" appears only once, buried deep in an irrelevant proposed (and rejected) amendment concerning enforcement mechanisms. *Id.* at 2215. In short, in over 22,000 words – spanning 57 pages of U.S.C.C.A.N – the Congressional record is *completely silent* on the question of wealth. It simply wasn't discussed. Neither wealth nor any of the variations thereof proposed by the plaintiffs were ever carved out. There is simply no basis for the plaintiffs' claim.

The FHA protects *all* recovering alcoholics. The plaintiffs' proposed carve-out fails. The Complaint should be dismissed.

CONCLUSION

For the foregoing reasons set forth more fully above, defendants Fox Hill and McLean Hospital respectfully request that the Court dismiss the plaintiffs' Complaint with prejudice for failure to state a claim for which relief may be granted and grant any other relief the Court deems just.

Respectfully submitted,

FOX HILL REAL ESTATE, LLC and MCLEAN HOSPITAL,

By their attorneys,

/s/ Timothy R. Shannon
Timothy R. Shannon
Scott D. Anderson
VERRILL DANA, LLP
One Portland Square
P.O. Box 586
Portland, ME 04112-0586
Tel: (207) 774-4000
tshannon@verrilldana.com
sanderson@verrilldana.com

Dated: May 23, 2014

CERTIFICATE OF SERVICE

I, Timothy R. Shannon, hereby certify that on May 23, 2014, I caused a true and accurate copy of this document to be electronically filed with the Clerk of Court using the CM/ECF system, thereby serving all counsel of record.

/s/ Timothy R. Shannon