UNPUBLISHED CASES

2002 WL 31951272
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United States District Court, S.D. Ohio, Eastern Division.

Jessie HAMM, et al., Plaintiffs,
v.
CITY OF GAHANNA, OHIO, et al., Defendants.

No. C–2–96–0878.
|
Dec. 23, 2002.

OPINION AND ORDER

SMITH, J.

***1** Plaintiffs assert claims under three federal Acts: the Fair Housing Act ("FHA"), as amended by the Fair Housing Amendments Act ("FHAA"), the Americans with Disabilities Act ("ADA"), the Rehabilitation Act ("RA"), and Ohio's Fair Housing Act ("OFHA"), seeking injunctive relief and monetary damages. Plaintiffs allege that defendants acted with discriminatory animus when they refused to approve a zoning change to allow plaintiffs to build homes in a residential neighborhood in Gahanna, Ohio for individuals who are elderly or disabled. Plaintiffs also assert disparate impact, and contend defendants failed reasonably to accommodate the needs of disabled persons when they denied plaintiffs' request for a zoning change. Defendants move for summary judgment (Doc. 39). For the following reasons the Court grants defendants' summary judgment motion.

I. Facts

A. Procedural history

This matter initially came before the Court on plaintiffs' motion for a temporary restraining order, which motion the Court declined to grant. The parties engaged in discovery, after which defendants filed a motion for summary judgment (39) on March 10, 1998. Plaintiff responded, and the parties continued to submit additional briefs on the motion through January 24, 2000.

The Court conducted a settlement conference on January 25, 2000. At the conclusion of the conference, plaintiffs agreed temporarily to stay proceedings in this case while they re-submitted their request for a zoning change to an essentially new City Council. The Court then stayed and closed this case administratively (Doc. 64).

Plaintiffs then reapplied for the zoning change, and a more recently-elected Gahanna City Council granted it. Thus, plaintiffs obtained a large part of what they sought in this lawsuit through their claim for injunctive relief. Their claim for monetary damages, however, remained. On two occasions since the time they obtained the variance, plaintiffs asked the Court to set this matter for a settlement conference. Both times, however, defendants declined to participate in light of their pending summary judgment motion. Unfortunately, the matter was nonetheless set for a conference and, as a result of administrative mistake, plaintiffs were not informed that the conference had been canceled as a result of defendants' refusal to participate. As the parties are well aware, the Court cannot and will not seek to force the settlement of any matter.

The Court now reopens this case to rule on defendants' summary judgment motion.

B. Facts Underlying Plaintiffs' Claims

Plaintiffs Jessie and Albert Hamm are individual citizens of the State of Ohio. They live in a house located on a 5.1 acre track in City of Gahanna, Ohio.

Defendant Gahanna is a political subdivision of Ohio. It has about 36,000 residents.

Plaintiffs sue the following defendants in their individual capacities: James McGregor was the Mayor of Gahanna during the relevant period. Dorothy Micacchion, L. Nicholas Hogan, Maurice Bittner and Sherrie James–Arnold were all members of the Gahanna City Council during the relevant period. The Court takes judicial notice that none of these individuals currently serve in the government of Gahanna. *See http://www.gahanna.org/government/citycouncil/;* Fed.R.Evid. 201.

***2** The basic facts are fairly straightforward. In 1994 and 1995 plaintiffs contacted officials of the City of Gahanna about building housing for the elderly and disabled on their property. Plaintiffs prepared a request for a zoning change in accordance with the directions provided by City officials. Plaintiffs then went to the Gahanna Planning Commission,

which voted 5–0 in plaintiffs' favor, recommending that Gahanna City Council approve the requested zoning change.

During regular meetings in held in April, May and June 1995, Gahanna City Council considered plaintiffs' proposal. Plaintiffs were given the opportunity to speak in support of their request. Several of plaintiffs' neighbors, led by neighbor Don Tufto, were given the opportunity to speak in opposition to plaintiffs' request. Opponents were also represented by legal counsel, John Albers, who argued presented an oral argument and a written memorandum to City Council. The gist of the opponents' arguments was that plaintiffs' plan, if approved, would lower the value of surrounding property. They presented the opinion of a realtor in support of this contention. The opponents relied to a lesser extent on concerns about increased traffic and about one neighbor's property being landlocked. There were, however, no statements made to City Council that could reasonably be construed as direct evidence of discriminatory animus against disabled persons. [1]

The Council voted 3–3, with one abstention, to deny the zoning change, which would have required a majority vote. The three Council members who voted against plaintiffs' request say they did so, *inter alia,* because of plaintiffs' refusal to subdivide their property and dedicate a public street that would connect to the property of plaintiffs' landlocked neighbor.

II. Summary Judgment

The standard governing summary judgment is set forth in Fed.R.Civ.P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *see also* *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150–51 (2000). [2] The Court disregards all evidence favorable to the moving party that the jury would not be not required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

***3** The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby, Celotex,* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1476 (6th Cir.1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment." ' *Id.* (quoting *Liberty Lobby,* 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely " 'show that there is some metaphysical doubt as to the material facts." ' *Id.* (quoting *Matsushita,* 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of

material fact." *Id.* at 1479–80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris,* 260 F.3d 654, 665 (6th Cir.2001).

III. Discussion

The law governing plaintiffs' claims has advanced significantly over the past three years. In several recent decisions, federal circuit courts have refined the principles applicable to claims under the FHA, ADA and RA concerning zoning decisions that adversely affect homes for the disabled. *See Oconomowac Resid. Prog., Inc. v. Milwaukee,* 300 F.3d 775 (7th Cir.2002); *Regional Econ. Comty. Action Program, Inc. v. City of Middletown ("RECAP"), Inc. v. Middletown,* 294 F.3d 35 (2nd Cir.2002); *MX Group, Inc. v. Covington,* 293 F.3d 326 (6th Cir.2002); *see also Bay Area Addiction Research and Treatment, Inc. v. City of Antioch ("BART"), Inc. v. Antioch,* 179 F.3d 725 (9th Cir.1999). The Sixth Circuit has put to rest defendants' argument that plaintiffs lack standing to assert their claims under the ADA and the RA. *MX Group,* 293 F.3d at 335. The recent circuit court decisions also foreclose defendants' contention that the ADA and RA do not apply to legislative zoning decisions. *Id.* at 332; *Oconomowac,* 300 F.3d at 782; *RECAP,* 294 F.3d at 45–46; *BART,* 179 F.3d at 732.

Congress enacted the FHA "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S .C. § 3601. The amendments to the Fair Housing Act, contained in the FHAA, specifically prohibit discrimination in housing on the basis of disability. 42 U.S.C. § 3604(f). The FHAA makes it illegal

> ***4** (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—(A) that buyer or renter, ... (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 in connection with such dwelling, because of a handicap of—(A) that person.

42 U.S.C. § 3604(f)(1)-(2). The FHA serves as "a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals." *Bronk v. Ineichen,* 54 F.3d 425, 428 (7th Cir.1995). It prohibits as discrimination "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). The FHAA defines handicap as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." 42 U.S.C. § 3602(h).

"Congress explicitly intended for the FHAA to apply to zoning ordinances and other laws that would restrict the placement of group homes." *Oconomowac,* 300 F.3d at 782 (citing 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 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).

From a broader perspective, the ADA "provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA provides, "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 any such entity." 42 U.S.C. § 12132. The ADA does not explicitly define "services, programs, or activities." Nonetheless, 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. Courts that have considered the issue have held that the ADA clearly encompasses zoning decisions by local government entities. *RECAP,* 294 F.3d at 44–46; *BART,* 179 F.3d 725, 730 (9th Cir.1999). The definition of a disability under the ADA is substantively identical to that in the FHAA. 42 U.S.C. § 12102(2).

Mindful of these principles, the Court will proceed to address plaintiffs' three theories of liability: (1) intentional discrimination; (2) disparate impact; and (3) failure reasonably to accommodate. The Court will then discuss issues pertaining individual capacity, plaintiffs' state law claim, and, finally, damages.

A. Intentional Discrimination

***5** One of plaintiffs' theories for recovery is that defendants' refusal to grant a zoning variance was motivated by discriminatory animus expressed to defendants by various citizens opposed to plaintiffs' plan to build homes for the disabled. Defendants maintain that plaintiffs cannot demonstrate discriminatory animus, and that in any event they have stated a legitimate, non-discriminatory reason for their decision, and that plaintiff cannot demonstrate that the stated reason is a mere pretext for discrimination.

The Court addresses claims of intentional discrimination in the context of a zoning decision under the burden-shifting analysis established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). *RECAP,* 294 F.3d at 48–49; *Smith & Lee Assoc. v. City of Taylor, Michigan,* 102 F.3d 781, 790–91 (6th Cir.1996).

To establish a prima facie case of intentional discrimination under the FAA or ADA, the plaintiff must adduce evidence from which a trier of fact may infer that the defendant's zoning decision was motivated at least in part by discriminatory animus. *Smith & Lee,* 102 F.3d at 791. To establish a prima facie case under the RA, however, the plaintiff must show that defendant's decision was based solely on discriminatory animus. *RECAP,* 294 F.3d at 49. Discriminatory intent may be inferred from the totality of the circumstances, including the events surrounding the decision and statements made by the decision-makers contemporaneously with the decision. *RECAP,* 294 F.3d at 49. A decision made in the context of strong, discriminatory opposition is tainted with discriminatory animus even if the decision-makers have no strong views on the issue. *Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 49 (2nd Cir.1997). Nonetheless, the mere fear that a proposed use of property for the disabled may cause property values to decline is not necessarily evidence of discriminatory animus. *Smith & Lee,* 102 F.3d at 793.

Once the plaintiff establishes a prima facie case, the burden then shifts to the defendant to prove that it would have made the same decision even if it had not been motivated by an unlawful purpose. *Smith & Lee,* 102 F.3d at 791; *RECAP,* 294 F.3d at 49. If the defendant in turn meets its burden, then the burden shifts to plaintiff to demonstrate that the legitimate, nondiscriminatory reason defendants have provided for their decision is a mere pretext for discrimination. *RECAP,* 294 F.3d at 49.

Turning to the facts of this case, plaintiff stresses that opponents expressed discriminatory animus to defendants at the Gahanna City Council Meeting on June 6, 1995. James Albers, an attorney who represented the opponents of plaintiffs' planned development, said the following:

> If you leave here with only one thought before you vote. Or you won't leave if you only have one thing to consider and put all of the legal matters aside, it is what is the impact on the economics of the neighborhood. You don't have one opinion to the contrary and that's why I asked last week is there any more evidence coming in? *This idea is a warm and fuzzy one to put up homes for the elderly. It's a nice idea. We talked about how it's not working in a lot of places. I can see why it has some appeal emotionally, but as a practical matter, it simply makes no sense. This is not the place for it. The neighbors don't want it.* (emphasis added).

***6** Plaintiffs also refer to a comment by Mr. Tufto, who said, "don't let these people cheapen your neighborhood."

Plaintiffs additionally refer to comments of opponents to the effect that plaintiffs' proposed plan would lower the value of their property. Plaintiffs contend that some individual defendants indicated that their vote was motivated, at least in part, by a concern that plaintiffs' plan may adversely affect the value of neighbors' property. From this, plaintiffs infer that defendants bowed to the pressure of biased opponents when they denied their request for a zoning variance.

The Court finds that, even when this evidence is viewed in the light most favorable to plaintiffs, it amounts to no more than a scintilla of evidence of discriminatory animus. First, viewing the totality of the evidence, the Court finds that it is unreasonable to infer that opponents' or defendants' concerns about property values were tied to any stereotyping or prejudice toward the disabled. Mr. Albers said plaintiff's plan was "a nice idea." He was conceding the merit of plaintiff's plan, but opposed it because he felt it might adversely affect property values. He did not deride or criticize the disabled in any way. Similarly, saying that plaintiffs' plan was "warm and fuzzy" was merely a clumsy way of imploring defendants not to make their decision based on whatever emotional appeal plaintiffs' plan may have had. Hence, this is not like cases involving group homes for the mentally ill or drug rehabilitation, in which opponents directly voiced their fears of the prospective residents, based on widely held stereotypes of the mentally ill or recovering drug addicts.

Neighbor Don Tufto's statement is likewise devoid of discriminatory animus. In context, "these people" obviously refers to plaintiffs, not the disabled. Indeed, viewing the totality of the evidence, it is abundantly clear that plaintiffs' neighbors were simply opposed to *any* commercial development of plaintiffs' property.

The only clear statements of discriminatory animus were made not to City Council, but to the Planning Commission. For example, one neighbor, Roy Helman, told the Planning Commission, not City Council, that plaintiffs' planned housing "could be a halfway house situation with drug addicts and alcoholics; don't want people like these in my back yard." The Commission presumably rejected any such discriminatory statements, as it voted unanimously to approve plaintiffs' plan. Even if defendants were aware of such statements from the written minutes of the Commission meeting, they are, in this context, a mere scintilla of evidence of discriminatory animus, and fall far short of the kind of strong, discriminatory opposition that could be deemed to taint the decision-making process of City Council.

At most, plaintiffs are able to show that defendants considered neighbors' concerns about the possible adverse affect that plaintiffs' plan would have on the value of surrounding property. The only evidence before City Counsel on this matter supported the truth of the opponents' assertion. In the circumstances this case presents, and in the absence of any direct evidence of discriminatory animus against the disabled on the part of defendants, the Court finds that the mere consideration of the affect of the planned development on property value is not evidence of discriminatory animus. *See* *Smith & Lee,* 102 F.3d at 793. Defendants are therefore entitled to summary judgment in their favor on plaintiffs' claims of intentional discrimination under the FHAA, the ADA, and the RA.

B. Disparate Impact

***7** Plaintiffs contend that in denying plaintiffs' request for a zoning change, defendants treated the matter differently than requests not involving housing for the disabled.

> "A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group." Huntington Branch, NAACP, 844 F.2d at 933. To establish a prima facie case under this theory, the plaintiff must show: "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir.1997) (internal quotation marks and citation omitted); see also Huntington Branch, NAACP, 844 F.2d at 934.
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> For example, a handicapped person might challenge a zoning law that prohibits elevators in residential dwellings. That neutral law might have a disproportionate impact on such a plaintiff and others with similar disabilities, depriving them of an equal opportunity to use and enjoy dwellings there.

RECAP, 294 F.3d at 52–53. In contrast, where a claim does not challenge a facially neutral policy or practice, but challenges one specific act, no comparison of the act's

disparate impact on different groups of people is possible, and such a claim is not cognizable under a disparate impact theory. *Id.* at 53.

Here, plaintiffs challenge defendants' single act of denying plaintiffs' request for a zoning variance. As a result, plaintiffs fail to state a claim of disparate impact. Defendants are therefore entitled to summary judgment in their favor on plaintiffs' disparate impact claims.

C. Reasonable Accommodation

Plaintiffs also assert that by denying the request for a zoning variance, defendants failed reasonably to accommodate plaintiffs' proposed plan to create housing for the disabled.

The FHAA requires accommodation if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a handicapped person the equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B); see also *Oconomowoc,* 300 F.3d at 782; *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 Assoc. v. City of Taylor, Michigan,* 102 F.3d 781, 794 (6th Cir.1996). The requirements for reasonable accommodation under the ADA and RA are the same as those under the FHAA. 42 U.S.C. § 12131(2); *Dadian v. Village of Wilmette,* 269 F.3d 831, 838 (7th Cir.2001)(analyzing the requirement to reasonably accommodate under the ADA and FHAA as one); *Erdman v. City of Fort Atkinson,* 84 F.3d 960, 962 (7th Cir .1996) ("reasonable accommodation" in the FHAA is interpreted by analogy with the same phrase in the Rehabilitation Act), *Gile v. United Airlines, Inc.,* 95 F.3d 492, 497 (7th Cir.1996) (definition of "reasonable accommodation" in the Rehabilitation Act is the same as that in the ADA).

***8** Under these Acts, a public entity must reasonably accommodate a qualified individual with a disability. *Dadian,* 269 F.3d at 838; *see also* 28 C.F.R. § 35.130(b)(7) (in regulations interpreting Title II of the ADA, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity"). The " 'reasonable accommodation' provision prohibits the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled." *Hovsons, Inc. v. Township of Brick,* 89 F.3d 1096, 1104 (3d Cir.1996) (internal citation omitted).

The plaintiffs bear the burden of showing that the accommodation sought is reasonable. *US Airways, Inc. v. Barnett,* 535 U.S. 391, ——, 122 S.Ct. 1516, 1523 (2002). If the plaintiffs make this prima facie showing, the defendant must come forward to demonstrate unreasonableness or undue hardship. *Id.; see also Vande Zande v. Wisconsin Dep't of Admin.,* 44 F.3d 538, 543 (7th Cir.1995). This burden-shifting analysis also applies to the "necessary" and "equal opportunity" elements of the requirement because " 'a plaintiff is in the best position to show what is necessary to afford its clients (i.e., the handicapped population that it wishes to serve) an equal opportunity to use and enjoy housing, [while] a defendant municipality is in the best position to provide evidence concerning what is reasonable or unreasonable within the context of the zoning scheme." ' *Oconomowoc,* 300 F.3d at 783 (quoting *Lapid–Laurel, L.L.C.,* 284 F.3d at 458–59).

The Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits require a plaintiff to make an initial showing that an accommodation is reasonable, but then places the burden on the defendant to show that the accommodation is unreasonable. *See e.g., Oconomowoc,* 300 F.3d at 783–84 (7th Cir.); *Lapid–Laurel, L .L.C.,* 284 F.3d at 457; *Vinson v. Thomas,* 288 F.3d 1145, 1154 (9th Cir.2002), *petition for cert. filed,* No. 01–1878 (June 20, 2002); *Jackan v. New York State Dep't of Labor,* 205 F.3d 562, 566 (2d Cir.2000), *cert. denied,* 531 U.S. 931 (2000); *Fjellestad v. Pizza Hut of America, Inc.,* 188 F.3d 944, 950 (8th Cir.1999); *White v. York Int'l Corp.,* 45 F.3d 357, 361 (10th Cir.1995).

Whether a requested accommodation is reasonable requires a balancing of the needs of the parties. *Oconomowoc,* 300

F.3d at 784. An accommodation is reasonable if it is both efficacious and proportional to the cost of implementation. *Id.* "An accommodation is unreasonable, however, if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program." *Id.* 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." *Id.* (quoting *Dadian,* 269 F.3d at 838–39).

***9** "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). That is, to demonstrate necessity, the plaintiffs must show that without the requested accommodation they will be denied the equal opportunity to live in a residential neighborhood. *Oconomowac,* 300 F.3d at 784.

"Equal opportunity" means the chance to choose to live in a residential neighborhood. *Lapid–Laurel, L.L.C.,* 284 F.3d at 460; *Smith & Lee Assoc.,* 102 F.3d at 794. The FHAA "prohibits local governments from applying land use regulations in a manner that will ... give disabled people less opportunity to live in certain neighborhoods than people without disabilities." *Smith & Lee Assoc.,* 102 F.3d at 795 (internal citation omitted). Community-based residential facilities often provide the only means by which disabled persons can live in a residential neighborhood. *Erdman,* 84 F.3d at 963; *Brandt v. Village of Chebanse, Illinois,* 82 F.3d 172, 174 (7th Cir.1996); *Larkin,* 89 F.3d at 291; *Hovsons, Inc.,* 89 F.3d at 1105; *Smith & Lee Assoc.,* 102 F.3d at 795–96. If a zoning authority refuses reasonably to accommodate small group community living facilities, it denies disabled persons an equal opportunity to live in the community of their choice. *Oconomowac,* 300 F.3d at 784; *Erdman,* 84 F.3d at 963.

In the instant case, plaintiffs acknowledged to defendants that they could proceed with their proposed plan without the zoning change because they had the option of subdividing their property. For this reason alone, the Court finds as a matter of law that plaintiffs are unable to demonstrate that the requested accommodation was necessary. In other words, the plaintiffs cannot show that without the requested accommodation the disabled would be denied the equal opportunity to live in this specific residential neighborhood. Defendants are therefore entitled to summary judgment in their favor on plaintiffs' reasonable accommodation claims.

D. Individual Capacity Claims and Immunity

Although the above rulings are dispositive of plaintiffs claims, the Court will nonetheless examine immunity as an alternative basis for its decision as to the individual defendants. Plaintiffs sue the individuals who were, at the relevant times, members of the Gahanna City Council. Defendant argues that to the extend plaintiffs assert claims against these persons in their individual capacities, defendants are entitled to dismissal on the bases of legislative immunity or qualified immunity. In their Memorandum Contra (Doc. 52) plaintiffs do not attempt to refute defendants' arguments on this issue. The Court finds that to the extent defendants are sued in their individual capacities, they are immune from suit under the doctrine of legislative immunity, *see Bogan v. Scott–Harris,* 523 U.S. 44, 52 (1998), or the doctrine of qualified immunity, *see Conn v. Gabbert,* 525 U.S. 286, 290 (1999). Plaintiffs also fail to dispute defendants' contention that the City of Gahanna and the individual defendants are immune from plaintiffs state law OFHA claim. *Enghauser Mfg. Co. v. Eriksson Engineering Ltd.,* 6 Ohio St.3d 31 (1983)(syllabus by the court, ¶ 2); Ohio Rev.Code § 2744.03. Therefore, in the alternative to the above rulings on the merits of plaintiffs' claims, the Court dismisses all of plaintiffs' individual capacity claims, and plaintiffs' claim under the OFHA.

E. Damages

***10** Aside from issues pertaining to liability, defendants argue that plaintiffs cannot state a claim for punitive damages, and that their claim for lost profits is too speculative to support an award of damages. Although the above rulings are dispositive of plaintiffs' claims, the Court will examine damages as a partial alternative basis for its decision.

1. Punitive Damages

Plaintiffs request punitive damages in their Amended Complaint (Doc. 27). Defendants argue that plaintiffs' punitive damages claim fails because all individual capacity claims are subject to dismissal, and the only remaining defendant is the municipality, which is immune from punitive damages. *See* *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 (1981) (municipalities not liable for punitive damages under § 1983) ("Judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions."). Plaintiffs do not dispute issue. The Court dismisses plaintiffs' claim for punitive damages.

2. Lost Profits

Defendants argue that because plaintiffs' proposed housing project was a new venture, which had not yet made any profit, any request for damages based upon lost profits would be too speculative to submit to a jury.

> While the nature of a new venture may make it difficult to recover lost profits by establishing all of the elements of the general rule, such damages are not barred as a matter of law. This is consistent with the weight of modern authority, as explained in Robert L. Dunn, *Recovery of Damages for Lost Profits* § 4.3 (5th ed.1998):
>
> > Most recent cases reject the once generally accepted rule that lost profits damages for a new business are not recoverable. The development of the law has been to find damages for lost profits of an unestablished business recoverable when they can be adequately proved with reasonable certainty.... What was once a rule of law has been converted into a rule of evidence.
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> > *Id.* In a similar vein, the Seventh Circuit has quoted approvingly the following statement by the Alabama Supreme Court:
> >
> > [T]he weight of modern authority does not predicate recovery of lost profits upon the artificial categorization of a business as "unestablished," "existing," or "new" particularly where the defendant itself has wrongfully prevented the business from coming into existence and generating a track record of profits. Instead the courts focus on whether the plaintiff has adduced evidence that provides a basis from which the jury could with "reasonable certainty" calculate the amount of lost profits.... [T]he risk of uncertainty must fall on the defendant whose wrongful conduct caused the damages.
>
> *Mid–America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1366 (7th Cir.1996) (quoting *Super Valu Stores, Inc. v. Peterson*, 506 So.2d 317, 327–30 (Ala.1987)); *see also* *DSC Communics. Corp. v. Next Level Communics.*, 107 F.3d 322, 329–30 (5th Cir.1997) (affirming award of profits based on expert testimony regarding projected sales of "revolutionary new product" yet to enter market); *In re Merritt Logan, Inc.*, 901 F.2d 349, 357–59 (3rd Cir.1990) (affirming award of profits for new venture, based on plaintiff's contemporaneous projections of expected sales and expert testimony that forecasts were reasonable); *Computer Sys. Eng'g, Inc. v. Qantel Corp.*, 740 F.2d 59, 67 (1st Cir.1984) (affirming award of profits to new business based on expert testimony).

***11** *Energy Capital Corp. v. United States*, 300 F.3d 1314, 1326–27 (Fed.Cir.2002). In sum, the most recent authorities hold that lost profits are not per se unavailable in cases involving new businesses.

Here, it is undisputed that plaintiffs have no experience whatsoever in operating group homes. They had not taken any concrete steps to begin the business. Hence, the business was not new, rather it did not yet exist. Plaintiffs' only evidence to support lost profits are figures derived from the business records of Jerry Poff, who operated two facilities for the elderly or disabled in London, Ohio. The figures Mr. Poff provided plaintiffs reflected a business that had been in operation for three years. Plaintiffs assumed, without any apparent basis in evidence, that they would have full occupancy of their group homes immediately following completion of construction. Although the Court is mindful that there is no per se rule against an award of lost profits to a new business, in the specific circumstances this case presents, no rational trier of fact could say with reasonable certainty that plaintiffs would have enjoyed the same profits realized by a different business, in a different location, that had been in operation for three years. For this reason the Court holds that defendants are entitled to summary judgment in their favor on plaintiffs' claim for lost profits. [3]

IV. Disposition

Based on the above, the Court GRANTS defendant's summary judgment motion (Doc. 39).

The Clerk shall REOPEN this case and enter final judgment in favor of defendants, and against plaintiffs, dismissing this action in its entirety with prejudice.

The Clerk shall then remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31951272

Footnotes

1 It appears, however, that several statements evidencing discriminatory animus were made to the Planning Commission. The most blatant of these was by Roy Helman, who told the Commission that plaintiffs' planned housing “could be a halfway house situation with drug addicts and alcoholics; don't want people like these in my back yard.” The Commission presumably rejected any such discriminatory statements, as it voted unanimously to approve plaintiffs' plan.

2 *Reeves* involved a motion judgment as a matter of law made during the course of a trial under Fed.R.Civ.P. 50 rather than a pretrial summary judgment under Fed.R.Civ.P. 56. Nonetheless, standards applied to both kinds of motions are substantially the same. One notable difference, however, is that in ruling on a motion for judgment as a matter of law, the Court, having already heard the evidence admitted in the trial, views the entire record, *Reeves,* 530 U.S. at 150. In contrast, in ruling on a summary judgment motion, the Court will not have heard all of the evidence, and accordingly the non-moving party has the duty to point out those portions of the paper record upon which it relies in asserting a genuine issue of material fact, and the court need not comb the paper record for the benefit of the nonmoving party. *In re Morris,* 260 F.3d 654, 665 (6th Cir.2001). As such, *Reeves* did not announce a new standard of review for summary judgment motions.

3 This is not to say, however, that plaintiffs would not be entitled to damages other than lost profits or punitive damages if they prevailed on the merits of their claims.