

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN AND RUTH DISCHER,                    )  
  )  
      Petitioners,                            )  
  )  
vs.    )     Case No. 08-0603  
  )  
MONROE COUNTY COMMISSIONERS,         )  
  )  
      Respondent.                            )  
\_\_\_\_\_                                      )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 16, 2008, in Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John and Ruth Discher, pro se  
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For Respondent: Robert B. Shillinger, Jr., Esquire  
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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent discriminated against Petitioners in violation of the Fair Housing Act by failing to release them from a 20-year affordable housing deed restriction.

PRELIMINARY STATEMENT

John and Ruth Discher filed a fair housing discrimination complaint against the Monroe County Commissioners (Monroe County) with the U.S. Department of Housing and Urban Development (HUD). The complaint was investigated by the Florida Commission on Human Relations (FCHR). The Dischers alleged that Monroe County discriminated against them through its failure to make a reasonable accommodation by refusing to release them from a 20-year affordable housing deed restriction. On January 7, 2008, the FCHR issued a Determination of No Reasonable Adverse Cause (No Cause) determining that no reasonable cause existed to believe that a discriminatory housing practice had occurred.

The Dischers timely filed a Petition for Relief from a housing discriminatory practice with FCHR against Monroe County. On February 1, 2008, FCHR referred this matter to the Division of Administrative Hearings.

At hearing, the Dischers testified in their own behalf and entered nine exhibits (Petitioner's Exhibits numbered 1, 2, 4-9, and 12) into evidence.<sup>1</sup> Monroe County presented the testimony of four witnesses and entered seven exhibits (Respondent's Exhibit numbered 1-5, 9, and 10) into evidence. Official Recognition was taken of Florida Administrative Code Rule 28-20.110, Monroe County's Comprehensive Plan; and Chapter 380, Florida Statutes.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the transcript. The Transcript, consisting of two volumes, was filed on July 7, 2008. Prior to filing its post-hearing submission, Monroe County filed a Motion to Relinquish Jurisdiction (Motion) on August 1, 2008, which, in essence, alleges that the Dischers failed to meet its burden at hearing and requests an order dismissing the Dischers' housing complaint. This Recommended Order addresses whether the Dischers met their burden and recommends an action for the FCHR to take; therefore, the Motion is denied but the ground for the Motion is addressed in this Recommended Order. The parties timely filed their post-hearing submissions, which were considered in the preparation of this Recommended Order.<sup>2</sup>

#### FINDINGS OF FACT

1. No dispute exists that Mr. Discher is handicapped, as indicated in his medical records, for purposes of the Fair Housing Act.

2. John and Ruth Discher own the property located at 22916 Bluegill Lane, Cudjoe Key, Florida, with the following legal description: Lot 32, Block 10, Cudjoe Ocean Shores, as recorded in Plat Book 6, Page 76, of the Public Records of Monroe County, Florida.

3. At the time of hearing, the Dischers did not live in the residential home on the property but rented it.

4. No dispute exists that Monroe County is a political subdivision of the State of Florida having regulatory jurisdiction over the Dischers' property.

5. Since around 1979, Monroe County has been designated as an Area of Critical State Concern (ACSC).

6. As an ACSC, increased State oversight of and involvement in local planning decisions is required by the Governor and Cabinet, sitting as the Florida Administrative Commission, and the Department of Community Affairs (DCA), as the State land planning agency.

7. The Florida Legislature imposed a series of "principles for guiding development" in the Florid Keys. § 380.0552(7), Fla. Stat. One of the principles for guiding development imposed by the State is "to make available adequate affordable housing for all sectors of the population of the Florida Keys." § 380.0552(7)(j), Fla. Stat.

8. In 1992, the Rate of Growth Ordinance (ROGO) was adopted by the Florida Administrative Commission on behalf of Monroe County in order to limit growth in the Keys. The purpose and intent of ROGO was to facilitate implementation of goals, objective and policies set forth in Monroe County's comprehensive plan relating to many areas of concern, including

the protection of the environment (including endangered species and species on the concerned list), residents, and visitors; hurricane evacuation; road improvement; property and property development. ROGO consists of a competitive point system, based on a complex scoring system, and those who obtain the top points receive allocations. Point values are accessed on and using a number of criteria.

9. Under the ROGO system, property owners, who wish to build houses on vacant land, must compete to receive a limited number of residential allocations. The yearly number of building allocations is limited by state administrative rule. Property owners seeking building allocations compete against each other in order to receive one of the limited number of allocations.

10. In 1996, Monroe County's comprehensive plan was effective. Prior to 1996, Monroe County received very few applicants for ROGO; however, after the comprehensive plan became effective the competition under ROGO increased tremendously. Developers and persons with high economic means became the majority of those able to receive points in order to obtain the majority of the limited allocations. With the increase in competition, affordable housing became a concern.

11. The ultimate goal of Monroe County under the ACSC program is for it (Monroe County) to get into the position of

being able to protect the environmental resources, provide for hurricane evacuation, and do everything that is required in Chapter 380, Florida Statutes, and be removed or "de-designated" as an ACSC.

12. Applicable to the instant matter, affordable housing was defined in Monroe County Code, Land Development Regulations, Section 9.5-4, which provided in pertinent part:

(A-5) Affordable housing means housing which:

\* \* \*

(c) With respect to a housing unit to be occupied by moderate-income persons, that monthly rents, or monthly mortgage payments, including taxes and insurance, do not exceed thirty (30) percent of that amount which represents one hundred twenty (120) percent of the median adjusted gross annual income for households within Monroe County, divided by 12 for a period of twenty (20) years. The dwelling unit must also meet all applicable requirements of the United States Department of Housing and Urban Development minimum property standards as to room sizes, fixtures, landscaping and building materials, when not in conflict with applicable laws of Monroe County.

(d) For the purposes of this section, "adjusted gross income" means all wages, assets, regular cash or noncash contributions or gifts from persons outside the household, and such other resources and benefits as may be determined to be income by rule of the department of community affairs, adjusted for family size, less deductions allowable under section 62 of the Internal Revenue code; and

(e) In which, if permitted by law, preference is given to local contractors.

The threshold for a household's income to qualify for affordable housing was set by this regulation.

13. Further, Monroe County Code, Land Development Regulations, Section 9.5-266, applicable to the instant matter, provided in pertinent part:

(a) Affordable Housing:

(1) Notwithstanding the density limitation in section 9.5-262, the owner of a parcel of land shall be entitled to develop affordable housing as defined in section 9.5-4(A-5). . . .

\* \* \*

(3) Before any certificate of occupancy may be issued for any structure, portion or phase of a project subject to this section, restrictive covenant(s), limiting the required number of dwelling units to households meeting the income criteria described in paragraph (4)(a)-(f) of this subsection (a) running in favor of Monroe County and enforceable by the county, shall be filed in the official records of Monroe County. The covenant(s) shall be effective for twenty (20) years but shall not commence running until a certificate of occupancy has been issued by the building official for the dwelling unit or units to which the covenant or covenants apply.

(4) In order for the owner of a parcel of land to be entitled to the incentives outlined in this section, the owner must ensure that:

a. The use of the dwelling is restricted to households that derive at least seventy (70) percent of their household income from gainful employment in Monroe County; and

\* \* \*

e. The use of the dwelling is restricted for a period of at least twenty (20) years to households with an income no greater than one hundred twenty (120) percent of the median household income for Monroe County . . . .

This regulation sets the limitation for covenants at 20 years, with the time period beginning to run at the issuance of the certificate of occupancy by the building department.

14. Under the ROGO plan, a person was awarded additional points if the person agreed to the imposition of an affordable housing deed restriction. Being awarded the additional points meant that a person would receive an allocation in a shorter period of time.

15. At that time, Mrs. Discher was an employee of the Monroe County Sheriffs Department.

16. The Dischers completed a ROGO application. They wanted to be awarded additional points to reduce the period of time for them to receive an allocation for the construction of their home.

17. The Dischers completed an Annual Affidavit of Qualification for Affordable Housing (Residential Dwelling Unit). The Affidavit provided, among other things, an acknowledgement by the Dischers that the Affidavit was a waiver of payment of the required impact fees; that Mrs. Discher was an



employee of the Monroe County Sheriff's Department and at least 70 percent of the household's income was derived from that employment; that the single family home was restricted for 20 years to household's with adjusted gross income of a certain amount; that the Dischers would file an approved deed restriction indicating "that, either (1) the deferred impact fees shall become due and owing if the unit no longer qualifies as Affordable Housing, or, (2) that the dwelling unit shall be restricted by the affordable housing criteria for twenty years commencing from the issuance of the certificate of occupancy"; and that the Dischers understood that, if affordable housing was used to gain points in the allocation system, the single-family home would be restricted by the covenants for 20 years.

18. Mr. Discher prepared an affordable housing deed restriction for a residential dwelling unit in 1997. The Affordable Housing Deed Restriction, prepared by Mr. Discher, was executed by the Dischers on July 2, 1997.

19. Provision II of the Affordable Housing Deed Restriction provided, among other things, an acknowledgement that "fair share impact fees" shall be paid by any person prior to receiving a building permit for any new land development.

20. Provision III of the Affordable Housing Deed Restriction provided, among other things, an acknowledgement by the Dischers that they were being exempt from payment of their

fair share impact fees for the single family home to be constructed by them on their property.

21. Provision IV of the Affordable Housing Deed Restriction provided, among other things, that the sale, transfer or rental of their single family home shall only be to persons who qualify under Monroe County's current affordable housing eligibility requirements as established and amended from time to time.

22. Provision V of the Affordable Housing Deed Restriction provides, among other things, that the covenants shall be effective for 20 years and shall begin to run at the issuance of certificate of occupancy by the building department.

23. Provision VI of the Affordable Housing Deed Restriction provides, among other things, that the Dischers used the affordable housing program to gain additional points in the permit allocation system.

24. The Affordable Housing Deed Restriction contains no provision for removal of the affordable housing deed restriction.

25. The Dischers were given additional points. Their wait-time for an allocation was reduced, and they received an allocation to build their single family home.

26. The Dischers attempted to pay impact fees on or about October 2, 1997. They were informed by the building department

that they were not required to pay the impact fees and their check for the impact fees was returned to them.

27. They obtained a mortgage loan and completed their single family home. A certificate of occupancy was issued on June 30, 1999.

28. Mr. Discher testified at hearing that the only reason that he and his wife applied for the ROGO program and that he prepared and he and his wife executed the Affordable Housing Deed Restriction was because an employee of the Monroe County Building Department informed him that they (the Dischers) could be released from the affordable housing deed restriction simply by paying the fair share impact fee at any time.

29. Before ROGO, Monroe County had an affordable housing ordinance that permitted the removal from affordable housing by paying the impact fees. A household benefited by not initially paying impact fees; but, the household could later decide to pay the impact fees, come forward and pay the impact fees, and be removed from affordable housing. However, after ROGO was adopted, the option to later pay the impact fees and be removed from affordable housing no longer existed. ROGO contained no mechanism for a person to pay the impact fees and be removed from affordable housing before the time limit expired or to be removed from affordable housing before the time limit expired.

30. At hearing, the building official was identified but did not testify. Insufficient evidence was presented to ascertain whether the building official had the apparent authority to allow the Dischers to pay the impact fees and remove them from the affordable housing restrictions prior to the 20 years. Consequently, the evidence is insufficient to demonstrate that the Dischers reasonably relied upon the building official's representation to support a release from the affordable housing restrictions.

31. No copy of any release from the affordable housing deed restrictions recorded in the official records of Monroe County was presented at hearing. The evidence is insufficient to demonstrate that Monroe County had released any persons from affordable housing deed restrictions.

32. In 2005, the Dischers made a request to Monroe County for removal of the affordable housing deed restrictions. The Dischers were notified by Monroe County that no provision existed in the Monroe County Code or Monroe County's Comprehensive Plan for removal of the affordable deed restrictions prior the effective date of their expiration or termination and that its Comprehensive Plan provided that affordable housing projects shall be required to maintain the project as affordable housing on a long-term basis in accordance with deed restrictions. Furthermore, the Dischers were notified

by Monroe County that prospective occupant(s) of the affordable housing must meet the qualifications for affordable housing.

33. The Dischers attempted to pay the impact fees in order to be released from the affordable housing deed restrictions. They attempted to pay the impact fees on at least two occasions—March 20, 2006, and February 20, 2007. On each occasion, their payment was refused by Monroe County. Monroe County determined that payment of the impact fees would not release the Dischers from the affordable housing deed restrictions, and, therefore, refused and returned the Dischers' payments. Moreover, no provision in the Monroe County Code permitted the removal of the affordable housing deed restrictions.

34. Monroe County admits that, under the guidelines in place when the Dischers obtained affordable housing, the Dischers are not restricted to a selling or renting price for their single family home. However, they are restricted as to the income of prospective buyer(s) or renter(s), i.e., the prospective buyer(s) or renter(s) must meet the income guidelines set forth in the Monroe County Code.

35. Prior to and during the entire process involving the ROGO program, Mr. Discher was disabled. A copy of a letter written by the Dischers in September 1997, in which Mr. Discher indicated his disability, was forwarded to Monroe County. After

the completion of the Dischers' home, Mr. Discher's health deteriorated.

36. At hearing, Mr. Discher admitted that, prior to filing the discriminatory fair housing complaint, he had never mentioned his disability to Monroe County in relation to having the affordable housing deed restrictions removed. Moreover, at hearing, he admitted that Monroe County had not discriminated against him on the basis of his disability by refusing to remove the affordable housing deed restrictions.

37. Mr. Discher's physicians recommended to him that he move away from the Keys to improve his health. Furthermore, eventually, Mr. Discher needed to be closer to the locations where he was receiving his medical treatments, which were outside of the Keys.

38. The Dischers finally moved away from the Keys to be closer to the locations where Mr. Discher was receiving his medical treatments. They rented their single-family home in Monroe County. Mrs. Discher was forced to return to work.

39. If the Dischers are released from the affordable housing deed restrictions or if the affordable housing deed restrictions are removed, the Dischers would sell the single-family home.

40. A Senior Planner with DCA, Ada Mayte Santamaria, testified at hearing as an expert in community planning.

Ms. Santamaria testified that neither Monroe County's Comprehensive Plan nor its Land Development Regulations allow for the removal of the Dischers' affordable housing deed restrictions; and that, if the affordable housing deed restrictions were released, DCA would probably issue a notice of violation against Monroe County for not properly implementing its Comprehensive Plan and Land Development Regulations and probably recommend to the Administration Commission that Monroe County's allocations for the year following such release be reduced because of the failure of Monroe County to enforce and implement its Comprehensive Plan and Land Development Regulations. Ms. Santamaria further testified that Monroe County is allowed to submit two proposed comprehensive plan amendments per year; and that, because of the process involved in proposed amendments, including review by DCA, a proposed amendment by Monroe County to release affordable housing deed restrictions would take a minimum of six months and could take up to a year and a half to complete the process.

41. At a Monroe County Commission meeting held on January 17, 2007, the Dischers requested to be released from their affordable housing deed restrictions based on hardship due to Mr. Discher's medical conditions. At the meeting, copy of his medical documents, identifying his disability, was distributed to the Commissioners. The Commissioners denied the

Dischers' request. However, the Commissioners also decided that they wanted to address extreme hardship situations and unanimously voted to direct its staff to begin work on an "exit strategy" for affordable housing deed restrictions on the basis of extreme hardship situations. The Commission staff represented at the meeting that such a process would take at least three months and indicated that Monroe County's Comprehensive Plan may have to be amended in conjunction with what the Commission wanted. At the time of the final hearing in the instant matter, approximately a year and a half later, no "exit strategy" had been brought before the Commission. No evidence was presented that the Commission had decided that it no longer wanted to develop an "exit strategy." No evidence was presented as to why the process had not begun.

42. The Dischers are convinced that Monroe County wants to take their property. The evidence is insufficient to demonstrate that Monroe County wants to take the Dischers' property.

#### CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).



44. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2008).

45. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2008).

46. The Fair Housing Act is found at Sections 760.20-760.37, Florida Statutes (2008).<sup>3</sup>

47. A discriminatory housing practice is defined as "an act that is unlawful under the terms of ss. 760.20-760.37." § 760.22(3), Fla. Stats.

48. Section 760.23, Florida Statutes, provides in pertinent part:

(2) It is unlawful 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 therewith, because of race, color, national origin, sex, handicap, familial status, or religion.

\* \* \*

(8) It is unlawful 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 buyer or renter;

(b) A person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

(c) Any person associated with the buyer or renter.

(9) For purposes of subsections (7) and (8), discrimination includes:

- (a) A refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises;
- or
- (b) 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.

49. Handicap is defined to include a person who "has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment." § 760.22(7)(a), Fla. Stat.

50. The parties agree that Mr. Discher is handicapped as defined by Section 760.22(7)(a), Florida Statutes, and is, therefore, a member of the protected class.

51. When the Florida Legislature enacted the Fair Housing Act, it essentially codified the United States Fair Housing Amendments Act of 1988 (FHAA). Dornbach v. Holley, 854 So. 2d 211, 213 (Fla. 2nd DCA 2002). The application of the FHAA by the federal courts has been found to be instructive and persuasive by the courts of Florida in considering the application of the Fair Housing Act. Id.

52. "Discrimination claims under the FHA [FHAA and the Fair Housing Act] are subject to the Title VII McDonnell Douglas

Corp. v. Green, burden-shifting analysis.” Savanna Club Worship Service, Inc. v. Savanna Club Homeowners’ Association, 456

F.Supp.2d 1223, 1231 (S.D. Fla. 2005) (citations omitted).

“Under this test, a plaintiff first bears the burden of establishing that the defendant has engaged in discrimination. Once that is done, the burden then shifts to the defendant to establish a legitimate non-discriminatory business reason for taking the action. If the defendant comes forth with such reason, then the burden returns to the plaintiff to establish that the defendant’s reason is merely a pretext.” Id. at 1231-1232.

53. The federal courts have determined that discrimination may exist under the FHAA in either one of three ways: the FHAA (1) "prohibits intentional discriminatory conduct towards a handicapped person"; (2) "prohibits incidental discrimination, that is, an act that results in making the property unavailable to a handicapped person"; or (3) "prohibits an act that fails to make a reasonable accommodation that would allow a handicapped person the enjoyment of the chosen residence." Dornbach, at 213 (citations omitted). Given the similarity of the language and the purpose of the FHAA and the Fair Housing Act, the three approaches to fair housing discrimination are applicable to the Fair Housing Act. Id.

54. "The [United States] Supreme Court has decided that discrimination under the Fair Housing Act [FHAA] includes a refusal to make a 'reasonable accommodation' for handicapped persons." Loren v. Sasser, 309 F.3d 1296, 1302 (11th Cir. 2002) (citation omitted). Determining whether a requested accommodation is required by law is "highly fact-specific, requiring case-by-case determination." Id. (citation omitted).

55. "Under the Fair Housing Act [FHAA], plaintiffs have the burden of proving that a proposed accommodation is reasonable." Loren, at 1302 (citations omitted).

56. The Dischers failed to establish a prima facie case that Monroe County engaged in discrimination by refusing to release or remove their affordable housing deed restrictions. The Dischers agreed to and received a benefit from the affordable housing deed restrictions; they received additional points under the ROGO system, which allowed the Dischers to obtain an allocation to construct their single family home and to obtain the allocation in a shorter time period. The evidence was insufficient to demonstrate that Monroe County had released or removed any other persons from affordable housing deed restrictions. Mr. Discher admitted that Monroe County had not discriminated against him on the basis of his disability in refusing to release or remove their affordable housing deed restrictions.

57. As to Monroe County providing a reasonable accommodation, the Dischers requested that Monroe County release or remove their affordable housing deed restrictions. Neither Monroe County's regulations nor its comprehensive plan contained a provision for the release or removal of affordable housing deed restrictions during the time period material to the instant matter. The evidence fails to demonstrate that a reasonable accommodation was available.

58. Even assuming that the Dischers had established a prima facie case of discrimination, Monroe County established a non-discriminatory reason for its action. Monroe County was complying with its regulations and comprehensive plan regarding providing long term affordable housing in the Keys.

59. Monroe County having established a non-discriminatory reason for its action, the burden shifts to the Dischers to establish that Monroe County's reason for its action is merely a pretext for discrimination. The evidence fails to establish that Monroe County's reason for its action is merely a pretext for discrimination.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Monroe County Commissioners did

not commit a discriminating housing practice against John and Ruth Discher in violation of the Fair Housing Act by failing to release or remove the affordable housing deed restrictions.

DONE AND ENTERED this 31st day of December, 2008, in Tallahassee, Leon County, Florida.



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ERROL H. POWELL  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of December, 2008.

ENDNOTES

<sup>1/</sup> Petitioners' Exhibits numbered 3, 10, and 11 were rejected.

<sup>2/</sup> The Dischers filed documents subsequent to the final hearing. Those documents were not considered in the preparation of this Recommended Order.

<sup>3/</sup> The statutory sections are applicable from 1997 through 2008.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.