STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA COMMISSION ON HUMAN RELATIONS, ON BEHALF OF JEANNETTE SHAW-PEREZ,	)	
Petitioner,	)	
vs.	)	Case No. 11-3319
CITY OF HOLLY HILL,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 16, 2012, by video teleconference at sites in Tallahassee, Florida and Daytona Beach, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jeannette Shaw-Perez, pro se
1415 Climax Street
Burlington, North Carolina 27217

For Respondent: Scott E. Simpson, Esquire
Korey, Sweet, McKinnon, Simpson & Vukelja
595 West Grenada Boulevard, Suite A
Ormond Beach, Florida 32174-5181

STATEMENT OF THE ISSUE

Whether Petitioner was the subject of unlawful coercion, intimidation, threats, or interference in the exercise of her

rights in connection with Respondent's regulatory actions regarding rental property owned by Petitioner, in violation of section 818 of Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988 and the Florida Fair Housing Act, chapter 760, Part II, Florida Statutes (2011).

PRELIMINARY STATEMENT

On August 31, 2010, Petitioner executed a Housing Discrimination Complaint with the U.S. Department of Housing and Urban Development (HUD) and the Florida Commission on Human Relations (FCHR), alleging that she was discriminated against by Respondent based on her race.[1/] The basis for the claim of discrimination is that Respondent engaged in a pattern of code enforcement that was disproportionate to that taken with regard to white property managers, and as a result constituted unlawful coercion, intimidation, threats, or interference in the exercise of her rights in connection with her rental property in violation of the Fair Housing Act.

An investigation of the complaint was made by HUD. On October 19, 2010, HUD issued its Determination, which concluded that there was reasonable cause to believe that a discriminatory housing practice had occurred.

On November 17, 2010, the FCHR issued a Notice of Determination (Cause). Petitioner elected to have the FCHR file

a petition for an administrative hearing on her behalf. On June 27, 2011, a Petition for Relief was served by the FCHR.[2/]

The petition was forwarded to the Division of Administrative Hearings for a formal hearing on the matter. The final hearing was scheduled for September 6, 2011. Petitioner requested that the case be placed in abeyance, which motion was unopposed. The hearing was subsequently reset for January 9, 2012.

On December 22, 2011, counsel for the FCHR moved to withdraw as counsel of record. The motion was twice amended, with the last amendment being filed on January 4, 2012. Good cause having been shown, the motion to withdraw was granted on January 4, 2012. The January 9, 2012, hearing was continued, without objection by Respondent, to allow Petitioner an opportunity to retain substitute counsel.

On February 3, 2012, substitute counsel filed a Notice of Limited Appearance and Motion to Extend Time. The Notice indicated that one day in April, 2012, would be suitable for the final hearing. The hearing was thereupon set for April 16, 2012.

On March 30, 2012, Petitioner's substitute counsel filed a Notice of Non-Representation, which indicated that the terms of his limited appearance having been completed, he no longer represented Petitioner. The notice was accepted as a motion to

withdraw as counsel, and was granted on April 3, 2012. The case proceeded with Petitioner appearing pro se. Respondent filed a Pre-hearing Statement that established its position regarding the issues in the case.

The hearing was held on April 16, 2012 as scheduled. At the hearing, Petitioner testified on her own behalf. Petitioner offered Petitioner's Exhibits P1-P17, which were received in evidence. Respondent presented the testimony of Kurt Swartzlander, Finance Director for the City of Holly Hill. Respondent offered Respondent's Exhibits A-S, which were received in evidence.

During the hearing, Petitioner was allowed to testify as to an alleged change in water metering and billing at her property that was not specifically pled in her housing discrimination complaint. Her testimony was accepted as providing contextual evidence of a pattern or practice regarding her allegations of discrimination. Since the issue of the water metering and billing had not been specifically pled, Respondent was granted leave to supplement the record as to that limited issue. On April 19, 2012, Respondent filed the affidavits of Kurt Swartzlander and Valerie Manning, along with Respondent's business records for water billing at the Dubs Drive location for a period commencing prior to her purchase of the property to the present. The affidavits and records are consistent with and

supplement Mr. Swartzlander's testimony, and are accepted as Respondent's Exhibit's T and U.

The two-volume Transcript was filed on May 2, 2012, and a Notice of Filing Transcript was entered that established May 14, 2012, as the date for filing Proposed Recommended Orders. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order. References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, an African-American woman, owns and manages a residential tri-plex rental unit located at 302 Dubs Drive, Holly Hill, Florida. Dubs Drive is zoned R-2 single-family residential. Petitioner's tri-plex was constructed in 1955, and is grandfathered as a non-conforming use. The other houses on Dubs Drive are newer, and are all single-family homes.

2. Petitioner purchased the tri-plex in 1998. At the time of her purchase, the tri-plex consisted of a single-story building with 3 apartments and two garages, and was configured, from south to north, as a two-bedroom apartment, a two-bedroom apartment, a one-bedroom apartment, a garage with a washer/dryer connection, and a garage with a toilet. The garages had drywall interiors, except that the ceilings lacked drywall.

3. After she purchased the tri-plex, Petitioner hired Arthur Kowitz, a realtor, to manage the property for her. He performed management services from the time of the purchase until 2001. Mr. Kowitz is white.

4. In 2001, Petitioner retained All-Florida Realtors to manage the property. All-Florida performed management services from 2001 to 2004. All-Florida is a white-owned company.

5. In 2004, Petitioner retained John Benzette to manage the property. Mr. Benzette performed management services from 2004 through November 2007. Mr. Benzette is white.

6. In 2004, Petitioner applied to Respondent for a permit to install an electric meter at the tri-plex. The purpose of the meter was not to serve the apartments -- each of which already had meters by which the tenants individually received and paid for service -- but was a "house meter" or "landlord's meter" for exterior lighting, garage lighting and outlets, and other uses common to the tri-plex. The permit was issued, and the meter was installed. During one of the 2005 hurricanes that hit the area, the meter was knocked off of the unit by falling debris. It was not reinstalled at that time.

7. The property managers from 1998 through 2007 were responsible for general maintenance and repair activities. Those types of activities did not require building permits.

8. From the time she purchased the tri-plex in 1998, until 2008, the unit was not subject to any formal code-enforcement actions by Respondent.

9. Starting in December, 2007, Petitioner began managing the tri-plex on her own. One of the first activities she performed as owner/manager was the conversion of the garage on the northern end of the building -- separated from the apartments by the other garage -- to a living space. That was accomplished by removing the garage door, constructing a block wall with a window and exterior door, completing interior drywall work, and installing a shower. Petitioner did not apply for or receive a building permit for the work.

10. As part of the construction, Petitioner had the electric meter that was knocked off in 2005 renovated and reinstalled onto the unit. When Petitioner requested service from Florida Power & Light, Florida Power & Light contacted Respondent to confirm a legal connection.

11. Respondent sent employees Mark Ballard and Tim Harbuck to the tri-plex. At that time, it was determined that Petitioner had performed construction without a building permit.

12. Respondent's employees initially thought the new living space was to be rented as a fourth apartment, an act that would have constituted an unallowable expansion of the non-conforming use of the property. Their belief was not

unreasonable, as the configuration of the converted garage was conducive to its being used as a separate apartment, and since Petitioner subsequently placed a "For Rent" sign on the unit, despite the fact that she was living in apartment #3 at the time. However, Petitioner has denied that the rental of the converted garage as a separate unit was her intent, but that the converted garage was intended as an added room for apartment #3. Regardless of whether the conversion of the garage was intended to result in a separate apartment, the construction required a building permit.

13. As a result of the determination that the construction was not permitted, the meter was removed on February 8, 2008. The requirement that the meter be removed, despite the 2004 permit, was not related to Petitioner's race, but was related to the unauthorized construction and intended use of the converted garage.

14. On April 25, 2008, Respondent sent Petitioner a Notice to Appear at a hearing before a special magistrate. The notice provided that the purpose of the hearing was the "violation of City Ordinance Building Permit Required." The hearing was set for May 14, 2008.

15. Petitioner asserted that she called the telephone number printed on the notice to ascertain the purpose of the May 14, 2008, hearing. She alleged that she was told by an

unnamed city employee that the hearing was to be held regarding issues pertaining to her rental license. The evidence of the call was entirely hearsay, and was not corroborated by any non-hearsay evidence. Regardless of the substance of the telephone call, the notice plainly stated that the purpose of the hearing was related to a required building permit.

16. The hearing was held as scheduled on May 14, 2008. At the hearing, Petitioner was advised that the subject of the hearing was the unpermitted construction at the Dubs Drive location. Petitioner, claiming to have had no knowledge of the subject of the hearing, requested a continuance to retain an attorney to represent her. The request was denied.

17. At the hearing, it was determined that, at a minimum, Petitioner removed the garage door, blocked up the front of the garage and installed a door and window in its place to convert it to living space, and installed a shower.

18. On May 22, 2008, the special magistrate entered an Order of Non-Compliance in which he concluded that Petitioner violated the Holly Hill Zoning Ordinance requiring a building permit for the work done on the property, required Petitioner to obtain a building permit, and imposed an administrative fine of $250.00. If the corrective measures were not taken, or the fine was not paid, the Order authorized an additional penalty of $150.00 per day, and authorized Respondent to place a lien on

the Dubs Drive location. Petitioner was warned that she was not to use the renovated garage as a separate dwelling unit, but could only use it as an addition to apartment #3.

19. The action by Respondent to enforce its building code was entirely appropriate, and was undertaken with all due process rights having been afforded to Petitioner. There was no evidence presented to support a finding that Petitioner's race had anything to do with Respondent's reaction to Petitioner's unpermitted construction, or that Respondent failed to enforce its building code, including permit requirements, against similarly-situated property owners who were not members of Petitioner's protected class.

20. Petitioner paid the administrative fine on June 2, 2008, and received the after-the-fact building permit on June 10, 2008.

21. On September 5, 2008, Respondent placed a lien on the Dubs Drive location based on its mistaken belief that Petitioner had failed to pay the $250.00 administrative fine. The notice of lien letter was received by Petitioner on November 18, 2008. Petitioner advised Respondent that she had paid the fine. Ms. Sue Meeks confirmed that the fine was paid, and Respondent promptly recorded a satisfaction of lien. The evidence indicates that the decision to record the lien was a bureaucratic error that was immediately corrected. There was no

evidence presented to support a finding that Petitioner's race was Respondent's motive for recording the lien.

22. A business tax receipt is required for each of the three apartments at the Dubs Drive location in order for Petitioner to engage in the business of real estate rental. Authorization for the business tax receipt was adopted by ordinance by Respondent in July, 2000, and is applicable to all rental units in the city of the type owned by Petitioner. Prior to July 2000, Respondent did not require an owner of a small rental location to obtain a business tax receipt.

23. The business tax receipt ordinance required Respondent to perform annual inspections of businesses within its municipal boundaries. The inspections were started in 2000 or 2001.

24. Business tax receipts are issued for a term from October 1 to September 30 of each year. If a business tax receipt is not renewed on time, Respondent is authorized to assess a 25 percent penalty, plus additional filing fees.

25. For 2008-2009, Petitioner timely paid the business tax receipts for apartment Nos. 1 and 2. The tax was $45.00 for each apartment. Petitioner failed to pay the business tax receipt for apartment #3 until March 2009, after the renewal date had passed. Therefore, a penalty and additional filing fees were assessed which raised the business tax receipt fee for that apartment to $70.00. Petitioner alleged that Respondent

"overcharged" her for the apartment #3 business tax receipt, which she construed as evidence of a pattern of discrimination. The evidence demonstrates that the $70.00 charge was the result of Petitioner's failure to timely renew, and was not the result of discrimination based on her race. There was no evidence presented to support a finding that Petitioner's race had anything to do with Respondent's assessment of late penalties and fees, or that Respondent failed to assess such late penalties and fees against similarly-situated rental apartment owners who were not members of Petitioner's protected class.

26. On or about February 6, 2009, Respondent issued a violation notice alleging that Petitioner failed to renew her business tax receipt for apartment #1 and #2. The notice was posted on the doors of the apartments on February 10, 2009. The notice allowed three days to correct the violation, a period that had already passed when the notice was received. Petitioner had already paid the business tax receipt, and went to city hall to inquire about the violation notice. She was advised that her check, identified by Petitioner as check #486, had not been received. Petitioner went to Bank of America to stop payment on check #486, for which a banking fee of $30.00 was assessed. Upon her return to city hall, Petitioner was advised that a search had resulted in the discovery of check #486 on a city employee's desk. It had not been cashed.

Petitioner wrote a replacement check. Respondent credited Petitioner's utility bill for $30.00 to reimburse her for the Bank of America stop-payment charge and the matter was resolved without further ado. Petitioner alleged that the incident was "harassment," which she construed as further evidence of discrimination. To the contrary, the evidence demonstrates that the violation notice was a minor bureaucratic error that was promptly corrected, and for which Petitioner was made financially whole. There is no evidence in the record that the incident was the result of discrimination based on Petitioner's race.

27. On February 19, 2009, Petitioner wrote Respondent to express her belief that she was being overcharged for water. She had a single meter to serve the Dubs Drive tri-plex, but was being charged for three connections. In fact, Petitioner had three apartments. In such cases, Respondent bills for each unit served by a single "master meter." The minimum bill per apartment includes 2000 gallons of water per month, with additional usage added as an additional charge. Respondent billed for three connections at the Dubs Drive location since at least 1997, prior to Petitioner's purchase of the tri-plex.

28. Petitioner inquired whether she could have separate meters installed for each apartment, rather than having minimum and total bills determined by the "master meter." Respondent

would not allow separate meters since the Dubs Drive tri-plex was a non-conforming use in a single-family zoned area, and the installation of separate meters would "enhance the non-conformity."

29. Respondent's approach to billing for water in multi-family locations accounts for the demand created by three families versus one family. The evidence demonstrates that Respondent bills all multi-unit complexes in a manner to account for the demand of multiple family consumption on its water facilities. There is no evidence in the record that Respondent's billing practice for water consumption was applied to Petitioner differently from any other multi-family facilities, or was the result of discrimination based on Petitioner's race.

30. On or about March 3, 2009, as a result of an annual inspection conducted as part of the business tax receipt process, Respondent cited Petitioner for several deficiencies at the Dubs Drive tri-plex, including a lack of smoke alarms, some windows that would not open, and a lack of GFI (ground-fault interrupter) electrical outlets at one location in apartment #1, and two locations in apartment #2. GFI outlets are commonly known to prevent shocks, and are required at locations where the outlets may be exposed to water, e.g. kitchens and bathrooms. Petitioner installed the GFI outlets. There was no other

sanction or penalty. There is no evidence in the record that the requirement that Petitioner install a reasonable and necessary safety feature in apartments being rented to others was the result of discrimination based on Petitioner's race.

31. On or about March 24, 2009, during the follow-up compliance inspection of the tri-plex, one of Petitioner's tenants advised the inspector that Petitioner had been living in the converted garage for two months, and was receiving mail in "mailbox #4" during that period. The use of the converted garage as a separate living unit would be a violation of Respondent's zoning ordinance regarding limitations on the expansion of a non-conforming use, and would have violated the special magistrate's Order entered at the May 14, 2008, hearing. As a result, Respondent issued violation notices to Petitioner on March 24, 2009, and March 27, 2009, each of which concerned the use of the converted garage as a separate living unit. The March 27, 2009, notice indicated that Petitioner and Respondent were "working to resolve" the issue.

32. On March 31, 2009, Respondent provided Petitioner with a letter resolving the separate living unit issue that stated:

> This letter is to inform you of the requirements of Compliance in reference to 302 Dubs Ave.
>
> 1. Your triplex must not be occupied by more than 3 separate families.

> 2. The new addition on the north end of the building can be used in conjunction with #3, [b]ut can not be used as a separate unit.
>
> 3. Mailbox #4 must be taken down within 45 Days of this date. (March 31, 2009)

The letter contained nothing more than a straight-forward recitation of the terms and conditions applicable to the non-conforming residential structure. Respondent imposed no penalties or sanctions. There is no evidence to suggest that Respondent imposed terms or conditions on the use of the tri-plex different from any other similarly-situated non-conforming structure. There is no evidence in the record that Respondent's response to the tenant's statement that Petitioner was using the converted garage as a fourth apartment was either disproportionate under the circumstances, or was the result of discrimination based on Petitioner's race.

33. On April 30, 2009, the tenants of apartment #2 wrote to Petitioner with a long list of complaints regarding the conditions at the apartment that, on their face, were very serious, and which included structural, electrical, plumbing, and safety issues. The couple that lived in the apartment was white. The fact that the tenants were white does not minimize the fact that their concerns were legitimate.

34. Having received no response to their complaints, the tenants called Respondent about the living conditions. In

accordance with Respondent's routine practice regarding complaints, Ms. Meeks was dispatched to inspect the property. Her inspection of apartment #2 confirmed the tenant complaints. Ms. Meeks also inspected apartment #1 at the request of the tenants of that apartment, and noted problems with "the bottom of the walls pealing [sic.] off and has some kind of bugs that are biting the children that live there." The tenants also provided Ms. Meeks with a list of dates on which they alleged Petitioner had been staying in the converted garage which, if true, would have indicated that Petitioner used the addition as a separate living unit for more than 50 days over a three-month period.

35. Respondent sent Petitioner a letter detailing the problems observed during the inspection, and advising Petitioner that her issues would be taken up at a hearing before the Special Master on July 8, 2009. The letter was received by Petitioner on June 15, 2009. The time between the letter and the scheduled hearing was ample time for Petitioner to correct the problems.

36. On June 24, 2009, Respondent served Petitioner with a Notice to Appear at the July 8, 2009, hearing.

37. On June 25, 2009, and June 29, 2009, Respondent obtained written statements from the tenants of apartment #2 detailing the problems that they had encountered with their

leased apartment. Their statements were consistent with their earlier descriptions and the results of the inspection.

38. On July 7, 2009, Petitioner requested a continuance of the July 8, 2009, hearing due to the death of her father. The request was granted by notice dated July 15, 2009, and the hearing was continued to August 12, 2009. Respondent was directed to "bring proof of her father's passing" to the August hearing. On July 27, 2009, Respondent reissued a Notice to Appear for the August 12, 2009, hearing.

39. On August 12, 2009, a hearing was convened before the special magistrate. Petitioner was represented by counsel. At the hearing it was determined that the back door of apartment #2 had been replaced to the tenant's satisfaction, though Petitioner failed to obtain a building permit for the same, and that the electrical issue with the GFI outlet and the water heater breaker had been resolved. It was ultimately determined to be in the best interest of all of the parties to have the tri-plex inspected by Respondent, and to reconvene the hearing in September, 2009.

40. Petitioner asserted that the August 12, 2009, hearing was continued because a white tenant had not appeared at the hearing to testify against her. The record does not support that reason.

41. An Order Continuing Case was entered on August 26, 2009. The Order noted that Petitioner had not produced evidence of her father's death as instructed. On August 27, 2009, Respondent reissued a Notice to Appear for September 9, 2009.

42. On August 18, 2009, Respondent conducted an inspection of the tri-plex. It was determined that some of the deficiencies identified in the June notice had been made, but others had not.

43. The hearing was reconvened on September 9, 2009. Petitioner was represented by counsel. After considerable discussion, it was determined that Petitioner had substantially resolved the issues identified in the June notice, some more recently than others. The special magistrate assessed a $250.00 administrative fine for the initial items of non-compliance resulting in the need to have the hearings, and $300.00 for failure to make repairs within a reasonable period after the initial notice in June. Petitioner also produced a copy of her father's obituary as proof of his death in July. An Order of Non-Compliance reciting the outcome of the hearing was entered on September 25, 2009. The Order was not appealed.

44. Petitioner stated her belief that the requirement that she provide evidence of her father's death to substantiate the basis for the July 7, 2009, request for continuance was imposed as a result of harassment and discrimination against her due to

her race. Although the requirement that she produce an obituary or the like seems insensitive and unnecessary, there was no evidence that Petitioner's race was the basis for the request, or that such a requirement was not imposed on all persons seeking a continuance of a code enforcement hearing, regardless of race.

45. On November 4, 2009, the special magistrate, after having received evidence of the completion of the repairs from Respondent, entered an Order of Compliance by which he found all of the deficiencies at the Dubs Drive location had been satisfactorily resolved.

46. Petitioner has alleged that the code enforcement actions taken by Respondent were part of a pattern of harassment and intimidation directed at her because of her race. She argued that her white property managers were not cited for violations, thus establishing evidence of racial bias. While it is true that some of the violations for which Petitioner was cited concerned issues that pre-dated Petitioner's assumption of management duties in December 2007, e.g., the use of interior-grade doors being used as exterior doors and the lack of GFI outlets, there was no evidence that Respondent ever noticed those deficiencies, or that any tenant had ever complained.

47. The evidence demonstrates that the triggering event that drew the attention of Respondent's code enforcement section

was not Petitioner's race, but was Petitioner's unpermitted conversion of the garage into living space. The other triggering event was the complaint filed with Respondent by Petitioner's tenants that alleged crumbling infrastructure, including the very poor condition of the exterior doors. Both incidents properly resulted in thorough inspections. There was no event at the Dubs Drive location prior to December 2007, that would have resulted in increased scrutiny. Thus, the evidence demonstrates that Respondent's actions were reasonable and appropriate responses to conditions at the Dubs Drive location that were brought to its attention by the actions of Petitioner and her tenants, conditions for which Respondent would have been remiss had it failed to act. The evidence in this proceeding does not support a finding that Respondent's actions were taken due to Petitioner's race.

48. The evidence produced at the hearing contained not a shred of competent, substantial evidence that would support a finding that Respondent took any action regarding the Dubs Drive tri-plex because of Petitioner's race. Rather, the evidence supports a finding that Respondent was appropriately exercising its police powers to ensure that rental dwelling units within its jurisdiction are safe and sanitary. If anything, Respondent and the special magistrate treated Petitioner with considerable patience, restraint, and leniency given the nature of the non-

compliance resulting from the unpermitted renovations, and from the delays in making necessary repairs to the property.

49. Petitioner's dated signature on the Housing Discrimination Complaint that forms the basis for this proceeding indicates that Petitioner filed her initial complaint of discrimination no earlier than August 31, 2010. However, the HUD Determination gives two dates on which Petitioner supposedly filed her complaint -- August 13, 2010, and September 2, 2009. Given the findings and conclusions herein that Respondent had no racial animus or bias in its actions regarding Petitioner -- going back to the December 2007 date on which Petitioner assumed her property management duties -- it is not necessary to determine which of the dates is accurate. However, to the extent it were to become an issue with regard to the application of the jurisdictional limits established by section 760.34(2), the most persuasive evidence demonstrates that Petitioner filed her Housing Discrimination Complaint on or after August 31, 2010.

Ultimate Findings of Fact

50. There was no competent, substantial evidence adduced at the hearing that Respondent took any regulatory, utility billing, or code enforcement action regarding Petitioner, or the Dubs Drive location, in an effort to coerce, intimidate, threaten, or interfere with Petitioner in the exercise of her

rights as an owner of rental housing due to Petitioner's race. Respondent's actions were, in each instance, a legitimate response to unpermitted building activities, a correct application of Respondent's ordinances, or a reasonable response to complaints filed by Petitioner's tenants. At worst, Respondent committed two minor bureaucratic errors that were quickly resolved, and for which Petitioner suffered no loss.

51. There was no evidence that Respondent applied its code enforcement ordinances or policies in its dealings with Petitioner in a manner that was inconsistent with their application to similarly-situated persons who were not members of Petitioner's protected class.

52. Having found no evidence to demonstrate that Respondent discriminated against Petitioner on the basis of her race, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.57(1) and 760.35(3), Fla. Stat.

54. Florida's Fair Housing Act, sections 760.20 through 760.37, Florida Statutes, makes it unlawful to discriminate in actions regarding a person's rights and privileges in their property. In that regard, section 760.37, provides that:

> It is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise of, or on account of her or his having exercised, or on account of her or his having aided or encouraged any other person in the exercise of any right granted under ss. 760.20-760.37. This section may be enforced by appropriate administrative or civil action.

55. Section 760.34(2), provides that "[a] complaint [of a discriminatory housing practice] must be filed within one year after the alleged discriminatory housing practice occurred." The date of filing of a charge of discrimination is the date on which the charge is received by the Commission. LeBlanc v. City of Tallahassee, 2003 U.S. Dist. LEXIS 16140, (N.D. Fla. 2003) (citing Johnson v. Host Enterprise, Inc., 470 F.Supp. 381, 383 (E.D. Pa. 1979)). Allegedly discriminatory acts that occurred more than one year prior to the filing date are time-barred by section 760.34(2).

56. In cases involving a claim of discrimination, the burden of proof is on the complainant. § 760.34(5), Fla. Stat.

57. The Florida Fair Housing Act is patterned after Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988, and discrimination covered under the Florida Fair Housing Act is the same discrimination prohibited under the Federal Fair Housing Act. Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1224 (S.D. Fla. 2005); see also Loren v. Sasser, 309 F.3d 1296, 1300

(11th Cir. 2002). When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Millsap v. Cornerstone Residential Mgmt., 2010 U.S. Dist. LEXIS 8031 (S.D. Fla. 2010); Dornbach v. Holley, 854 So. 2d 211, 213 (Fla. 2d DCA 2002); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

58. A plaintiff may proceed under the Fair Housing Act under theories of either disparate impact or disparate treatment, or both. Head v. Cornerstone Residential Mgmt., 2010 U.S. Dist. LEXIS 99379 (S.D. Fla. 2010). To establish a prima facie case of disparate impact, Petitioner would have to prove a significantly adverse or disproportionate impact on a protected class of persons as a result of Respondent's facially neutral acts or practices. Head v. Cornerstone Residential Mgmt., supra, (citing E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1278 (11th Cir. 2000)). To prevail on a disparate treatment claim, Petitioner would have to come forward with evidence that she was treated differently than similarly-situated persons. Head v. Cornerstone Residential Mgmt., supra, (citing Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th Cir. 2008) and Hallmark Dev., Inc. v. Fulton Cnty., 466 F.3d 1276, 1286 (11th Cir. 2006)).

59. In establishing that she was the subject of any discriminatory impact of Respondent's actions based upon her race, Petitioner could either produce direct evidence of discrimination by which Respondent coerced, intimidated, threatened, or interfered with Petitioner in the exercise of her rights granted in the Fair Housing Act, or prove circumstantial evidence sufficient to allow the trier of fact to infer that discrimination was the cause of such treatment. See King v. Auto, Truck, Indus. Parts & Supply, 21 F. Supp. 2d 1370, 1381 (N.D. Fla. 1998).

60. A claim of discrimination requires proof that "'race played some role' in the decision." Hallmark Developers, Inc. v. Fulton Cnty., Georgia, 466 F.3d 1276, 1283 (11th Cir. 2006)(citing Sofarelli v. Pinellas Cnty., 931 F.2d 718, 722 (11th Cir. 1991)). The Hallmark Developers case, as here, involved a local government's exercise of regulatory authority, in that case zoning authority. With regard to the evidence necessary to support a claim, the court held that:

> Because explicit statements of racially discriminatory motivation are decreasing, circumstantial evidence must often be used to establish the requisite intent. Among the factors that are instructive in determining whether racially discriminatory intent is present are: discriminatory or segregative effect, historical background, the sequence of events leading up to the challenged actions, and whether there were any

> departures from normal or substantive criteria. (citations omitted).

61. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate. . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

62. Petitioner presented no direct evidence of discrimination by Respondent in the enforcement of its building and zoning codes.

63. When there is no direct evidence of discrimination, fair housing cases are subject to the three-part burden-shifting test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) to evaluate claims of discrimination based on circumstantial evidence. Steed v. EverHome Mortg. Co., 308 Fed. Appx. 364, 368, 2009 U.S. App. LEXIS 991 (11th Cir. 2009); Boykin v. Bank of America Corp., 162 Fed. Appx. 837, 838, 2005 U.S. App. LEXIS 28415 (11th Cir. 2005); Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1476 n.6 (11th

Cir. 1993); Secretary, U.S. Dept. of Housing and Urban Development, on Behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990); Savannah Club Worship Serv. v. Savannah Club Homeowners' Ass'n, 456 F. Supp. 2d at 1231-1232.

64. Under the three-part test, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. McDonnell Douglas Corp. v. Green, at 802; Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-253; Burke-Fowler v. Orange Cnty., Fla., 447 F.3d 1319, 1323 (11th Cir. 2006); Valenzuela v GlobeGround North America, LLC., 18 So. 3d at 22. "The elements of a prima facie case are flexible and should be tailored, on a case-by-case basis, to differing factual circumstances." Boykin v. Bank of America Corp. 162 Fed. Appx. at 838-839 (citing Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123 (11th Cir. 1993)).

65. Petitioner's burden is to prove that Respondent is guilty of an intent to discriminate based on race. She may not prevail merely by showing that Respondent's administration and enforcement of its local government ordinances was flawed or imperfect. Cf. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993).

66. If Petitioner is able to prove a prima facie case by a preponderance of the evidence, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its

actions. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). Respondent has the burden of production, not persuasion, to demonstrate that the exercise of its police powers, upon which the complaint was made, was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

67. If Respondent produces evidence that the basis for its action was non-discriminatory, then Petitioner must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-518 (1993). In order to satisfy this final step of the process, Petitioner must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason . . . is not worthy of belief." Dep't of Corr. v. Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256). Pretext can be shown by inconsistencies and/or contradictions in testimony. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); Woodward v. Fanboy, L.L.C., 298 F.3d 1261 (11th Cir. 2002); Secretary, U.S. Dept. of Housing and Urban Development, on Behalf of Herron v. Blackwell,

908 F.2d at 871. The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." (citations omitted) Holifield v. Reno, 115 F.3d at 1565.

68. Petitioner has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1013 n.7 (Fla. 1st DCA 1996), aff'd, 679 So. 2d, 1183 (Fla. 1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

69. The proof of discrimination offered in this case amounts to little more than Petitioner's speculation and belief concerning the basis for Respondent's actions. Such proof is insufficient, standing alone, to establish a prima facie case of intentional discrimination. While "direct evidence of discrimination is not necessary . . . a jury cannot infer discrimination from thin air. Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient." (citations omitted) Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001).

70. Petitioner did not meet her burden to establish a prima facie case of discrimination.

71. Petitioner failed to produce any evidence, and there was no proof of any kind, to support a claim that the Respondent's regulatory, utility billing, or code enforcement practices had a significantly adverse or disproportionate impact on members of Petitioner's protected class.

72. Petitioner failed to prove a claim of disparate treatment, and there was no persuasive evidence -- even if Respondent's actions regarding 302 Dubs Drive that would be time-barred by application of section 760.34(2) are considered in this proceeding -- to support a claim that Respondent treated other rental property owners differently from Petitioner due to their race. The fact that the complaining tenants were white is not evidence that the response to their complaints was different or disproportionate. The evidence that Respondent failed to issue citations to Petitioner's previous property managers for violations at her property utterly fails to demonstrate that the subsequent citations were the result of the property managers' race. Rather, the scrutiny that led to the subsequent discovery of the violations was the direct result of Petitioner's own illegal activity, or of complaints regarding the conditions at the tri-plex. No such illegal activities or complaints having

occurred prior to December 2007, it cannot be concluded that Petitioner's race was the cause of the responses thereto.

73. Petitioner failed to demonstrate that the mistaken entry of the lien on her property or the loss of her business tax receipt payment, both of which were quickly acknowledged and corrected, were done to coerce, intimidate, threaten, or interfere with Petitioner's rights with regard to her property. The fact that Respondent was not 100 percent efficient or accurate in the procedures by which it administered its code enforcement duties was not proof of racial animus. See Boykin v. Bank of America Corp., 162 Fed. Appx. at 839; Randle v. City of Aurora, 69 F.3d 441, 454 (10th Cir. 1995).

74. In short, Petitioner did not prove by a preponderance of the evidence that Respondent discriminated against her based on her race.

75. Based on the foregoing, it is concluded that Respondent did not coerce, intimidate, threaten, or interfere with Petitioner in the exercise of her rights as an owner of rental housing due to Petitioner's race, and as a result, Respondent, City of Holly Hill, did not commit a violation of the Fair Housing Act as to Jeanette Shaw-Perez. Therefore, the Petition for Relief should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the Petition for Relief filed in FCHR No. 2011H0053.

DONE AND ENTERED this 22nd day of May, 2012, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of May, 2012.

ENDNOTES

[1/] The housing discrimination complaint bears a signature date of August 31, 2010. The HUD Determination at page 1 indicates that Petitioner filed her complaint with HUD on August 13, 2010. The HUD Determination at page 7 indicates that "Complainant filed her complaint with HUD on September 2, 2009." Given the findings herein, the lack of clarity in the filing date is not dispositive of any issue in this case.

[2/] The certificate of service erroneously gives a date of June 27, 2010.

COPIES FURNISHED:

Jeanette Shaw-Perez
1415 Climax Street
Burlington, North Carolina 27217

Scott E. Simpson, Esquire
Korey, Sweet, McKinnon, Simpson & Vukelja
595 West Grenada Boulevard, Suite A
Ormond Beach, Florida 32174-5181

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.