

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA COMMISSION ON HUMAN)
RELATIONS, ON BEHALF OF JOHN)
AND KIMBERLY WHITT,)
)
Petitioners,)
)
vs.) Case No. 12-2074
)
BAYHEAD LANDINGS PROP. OWNERS)
ASS'N, INC.; KIMBALL LEE;)
WILLIAM BARTHLE; AND TONY)
KOLKA,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 12, 2012, in Dade City, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioners: David A. Organes, Esquire
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 200
Tallahassee, Florida 32301

For Respondents: Gary M. Schaaf, Esquire
Stuart J. Barks, Esquire
Becker and Poliakoff, P.A.
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STATEMENT OF THE ISSUES

The issues are whether Respondent, Bayhead Landings Property Owners Association, Inc.; Kimberly Lee, president; William Barthle, Architectural Review Committee (ARC) member; and Tony Kolka, ARC member, discriminated against John and Kimberly Whitt,^{1/} on the basis of Mr. Whitt's physical handicap in violation of the Florida Fair Housing Act (the Act), and, if so, the relief to which Petitioners are entitled.

PRELIMINARY STATEMENT

The Florida Commission on Human Relations (FCHR) and the United States Department of Housing and Urban Development (HUD) administer the Act, sections 760.20 through 760.37, Florida Statutes (2012).^{2/} In October 2011, Mr. and Mrs. Whitt filed a housing discrimination complaint with the FCHR. In March 2012, Mr. and Mrs. Whitt were notified that the FCHR had investigated their complaint and determined there was "reasonable cause to believe that a discriminatory housing practice" had occurred. The Whitts and Respondents were provided notification as to how to proceed. After the requisite 30 days in which a conciliation agreement could have been reached, but was not, the FCHR, on behalf of the Whitts, issued a Notice of Failure of Conciliation and filed a Petition for Relief (Petition) on behalf of the Whitts. On June 14, the FCHR transferred the Petition to the Division. An Amended Notice of Hearing, dated July 2, scheduled

the hearing for August 30. On August 14, a joint motion for continuance was granted. On December 10, Respondents filed a motion for continuance, which was heard later that day and denied. The hearing was completed on December 12.

The case was originally assigned to Administrative Law Judge Elizabeth W. McArthur, but was later transferred to Administrative Law Judge Lynne A. Quimby-Pennock to conduct the final hearing.

At the final hearing, Petitioners asked that judicial notice be taken of chapter 760. The request was granted without objection. Petitioners called Mr. Whitt and William Barthle to testify.^{3/} Petitioners offered the following exhibits, which were received into evidence: 1, 3 through 6, and 10 through 12. Respondents called the following two witnesses to testify: Kimball Lee and Graeme Woodbrook. Respondents offered the following exhibits, which were received into evidence: R-1 through R-5.

At the conclusion of the hearing, the parties were advised that their proposed recommended orders (PROs) would be due ten days after the transcript was filed. The one-volume Transcript of the proceeding was filed on January 8, 2013. On January 16, Petitioners filed a Motion for Extension of Time to File Proposed Recommended Orders. The Respondents did not object. The motion was granted, and each party timely filed its respective PRO.

Each PRO has been considered in the preparation of this Recommended Order. There were undisputed facts within the pre-hearing stipulation that, as warranted, are recorded herein.

FINDINGS OF FACT

1. Bayhead Landings Subdivision (Bayhead) is a deed-restricted community for which the Bayhead Landings Property Owners Association, Inc., was organized to operate and administer. Deed restrictions have been in place since 1990 and will continue in place until at least January 2031.^{4/}

2. It remains unclear how many Bayhead parcels front the lake in question. There are four to five existing docks in that lake; however, none of those existing docks extend more than 80 to 100 feet into the lake.

3. The Declaration of Covenants, Conditions, and Restrictions for Bayhead provide in pertinent part:

6.(a) For the purpose of further insuring the development of said land as a residential/agricultural area of highest quality and standard, and in order that all improvements on each lot shall present an attractive and pleasing appearance from all sides of view, there shall be a Committee consisting of no less than three (3) persons appointed to review plans and specifications,

(b) The Committee reserves the exclusive power and discretion to control and approve all of the buildings, structures and other improvements on each lot or parcel in the manner and to the extent set forth herein. No residence, . . . or other structure

or improvement, regardless of size or purpose . . . shall be commenced, placed, erected or allowed to remain on any lot or parcel, . . . unless and until building plans and specifications covering same showing the shape, height, size, location and orientation on the lot, floor plans, square footage, front, side and rear elevations, materials to be incorporated and exterior color schemes . . . have been submitted to and approved in writing by the Committee.

* * *

(d) As a prerequisite to consideration for approval, and prior to commencement of the contemplated work, a complete set of plans and specifications must be submitted to the Committee. . . .

4. The purpose of the ARC is to ensure that any development in Bayhead maintains the "community standards and deed restrictions" and is of the "highest quality and standard." To ensure that goal is met, the ARC is to receive a complete set of plans and specifications prior to the work starting.

5. Mr. Whitt has a physical handicap as defined by the Act, section 760.22(7)(a). Mr. Whitt is confined to a wheelchair for mobility.

6. The Whitts' backyard property has a significant slope downhill or drop-off towards the lake. The area between the house and the lake is muddy for a long distance, the terrain is uneven, and it is not suitable for a wheelchair to traverse. No evidence was received as to the actual distances between the

house and either the drop-off area or where the terrain becomes uneven in the Whitts' backyard.

7. The water level in the lake has been relatively low for some time; however, there is some water in it now.

8. On September 7, 2010, Mr. Whitt submitted a proposed estimate and architectural review application to Respondents' ARC, seeking approval to construct a stationary dock on the Whitts' property (dock application). This dock application was the first received by the ARC in many years, and there is no evidence of any prior applications to build a stationary dock.^{5/}

9. The dock application (Petitioners' Exhibit 3) included a three-page proposal (Proposal) from Coastal Construction; Gulfside Docks^{6/} that included the following "SPECIFICATIONS":

- Timber Piles 2.5CCA • Frame/Stringers/Caps
- 2" x 8" • Dock Lumber Pressure Treated .40 •
- Dock Bolts 5/8" HDG • SS Nails/Screws

The Proposal also contained the following "STATIONARY DOCK" information:

- Construct new 300' x 5' dock with 20 x 16 head.
- We will add 2" x 2" lumber along perimeter of dock to act as bumper system
- Decking will be #1 pressure treated decking.
- Stainless Steel Screws will be used to secure deck boards

10. The dock application did not contain any specific references to the dock being "wheelchair accessible"; however, it

did contain information about a bumper system. The second proposal (Petitioners' Exhibit 10) contained the same "SPECIFICATIONS." The second proposal contained similar information regarding the "STATIONARY DOCK"; however, the language regarding the bumper system was altered to reflect "Install 2" x 2" wheel chair safety bumper around entire perimeter of dock - Approx. 663'LF. Stainless steel screws will be used as fasteners."

11. On September 19, 2010, William Barthle, a member of the ARC, sent an e-mail to Mr. Whitt. The e-mail provided Mr. Whitt with a portion of Bayhead's deed restrictions and requested "WE NEED A DIAGRAM OF DOCKS [sic] PLACEMENT ON PROPERTY AS REFERENCED IN DOCS."

12. On September 27, 2010, Mr. Whitt sent a plat map to the ARC with a hand-drawn dock sketched on it. The hand-drawing was not to scale and failed to provide detailed measurements of where the dock was to begin in relation to the residence or shed that were already on the property. Further, there was no rendering of what the dock itself would look like.

13. On October 10, 2010, the ARC sent Mr. Whitt a letter requesting four specific items in order for the ARC to consider the dock application, including:

1. Square footage of dock
2. Height of dock

3. The exact location of the dock on your property (distance from your house and distance from property line on each side, distance from any setback easement, or wetlands buffer boundary)

4. A letter from Southwest Florida Water Management District approving the placement, length and location (starting/ending) of the dock

14. Mr. Whitt's June 22, 2011, response letter (eight months later) to the request failed to provide the requested information. As of December 12, 2012, the Whitts had not provided the requested information.

15. Mr. Barthle and Graeme Woodbrook both served on the ARC when the Whitts' dock application was submitted. Both gentlemen credibly testified that the Whitts' dock application failed to provide enough information to allow them to make a decision about it. Further, Mr. Woodbrook admitted he has some physical limitations and is sympathetic to people who have disabilities. While both men knew Mr. Whitt was confined to a wheelchair, neither knew why Mr. Whitt had to use it.

16. Other ARC applications were admitted into evidence. These ARC applications involved: painting the exterior of a primary residence (two separate requests); landscaping in the front yard of a residence for a non-permanent 6' x 8' fish pond; replacing a playground set; resurfacing a pool deck, patio, and front porch entry; resurfacing a driveway; and extending a

present screen porch. Of the three ARC applications that involved some type of new construction (fish pond, playground set, and porch extension), each contained pictures, dimensions, and/or diagrams sufficient for the reviewer to appreciate where the project was being constructed in relation to the house and property lines.^{7/}

17. As of December 12, 2012, Respondent had neither approved nor rejected the Whitts' dock application. That application is simply not complete without the requested information.

18. The dock application remains "pending," awaiting receipt of the requested information. The Whitts' position that they have provided everything that the builder has provided them is insufficient to provide the ARC with the requisite information to know where the dock will begin on the Whitts' property; how far out the dock will extend into the lake; and what the structure will look like.

CONCLUSIONS OF LAW

19. The Division has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

20. Mr. and Mrs. Whitt have the burden of proving by a preponderance of the evidence that Respondents violated the Act by discriminating against them, based on Mr. Whitt's disability.

21. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary, 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

22. The Act is codified in sections 760.20 through 760.37. Section 760.23 states, in pertinent part:

Discrimination in the sale or rental of housing and other prohibited practices.--

* * *

(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.

23. Although it was established that Mr. Whitt is a member of a protected class (handicapped/disabled) and that Respondents were aware of his disability, the Whitts have failed to show by the preponderance of the evidence that Respondents discriminated against them based on Mr. Whitt's disability. The Whitts submitted an incomplete ARC application which remains "pending." The Whitts failed to prove their claim of discrimination. Once the Whitts submit the requisite information, then the ARC will be able to render a decision.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief filed on behalf of Mr. and Mrs. Whitt.

DONE AND ENTERED this 15th day of February, 2013, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of February, 2013.

ENDNOTES

^{1/} The style of the case is Florida Commission on Human Relations, on behalf of John and Kimberly Whitt.

^{2/} All references to Florida Statutes are to the 2012 version, unless otherwise noted.

^{3/} Respondents had also listed these witnesses for its own case-in-chief. To provide an orderly hearing flow and allow Respondents the opportunity to elicit the direct testimony of each witness, the undersigned allowed Respondents' cross examination to go beyond Petitioners' direct.

^{4/} Although testimony regarding the extension of the deed restrictions was offered, it was not the subject of the complaint.

^{5/} In 2010, Graeme Woodbrook submitted an ARC application for the construction of a floating dock. However, before the application could be acted upon, the water level in the lake went down significantly, and Mr. Woodbrook withdrew his application.

^{6/} Kimberly Whitt is listed as the sole "Customer" on the "PROPOSAL" from the Coastal Construction; Gulfside Docks company.

^{7/} The fact that the playground set application was submitted "after the fact" is of no consequence as it was, in fact, a replacement to a playground set that had already been there, but was decayed.

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.