STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIRYAM HATHAWAY AND BENJAMIN HATHAWAY,

Petitioners,

vs. Case No. 20-1704

GERLINDE WERMUTH AND HORST WERMUTH,

Respondents.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1] on June 25, 2020, in Sarasota, Florida.

APPEARANCES

For Petitioner: Miryam Hathaway, pro se
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Sarasota, Florida 34277

For Respondent: Kimberly Valashinas, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioners, Miryam Hathaway and Benjamin Hathaway, were subject to a discriminatory housing practice by Respondents, Gerlinde

[1] All statutory references are to Florida Statutes (2019), unless otherwise noted.

Wermuth and Horst Wermuth, based on a handicap, in violation of Florida's Fair Housing Act.

PRELIMINARY STATEMENT

On December 19, 2018, Petitioners filed a Housing Discrimination Complaint with the Florida Commission on Human Relations (the "Commission") alleging that Respondents, Gerlinde Wermuth and Horst Wermuth, violated the Florida Fair Housing Act ("FHA") by discriminating against them, based on a handicap.[2]

On March 4, 2020, the Commission notified Petitioners that no reasonable cause existed to believe that Respondents committed a discriminatory housing practice.

On March 30, 2020, Petitioners filed a Petition for Relief with the Commission alleging a discriminatory housing practice. The Commission transmitted the Petition to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on June 25, 2020. At the final hearing, Petitioner, Miryam Hathaway, testified on her own behalf. Petitioners' Exhibits 1 and 13 were admitted into evidence. Respondents Gerlinde Wermuth and Horst Wermuth both testified. Respondents' Exhibits E through I, as well as Respondents' supplemental exhibits, identified as O and P, filed on July 15, 2020, with leave of the undersigned, were admitted into evidence.

[2] Petitioners included Parkway Villas Condominium Association, Inc. ("Association"), in their initial complaint to the Commission. However, on May 11, 2020, Petitioners filed a motion to voluntarily dismiss the Association and proceed only against Respondents in their individual capacities, which was granted.

A one-volume Transcript of the final hearing was filed with DOAH on July 21, 2020. At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals. Following the hearing, Respondents requested an extension of the filing deadline, which was granted.[3] Both parties timely filed post-hearing submittals, which were duly considered in preparing this Recommended Order.[4]

FINDINGS OF FACT

1. Petitioners own a condominium in Parkway Villas Condominiums ("Parkway Villas") located in Bradenton, Florida. Petitioners have lived in Parkway Villas since 2012. Parkway Villas, as described by Petitioner, Mrs. Hathaway, is a "nice elderly community" of 225 units.[5]

2. Parkway Villas is governed by the Parkway Villas Condominium Association, Inc. (the "Association"), a homeowners' association formed in approximately 1970.

3. At the final hearing, Mrs. Hathaway testified that she suffers from a physical disability from a work injury that occurred many years ago. Supporting this claim, Mrs. Hathaway produced several medical records documenting an issue with her right shoulder and elbow, specifically acromioclavicular ("AC") joint arthropathy, which includes tendinosis, tendinopathy, and a partial tendon tear. Mrs. Hathaway asserts that this

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[3] By requesting a deadline for filing post-hearing submissions beyond ten days after the transcript filing date, the 30-day time period for filing the recommended order was waived. *See* Fla. Admin. Code R. 28-106.216(2).

[4] Petitioners subsequently filed a document on September 10, 2020, which was not considered.

[5] Petitioner Benjamin Hathaway did not participate in the final hearing. Nor did Petitioners produce any evidence regarding the discrimination claim he is pursuing against Respondents, or a specific disability from which he suffers. Consequently, when evaluating Petitioners' allegations and cause of action in this FHA matter, any reference to "Petitioners" only concerns the representations and testimony of Miryam Hathaway.

condition causes her chronic pain, and she has difficulty lifting more than five pounds with her right arm. Mrs. Hathaway also expressed that she suffers from depression, high blood pressure, and hypertension.

4. Mrs. Hathaway claims that from approximately January 2018 through July 2019, Respondents (the "Wermuths") discriminated against her based on her disability by denying her the use and enjoyment of certain community amenities (the Association's pool), and then failing to make a reasonable accommodation to enable her to use those amenities.[6]

5. The Wermuths also reside in Parkway Villas. Gerlinde Wermuth is currently President of the Association's Board of Directors. Mrs. Wermuth served as Board President during all times relevant to Petitioners' FHA claim.

6. Horst Wermuth is Gerlinde Wermuth's husband. Mr. Wermuth, however, has never served or held any position on the Association Board.

7. The Association's Board of Directors has seven members. All Board members are residents of Parkway Villas. All Board action requires at least four affirmative votes of its members. The Board may not take any action without a quorum of four members.

8. Petitioners point to Mrs. Wermuth as the primary perpetrator of the alleged wrongdoing based on her position as Board President. Petitioners contend that Mrs. Wermuth has severely abused her authority and mistreated Mrs. Hathaway for years.

9. Petitioners' issues raised in this matter began in April 2016. That month, Petitioners applied to the Board for approval to enlarge the patio

[6] Petitioners also alleged in their complaint filed with the Commission that Mrs. Hathaway, who is from Columbia, South America, was discriminated against based on her race and national origin, as well as retaliation. However, no evidence in the record supports a claim that the Wermuths took any actions or supported any Board decisions that were motivated by Mrs. Hathaway's race or national origin or in retaliation for a protected activity. Petitioners further allege that the Wermuths committed a number of non-FHA indiscretions, which are not considered in this administrative proceeding, including abuse of power, defamation, elder abuse, emotional distress, extortion, intimidation, and invasion of privacy.

outside their back door. Petitioners included with their application specific plans, diagrams, and measurements to allow the Board to determine whether the patio would fit within the community's aesthetics. The Board approved the patio construction on May 1, 2016, and Petitioners proceeded to construct their patio.

10. On December 14, 2017, several Board members and unit owners, including Mrs. Wermuth, trooped across the Parkway Villas property inspecting the community for potential "Carport/Patio Violations." According to Mrs. Wermuth, the Board regularly surveys the grounds to ensure consistent compliance with the Association's Policies, Rules, and Regulations ("Association Rules"). Petitioners, as residents and owners of a Parkway Villas dwelling, are members of the Association and subject to the Association Rules.

11. The survey revealed approximately 60 potential violations of the Association Rules. Thereafter, the Board determined that 23 of those potential violations warranted sending the unit owner a notice letter. Included on this list was Petitioners' unit (#115), about which was recorded "patio not approved." The Board determined that Petitioners' newly constructed patio departed from the plans that the Board reviewed and approved in May 2016.[7]

12. Following a Special Board Meeting held on January 5, 2018, the Board notified Petitioners of their findings. The Board warned Petitioners that they faced a fine of up to $1,000 unless they brought "their patio up to the agreed upon specifications." Petitioners were advised that they could appear before the Board's Compliance Committee on January 31, 2018, "to explain why you feel a fine should not be imposed."

[7] Association Rules, General Rules number 3, states: "Villa owners must obtain written Board approval before constructing add-ons, patios, or making any alterations to the common element."

13. On January 31, 2018, the Compliance Committee, of which Mrs. Wermuth is not a member, convened to review the status of the 23 violations identified in the survey done the previous December. By the time of the meeting, Petitioners were the only unit owners who had not voluntarily corrected their violation.

14. At the Compliance Committee meeting, Petitioners acknowledged that the patio they constructed differed from the design they submitted in April 2016. Primarily, their patio exceeded the dimensions shown in the previous design and exceeded standard dimensions acceptable to the Board.

15. The Board allowed Petitioners until March 31, 2018, to adjust the size of their patio. The Board also offered to work with Petitioners to bring their patio into compliance. At the final hearing, Mrs. Hathaway readily agreed that Mrs. Wermuth was very helpful in this process. Mrs. Hathaway relayed that Mrs. Wermuth made several welcomed suggestions advising how Petitioners could arrange their plants, and how to adjust uneven stone pavers.

16. In the meantime, on February 1, 2018, Mrs. Hathaway requested a private meeting with three Board members, including Mrs. Wermuth. During this gathering, Mrs. Hathaway revealed that Petitioners had installed an "emergency" half bathroom in their condominium in January 2016 without the Board's knowledge.

17. The Board later learned that the construction of the bathroom involved cutting through the concrete foundation of Petitioners' unit to connect the bathroom's pipes and plumbing to the Association's sewer system, as well as other significant plumbing and electrical work. Further, Petitioners never obtained the appropriate permits from Manatee County for the project, and the bathroom was constructed by an unlicensed contractor. In addition, Petitioners had taken a number of broken chunks of concrete from the unit's foundation and were using them as "decorative stones" around the plants on their patio, which the Association Rules prohibit.

18. On March 12, 2018, the Board voted to impose three separate fines on Petitioners for violating Association Rules, one for installing a bathroom without Board approval, one for constructing the patio contrary to the approved design, and one for placing the concrete chunks, as well as hanging wind chimes, adjacent to their patio.[8] The Board also suspended Petitioners from using the community common areas, which included the laundry room, the clubhouse, the exercise facilities, the showers, and the pool.

19. On March 28, 2018, the Compliance Committee met during a Special Board Meeting to consider Petitioners' multiple violations. During the meeting, the Compliance Committee found that Petitioners, as of that date, had properly reduced the size of their patio. The Compliance Committee also recognized that Petitioners had removed the concrete chunks and wind chimes from their patio area. Thereafter, the Compliance Committee voted to eliminate all fines imposed for those two violations.

20. Regarding the bathroom, however, the Compliance Committee concluded that the unapproved installation was too significant to overlook. The Compliance Committee was concerned that the structural alterations and plumbing necessary to construct Petitioners' new bathroom might have compromised the unit's infrastructure and potentially damaged the neighbor's adjoining unit. Consequently, the Compliance Committee upheld a fine of $1,000 for that violation. Mrs. Wermuth abstained from any vote on the matter.

21. In addition to the $1,000 fine, the Board upheld the suspension of Petitioners' use of Association amenities and common areas, including the clubhouse, exercise room, laundry room, and community pool. The suspension was to remain in effect until Petitioners paid the $1,000 fine and until Manatee County inspected the bathroom's construction and deem it sufficient

[8] The Parkway Villas Combined Amended and Restated Declaration of Condominium, section 9.3, directs that: "The Villa Owner shall be required to inform the Board in writing of any electrical, plumbing, or structural changes."

for permitting, as well as Petitioners' payment, in full, of any outstanding fine (the $1,000). The Board decided that any unauthorized use of the common areas by Petitioners during the suspension period would result in additional fines.

22. The Board formally notified Petitioners of its decision by letter dated March 29, 2018, and signed by Mrs. Wermuth. The letter expressly stated that any violation of the suspension from using the common areas "will be considered a separate finable violation of the association's condominium documents," which would have to be paid in full prior to restitution of full use.

23. Sometime around March 2018, Petitioners took steps to have their bathroom appropriately inspected. Unlike her experience with the patio modifications, however, Mrs. Hathaway testified that Mrs. Wermuth was most unhelpful in this process. Mrs. Hathaway charged that Mrs. Wermuth ordered her to obtain inspections from both an electrician and a plumber.

24. Based on this imperative, Petitioners proceeded to pay an electrician, a plumber, as well as a professional engineer to inspect their bathroom. They also contacted Manatee County to acquire the appropriate building permits. Petitioners ultimately secured several reports confirming that the bathroom was competently constructed, as well as a Certificate of Completion from Manatee County indicating that the bathroom complied with applicable building code requirements. (The evidence adduced at the final hearing was unclear as to exactly when Petitioners presented the results of these inspections to the Board. Mrs. Hathaway urged that she provided all the information to the Board before the March 29, 2018, Board meeting, and produced a bill from a plumber dated March 8, 2018. However, the building permit Petitioners received from Manatee County was not issued until April 3, 2018. More significantly, as described below, the Board did not consider the inspection results until well over a year later in July 2019.)

25. On April 2, 2018, Petitioners paid the $1,000 fine to the Board for the unapproved construction of their half bathroom. Petitioners subsequently appeared before the Board in April and May 2018, to contest paying the fine, as well as the imposition of the suspension. Notably, at neither of these meetings did Petitioners specifically request an accommodation to allow Mrs. Hathaway to use the community pool while their dispute was pending the Board's review. Neither did they express Mrs. Hathaway's desire to use the pool in relation to a disability.

26. Following Petitioners' payment of the $1,000 fine in April 2018, Mrs. Hathaway began using the pool. (In fact, the evidence indicates that she never stopped using the pool.) However, because the Board had not yet conducted its review of the bathroom inspections and permits, her suspension from accessing the common areas remained in effect.

27. The Board later addressed Petitioners' violations during a meeting on April 23, 2018. At that time, the Board noted that Petitioners had not provided any paperwork demonstrating that their new bathroom had been proficiently constructed. Therefore, the Board moved to require Petitioners to have a licensed plumber inspect the connection between their bathroom and the Association's sewer line, and also to have a licensed electrician inspect the electrical work.

28. Thereafter, Mrs. Wermuth, in her role as Board President, directed the Board Secretary to prepare a letter notifying Petitioners that, while the inspections remained outstanding, they faced a "$50 per day fine for violating the suspension from use of the clubhouse and pool areas." The letter, dated April 25, 2018, also alerted Petitioners that their current fine totaled $500, and further warned Petitioners that if they persisted "in using the pool and clubhouse areas before [the Board has] removed the suspension and approved your half-bath project, the fine may increase to the maximum of $1,000. **The suspension will not be lifted until fines are paid in full**."

29. At the final hearing, Mrs. Wermuth explained that the Board imposed the fine to motivate Petitioners to comply with the Board's request as quickly as possible. However, once Petitioners proved that their bathroom adhered to Association Rules, Mrs. Wermuth represented that the Board fully intended to set aside the penalties.

30. Despite her suspension, Mrs. Hathaway continued to regularly (perhaps daily) use the Association pool. Mrs. Hathaway explained that several medical professionals had advised her that the joint pain in her right shoulder and arm would benefit from physical therapy in the pool.

31. To support her testimony, Mrs. Hathaway produced a doctor's letter from May 2017, which recommended that she "would benefit from use of the community pool to assist in her joint pain therapy." A year later in May 2018, Mrs. Hathaway visited a local hospital emergency room complaining of pain. Upon her discharge, the physician told her that using the pool "would assist with [her] joint pain therapy."

32. Mrs. Hathaway credibly testified that, in May 2018, she provided both the doctor's letter and the discharge instructions to a member of the Association Board (not Mrs. Wermuth). However, Mrs. Hathaway admitted that, other than passing on these two documents, she did not communicate directly or indirectly with any Board member about her disability or health. Neither does the evidence establish that Mrs. Hathaway furnished these documents to the Board for the Board's consideration. More pertinently, Mrs. Hathaway conceded she never directly delivered these documents to either Mrs. or Mr. Wermuth.

33. During her testimony, Mrs. Hathaway also described an incident on October 20, 2018, when she was exercising in the pool. (Mrs. Hathaway was still suspended from accessing the community's common areas.) That day, another Parkway Villas Board member (not Mrs. Wermuth) "viciously" yelled at her and demanded to know why she was using the pool when she was not allowed to be there. When Mrs. Hathaway did not exit the pool in a timely

fashion, the resident called the Manatee County Sheriff's Office, who responded to the scene. The sheriff registered the complaint, but did not arrest Mrs. Hathaway.

34. Petitioners never paid the fine for Mrs. Hathaway's unauthorized use of the pool during her suspension, which eventually reach the maximum amount of $1,000. Mrs. Hathaway explained that Petitioners felt that paying anything beyond the initial fine of $1,000 for the unapproved bathroom installation was "extortion" and simply not fair. Finally, on June 26, 2019, Petitioners sent a letter to the Board requesting the Board reconsider the outstanding sanction. The letter, addressed to Mrs. Wermuth, specifically expressed:

> [W]e would like to know when the sanctions no to use pool – fitness – laundry – comun [sic] areas that you ordered last year 3-26/18 after we paid $1,000 fine and present to you all the documentation from Manatee County 3-26/18 following the regulation's to instaled [sic] 1/2 bath on January 2016 and was approved with all Professional Plumbing – Electrician etc.

35. On July 1, 2019, the Board held a Special Board Meeting to consider Petitioners' request. During the meeting, the Board determined that Petitioners had presented sufficient proof that their bathroom was installed in a professional manner and complied with all necessary building code and Manatee County permitting requirements. The Board also acknowledged that Petitioners had produced a Certificate of Completion from Manatee County and had paid the maximum $1,000 fine for the initial violation. Therefore, the Board voted to rescind the suspension of Petitioners' use of the pool, as well as all fines associated with Mrs. Hathaway's repeated violation of the suspension. Mrs. Wermuth presided over the meeting. However, she once again abstained from the vote.

36. The Board notified Petitioners of its decision by letter, dated July 1, 2019, which stated that, "Any pending fines or suspensions to the

Association's Common Elements are rescinded." The Board also posted its action on the Association website. In addition, the Board emailed the meeting minutes of the vote to the Parkway Villas residents and placed a copy of the minutes on the community bulletin board in the clubhouse.

37. With Petitioners' right to access the Association's common areas reinstated, Mrs. Hathaway has been free to use the pool since July 2019.

38. Despite the July 2019 publication of the Board's vote to lift Petitioners' suspension, at the final hearing Mrs. Hathaway complained that she has experienced a number of confrontations with other Parkway Villas residents who still believe that she is barred from using the pool. Mrs. Hathaway declared that she has been told to leave the pool; she has been yelled at in the laundry room; and, most significantly, "many people attack me, attacking us, at the pool." Mrs. Hathaway expounded that confrontations such as the one on October 20, 2018, are not uncommon. She proclaimed that, "people start to attack us because Mrs. Wermuth talk to everyone, she circulate all the information to all the residents." Mrs. Hathaway relayed that Parkway Villa residents have reported her to the Manatee County Sheriff's Office approximately seven times since March 2018.

39. Mrs. Hathaway asserted that she has implored Mrs. Wermuth to re-notify the residents that the Board has rescinded Petitioners' suspension. However, Mrs. Wermuth allegedly has refused to do so. Therefore, as part of the relief for her FHA claim, Mrs. Hathaway desires all harassment related to her use of the pool to stop. Because Mrs. Hathaway believes that Mrs. Wermuth is responsible for imposing the sanctions in the first place, she asserts that Mrs. Wermuth should be ordered to spread the word that Petitioners are no longer prohibited from using the common areas. Accordingly, Mrs. Hathaway seeks an administrative order directing Mrs. Wermuth to inform all Parkway Villas residents that Petitioners are no longer forbidden from using the pool.

40. Mrs. Hathaway also alleged several other instances of harassment by Respondents including:

a. December 2017, Bicycle Incident: Mrs. Hathaway complained that Mr. Wermuth rode his bicycle too close to her as she walked down a sidewalk. Mrs. Hathaway described the incident as intentionally intimidating.

b. Pictures of Petitioners' Unit: Mrs. Hathaway complained that Mr. Wermuth photographed her villa and complained about its condition. (This activity prompted Mrs. Hathaway to initiate a small claims court action against him.)

c. Mrs. Hathaway's Use of the Laundry Room: Mrs. Hathaway claimed that in March 2018, Mr. Wermuth harassed her while she was doing laundry. Mrs. Hathaway claims that Mr. Wermuth took pictures of her in the laundry room and raised his voice at her.

41. In addition to this FHA matter, Petitioners initiated several unrelated, but parallel, legal actions against Respondents in or about February 2018. These matters involved separate complaints in Manatee County small claims court against both Mrs. and Mr. Wermuth. In particular, on February 8, 2018, Mrs. Hathaway sued Mrs. Wermuth for discrimination, retaliation, intimidation, and harassment based on a "fine for no violations." *See Miryam Hathaway v. Gerlinde Wermuth*, Twelfth Judicial Circuit in and for Manatee County, Florida, Case No. 2018 SC 679. On April 5, 2018, Mrs. Hathaway sued both Mr. and Mrs. Wermuth for "harassment issues." *See Miryam Hathaway v. Horst and Gerlinde Wermuth*, Twelfth Judicial Circuit in and for Manatee County, Florida, Case No. 2018 SC 1509. These

civil matters were dismissed in December 2018.[9] However, Mrs. Wermuth was awarded over $20,000 in attorney's fees and costs spent in defending the matter against Mrs. Hathaway.

42. At the final hearing, Respondents denied that they ever took any action against Petitioners based on Mrs. Hathaway's disability. They also rejected any allegation that they ever participated in a decision that refused or failed to accommodate Petitioners' alleged disability.

43. Mrs. Wermuth testified that, while she did serve as Board President throughout the time of Petitioners' fines and suspension, she does not personally administer, control, or manage the Association. Further, as an individual Board member, she does not have the authority to unilaterally penalize a unit owner who has violated Association Rules. Neither can she personally suspend a unit owner's common use rights. Similarly, she does not have the power to reinstate the use of the Association's common elements, or grant any request for a disability accommodation, however reasonable.

44. Regarding the Board's decision to impose the suspension on Petitioners, Mrs. Wermuth maintained that as a Board member, she must participate in the Board's actions to enforce the Association Rules. Mrs. Wermuth asserted that the Board does so in a consistent, fair, and uniform manner to all Parkway Villas residents.

45. Regarding Petitioners' specific allegations, Mrs. Wermuth denied that she had any knowledge that either Petitioner suffered from a disability. She further denied any knowledge of a request from Mrs. Hathaway to use the pool for the express purpose of treating her shoulder pain. On the contrary,

[9] In granting the Wermuths' motion to dismiss, the judge noted that Mrs. Hathaway's "claim surrounds a sequence of events that have occurred between approximately December 2017 to April 2018, wherein [Mrs. Hathaway] believes the Defendants have harassed, discriminated against, and intimidated her by approaching her, yelling at her, 'stalking' her, taking photos of her, and participating in the HOA board's decisions denying her request to replace her patio, fining her for failing to bring her patio up to agreed-upon specifications, and suspending her common area privileges. [Mrs. Hathaway] claims that these events have caused her medical issues."

Mrs. Wermuth expressed that, throughout the time period covered by Petitioners' complaint, she has seen Mrs. Hathaway physically active around the community. Mrs. Wermuth has observed Mrs. Hathaway walking, exercising in the pool, hosting a Latin dancing party, and taking part in exercise classes in the clubhouse.

46. Mrs. Wermuth vigorously refuted the allegation that any of the Board's enforcement actions against Petitioners were administered unfairly. On the contrary, Mrs. Wermuth asserted that the fines and suspension were necessary to enforce the Association Rules, as well as to ensure that Petitioners adhere to them. Mrs. Wermuth explained that, in her experience, suspending a resident's access to the common areas is the most effective method to bring about compliance with Association Rules.

47. Mrs. Wermuth further declared that none of the Board's actions regarding Petitioners were based on her personal feelings. Instead, Mrs. Wermuth recused herself from most of the Board's decisions addressing Petitioners' issues and consistently voted to "abstain."

48. For his part, Mr. Wermuth testified that he does not hold, nor has he ever held, any decision-making authority with the Association or its Board. He has never served as a member of the Board or worked as an Association agent, committee member, or employee. Mr. Wermuth expressed that he has never made, nor has he ever had the power to make, housing determinations affecting Petitioners. Neither has he ever had any responsibility to determine Petitioners' access to community facilities. Petitioners did not present any evidence establishing that Mr. Wermuth participated in any vote of the Board to impose the fines or suspension on Petitioners.

49. Further, as with his wife, Mr. Wermuth attested that he had no knowledge of any disabilities claimed by Petitioners prior to learning of their Petition filed with the Commission. On the contrary, he too has observed Mrs. Hathaway walking around the community, exercising in the pool, and using the fitness equipment in the Association's clubhouse.

50. Mrs. Hathaway admitted that she had not spoken to Mr. Wermuth about her health or disability. Neither did she present any evidence that she requested an accommodation from him, or that he played any role in the Board's suspension of her use of the community pool.

51. As to Mrs. Hathaway's complaints of other transgressions:

a. Bicycle Incident: Mr. Wermuth did not recall ever riding his bicycle too close to Mrs. Hathaway while she was walking on a sidewalk. He specifically denied that he ever intentionally rode by her in an attempt to threaten or intimidate her. Mr. Wermuth offered that if his bicycle ever did pass too close to Mrs. Hathaway, it would have been unintentional and had nothing to do with her disability.

b. Pictures of Petitioners' Unit: Regarding Mrs. Hathaway's complaint that he once photographed her villa, Mr. Wermuth testified that he frequently takes pictures of the Parkway Villas community as part of an ongoing scrapbook of his homes and neighborhoods. Mr. Wermuth stated that during the incident in question, he was simply taking pictures of the community's Christmas lights. He denied that he ever intended to agitate Petitioners. Similarly, no evidence shows that Mr. Wermuth photographed Petitioners' condominium based on Mrs. Hathaway's disability or some discriminatory animus. Mrs. Hathaway admitted that Christmas lights were strung up next to her unit at the time.

52. Based on the competent substantial evidence in the record, the preponderance of the evidence does not establish that the Wermuths discriminated against Petitioners (Mrs. Hathaway) based on a handicap, or failed to provide a reasonable accommodation for the same. Accordingly, Petitioners failed to meet their burden of proving that the Wermuths committed unlawful discrimination in violation of the FHA.

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.35(3)(b), Florida Statutes. *See also* Fla. Admin. Code R. 60Y-4.016.

54. Petitioners bring this action alleging that the Wermuths discriminated against them in violation of the FHA. Petitioners assert that the Wermuths, in particular Mrs. Wermuth, treated them differently based on their handicaps. Petitioners specifically complain that the Wermuths refused to make "reasonable accommodations" in the application of the Association's rules, policies, practices, or services to Petitioners.[10]

55. The FHA is codified in sections 760.20 through 760.37 and makes it unlawful to discriminate against any person in the provision of services or facilities in connection with a dwelling because of a handicap. Section 760.23 specifically states, in pertinent part:

> (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;
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> * * *
>
> (9) For purposes of subsections (7) and (8), discrimination includes:
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> * * *
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> (b) A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such

[10] *See Sabal Palm Condo. of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272, 1293 (S.D. Fla. 2014)(Individual board members can be held liable when they have "personally committed or contributed to a [federal] Fair Housing Act violation.")

> person equal opportunity to use and enjoy a dwelling.

56. The FHA is patterned after the Federal Fair Housing Act found in 42 U.S.C. § 3601, *et seq*. Discrimination covered under the FHA is the same discrimination prohibited under the Federal Fair Housing Act. *Savannah Club Worship Serv. v. Savannah Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1224 n.1 (S.D. Fla. 2005); *see also Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1285 (11th Cir. 2014)("The [Federal Fair Housing Act] and the Florida Fair Housing Act are substantively identical, and therefore the same legal analysis applies to each."). Accordingly, federal case law involving housing discrimination is instructive in applying and interpreting the FHA. *See Loren v. Sasser*, 309 F.3d 1296, 1300 n.9 (11th Cir. 2002). Specifically regarding the subject matter of Petitioner's claim, the statutory language in section 760.23 is very similar to that found in its federal counterpart in 42 U.S.C. § 3604(f).[11]

57. To establish a claim under the FHA, the burden of proof is on the complainant. § 760.34(5), Fla. Stat.; *see also Sec'y, U.S. Dep't of Hous. & Urban Dev. ex rel. Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990); and *Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern &*

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[11] The pertinent language in 42 U.S.C. § 3604(f) states:

> (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;
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> * * *
>
> (3) For purposes of this subsection, discrimination includes--
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> * * *
>
> (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;

Co., 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). The preponderance of the evidence standard is applicable to this matter. § 120.57(1)(j), Fla. Stat.

58. Discrimination may be proven by direct, statistical, or circumstantial evidence. *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the decision without any inference or presumption. *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001); *see also 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).

59. Petitioners presented no direct evidence of housing discrimination by the Wermuths. The evidence and testimony do not establish that the Wermuths intentionally refused to make accommodations in the Association's rules, policies, practices, or services because of Petitioner's disability.

60. Where there is no direct evidence of discrimination, fair housing cases are analyzed under the three-part, burden-shifting framework set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See Blackwell*, 908 F.2d at 870; and *Savannah Club*, 456 F. Supp. 2d at 1231-32.

61. Under this three-part test, Petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-53; *Burke-Fowler v. Orange Cty.*, 447 F.3d 1319, 1323 (11th Cir. 2006); and*Valenzuela*, 18 So. 3d at 22. For Petitioner to establish a prima facie case of housing discrimination based on an alleged failure to make reasonable accommodations she must prove that: (1) she is "disabled" within

the meaning of the FHA; (2) she requested a "reasonable accommodation"; (3) the requested accommodation was necessary to afford her an equal opportunity to use and enjoy her dwelling; and (4) the Wermuths refused to make the requested accommodation. *Schaw v. Habitat for Humanity of Citrus Cty., Inc.*, 938 F.3d 1259, 1264 (11th Cir. 2019); *Sabal Palm Condo. of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272, 1281 (S.D. Fla. 2014); and *Bhogaita*, 765 F.3d at 1285.

62. Regarding the second prong of the prima facie case, Petitioner carries the burden of showing that her proposed accommodation is "reasonable." *U.S. Airways v. Barnett*, 535 U.S. 391, 401–02, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002). The Supreme Court has explained that a petitioner/plaintiff "need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily in the run of cases." *U.S. Airways*, 535 U.S. at 401. The reasonableness inquiry considers "whether the requested accommodation 'is both efficacious and proportional to the costs to implement it.'" *Schaw*, 938 F.3d at 1265.

63. If a petitioner's request is facially reasonable, the burden shifts to the respondent, who must prove that the accommodation would nonetheless impose an "undue burden" or result in a "fundamental alteration" of its program. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1220 (11th Cir. 2008); *Sabal Palm*, 6 F. Supp. 3d at 1281 (An accommodation "is not reasonable 'if [1] it would impose an undue financial and administrative burden on the housing provider or [2] it would fundamentally alter the nature of the provider's operations.'"). An accommodation requires a "fundamental alteration" if it would "eliminate an 'essential' aspect of the relevant activity," *id.* at 1220–21. Whether a particular aspect of an activity is "essential" will turn on the facts of each case. *Schwarz*, 544 F.3d at 1221; *Schaw*, 938 F.3d at 1266.

64. Regarding proof of the third element, Petitioners must show that the requested accommodation is "necessary" to address the need created by their

disability. *See Bhogaita*, 765 F.3d at 1288 ("[A] 'necessary' accommodation is one that alleviates the effects of a disability."). "To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability." *Sabal Palm*, 6 F. Supp. 3d at 1281–82. A reasonable accommodation is required "*only* if it 'may be necessary to afford [a disabled resident an] equal opportunity to use and enjoy a dwelling.'" *Schwarz*, 544 F.3d at 1225. In this context:

> "[E]qual opportunity" can only mean that handicapped people must be afforded the same (or "equal") opportunity to use and enjoy a dwelling as non-handicapped people, which occurs when accommodations address *the needs created by the handicaps*. If accommodations go beyond addressing these needs and start addressing problems not caused by a person's handicap, then the handicapped person would receive not an "equal," but rather a better opportunity to use and enjoy a dwelling, a preference that the plain language of this statute cannot support.

Schwarz, 544 F.3d at 1226.

65. If Petitioners prove a prima facie case, they create a presumption of discrimination. At that point, the burden shifts to the Wermuths to articulate a legitimate, nondiscriminatory reason for their actions. *Burdine*, 450 U.S. at 255; *see also Blackwell*, 908 F.2d at 870; *Savannah Club*, 456 F. Supp. 2d at 1231-32. The reason for the Wermuths' decision should be clear, reasonably specific, and worthy of credence. *See Dep't of Corr. v. Chandler*, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The burden on the Wermuths is one of production, not persuasion, to demonstrate to the finder of fact that its action was nondiscriminatory. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004). This burden of production is "exceedingly light." *Holifield*, 115 F.3d at 1564.

66. Finally, if the Wermuths meet their burden, the presumption of discrimination disappears. The burden then shifts back to Petitioners to prove that the Wermuths' proffered reason was not the true reason but merely a "pretext" for discrimination. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997); *Valenzuela*, 18 So. 3d at 25.

67. In order to satisfy this final step in the process, Petitioners must show "either directly by persuading the court that a discriminatory reason more likely motivated [the Wermuths] or indirectly by showing that [the Wermuths'] proffered explanation is unworthy of credence." *Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095. Petitioners must prove that the reasons articulated were false and that the discrimination was the real reason for the action. *City of Miami v. Hervis*, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011)(citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 2751 (1993), 509 U.S. at 515)("[A] reason cannot be proved to be 'a pretext <u>for discrimination</u>' unless it is shown <u>both</u> that the reason was false, <u>and</u> that discrimination was the real reason.").

68. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the [Respondents] intentionally discriminated against the [Petitioners] remains at all times with the [Petitioners]." *Burdine*, 450 U.S. at 253; *Valenzuela*, 18 So. 3d at 22.

69. Turning to Petitioners' allegations, Mrs. Hathaway claims that the Wermuths failed to accommodate her disability by refusing to lift the suspension from accessing the Parkway Villas common areas. Over the course of this dispute, Mrs. Hathaway identified two specific accommodation requests. First, she desired unrestricted access to the pool to conduct exercises to rehabilitate her shoulder injury. Second, at the final hearing, Mrs. Hathaway voiced that she wants the Wermuths to prevent the harassment she experiences from other Parkway Villas residents regarding her use of the pool. Based on the evidence in the record, however, Petitioners failed to establish a prima facie case of a discriminatory housing practice

against the Wermuths regarding each requested accommodation.[12]

a. Access to the Community Pool:

70. Petitioners' discrimination claim fails on Mrs. Hathaway's first accommodation request because the Board (and, therefore, the Wermuths) complied with her desire to use the pool by rescinding Petitioners' suspension from accessing the Association common areas.

71. In terms of Petitioners' prima facie case, based on the evidence in the record, Mrs. Hathaway satisfactorily established that she has a "handicap" within the meaning of the FHA.[13] Mrs. Hathaway also sufficiently demonstrated that she requested use of the pool for the purpose of treating her shoulder and arm injury. Mrs. Hathaway persuasively testified that she gave the two doctor's notes to a Board member in May 2018. These documents contained enough information to inform the Board that Mrs. Hathaway's use of the pool to "assist with [her] joint pain therapy" would afford her an equal opportunity to enjoy her dwelling in Parkway Villas. Further, allowing Mrs. Hathaway to use the pool for the limited purpose of exercise and rehabilitation was "reasonable" under the circumstances where the Board had imposed other penalties on Petitioners (fines and restricted access to the clubhouse), which would (and did) encourage Petitioners to obtain the proper inspections and permits for their unapproved bathroom installation.

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[12] While the basic thrust of Petitioners' FHA complaint centers on the Wermuths' alleged failure to provide a reasonable accommodation (which is not proven), Petitioners also failed to establish the broader claim that the Wermuths generally discriminated against Mrs. Hathaway based on her disability.

[13] A person has a disability under the federal Fair Housing Act if she has "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h); *see also Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000)("[C]hapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature.").

72. However, regarding the fourth prong of the prima facie case (refusal to make the requested accommodation), the evidence shows that Mrs. Hathaway's request for access to the Association's pool was granted, despite the fact that Petitioners did not pay the $1,000 fine for using the pool during the suspension. On July 1, 2019, the Board voted to lift the sanctions.

73. As far as the delay between the date Mrs. Hathaway provided a Board member Mrs. Hathaway's doctor's notes (May 2018), and the date the Board rescinded the suspension (July 2019), Petitioners did not prove that the Board should have addressed her situation prior to July 1, 2019. No evidence indicates that Petitioners made any sort of formal accommodation request to the Board until her June 26, 2019, letter asking about the status of the suspension. (Even then, Petitioners did not specifically explain that their desire to access the pool was to accommodate Mrs. Hathaway's disability.) Upon consideration of Petitioners' letter, the Board acted promptly and voted five days later to rescind the suspension.

74. Furthermore, and more material to this action, the evidence shows that the Wermuths, or, rather, Mrs. Wermuth as Board President, also took the limited steps within her power to accommodate Mrs. Hathaway's request to use the pool. Initially, the facts establish that Mrs. Wermuth had no individual authority to either bar or restore Mrs. Hathaway's access to the community pool. While she might have presided over Board meetings, Mrs. Wermuth's vote alone could not have rescinded Petitioners' suspension. Board action required at least three other affirmative votes. (And, in this case, at least four other votes because Mrs. Wermuth abstained from voting on Petitioners' sanctions.) Based on the facts found, the first time Mrs. Wermuth could have reasonably known that Mrs. Hathaway's desire for the Board to reconsider her suspension might be related to a disability was following Petitioners' letter dated June 26, 2019. Although Mrs. Hathaway provided the two doctor's notes to another Board member in May 2018, no evidence shows that Petitioners presented the documents to Mrs. Wermuth.

Conversely, both Respondents credibly testified that they were unaware that Mrs. Hathaway suffered from a disability based on their observation of her physical activity around the community. Accordingly, Petitioners did not prove a prima facie case of housing discrimination by Respondents based on the alleged failure to lift the suspension from use of the pool sooner than July 1, 2019.

75. Finally, the undersigned notes that even if Petitioners had proven their case, they have not shown that they would be entitled to any remedy. Section 760.35(3)(b) directs that, upon finding that a discriminatory housing practice has occurred, the administrative law judge "shall issue a recommended order ... prohibiting the practice and recommending affirmative relief from the effects of the practice, including quantifiable damages." In this matter, despite facing mounting fines, Mrs. Hathaway never stopped her (often daily) use of the pool. Further, the Board subsequently waived all fines. Consequently, because Mrs. Hathaway continued to conduct her pool exercises during the suspension and has had free access to the pool since July 2019, no discriminatory practice exists which the Commission must prohibit, and no affirmative relief or quantifiable damages can be identified for which an award should be made.

b. Preventing Harassment from Other Residents:

76. At the final hearing, Petitioners raised an additional accommodation request. Mrs. Hathaway implored the Wermuths to prevent the periodic harassment she receives from other Parkway Villas residents.
Mrs. Hathaway, however, failed to establish a prima facie case for this second request because the evidence does not show that the accommodation she seeks – that the Wermuths affirmatively act 1) to notify all community residents that the Board rescinded the suspension, and 2) to stop hostile encounters regarding Mrs. Hathaway's pool use – is "necessary" to give her an equal opportunity to use and enjoy her dwelling.

77. Petitioners brought this action to obtain an accommodation from the suspension to allow Mrs. Hathaway to use the pool to help alleviate her shoulder pain. Mrs. Hathaway's additional request for the Wermuths to provide notice to the community beyond that produced by the Board in 2019, however, relates solely to Petitioners' relationship with their neighbors, not her disability. While Mrs. Hathaway may have experienced unpleasant interactions with other residents, no evidence demonstrates that these occasional confrontations have effectively prevented her from using the pool.

78. Further, no evidence shows that the Wermuths have encouraged, participated, or been involved in any of these encounters. On the contrary, enforcing this second accommodation would require the Wermuths to take steps well beyond those necessary to address or ameliorate the effect of her handicap. The FHA only requires an accommodation that alleviates the effect of the disability. *See Schaw*, 938 F.3d at 1270. To the extent that Petitioners desire the Wermuths to take action over and above rescinding the suspension to the common areas (such as proactively policing personality conflicts within the community), such an accommodation would place Mrs. Hathaway in a better position, rather than an "equal" position, within the Parkway Villas community. She would receive a benefit beyond that available to non-handicapped persons based on factors unrelated to her actual disability. Consequently, Petitioners did not establish that the second accommodation Mrs. Hathaway seeks is "necessary" to afford her "equal" use and enjoyment of her dwelling. The fact that Mrs. Hathaway may have acrimonious relationships with other residents regarding her pool use does not, without more, sustain Petitioners' housing discrimination claim.

79. At its core, Petitioners' FHA complaint consists of broad assertions that the Board's decisions against their interests were based on Mrs. Hathaway's disability, and were driven by the Wermuths. However, the evidence and testimony in the record does not, either directly or

circumstantially, link Petitioners' aggravation with actual discrimination.[14] On the contrary, the Wermuths presented credible and persuasive explanations for Petitioners' suspension from accessing the pool (Petitioners' multiple violations of Association Rules), and no evidence shows that Mrs. Wermuth, in her role as Board President, was personally motivated to take some action (even if she held any individual authority to take such action) against Petitioners based on discriminatory animus.[15] Further, the Wermuths (and the Board) complied with Petitioners' request for an accommodation to use the pool. Consequently, Petitioners failed to meet their ultimate burden of proving that the Wermuths committed a discriminatory housing practice.

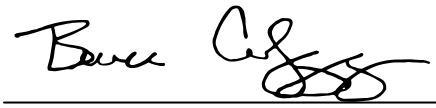
RECOMMENDATION

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 determining that Respondents, Gerlinde Wermuth and Horst Wermuth, did not commit a discriminatory housing practice against Petitioners and dismissing their Petition for Relief.

[14] *See Gooden v. Internal Rev. Serv.*, 679 Fed. Appx. 958, 966 (11th Cir. 2017)("[G]eneral allegations, based on mere speculation and hunches, in no way establish that any alleged [discriminatory activity] was race-, gender-, or disability based.").

[15] Similarly, Mrs. Hathaway's complaints about Mr. Wermuth riding his bicycle too close to her on the sidewalk or taking pictures of the side of her villa, at most, reflect a misunderstanding between neighbors, not a discriminatory housing practice.

DONE AND ENTERED this 5th day of October, 2020, in Tallahassee, Leon County, Florida.



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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.