No. 22-10773

In the United States Court of Appeals for the Eleventh Circuit

VISION WARRIORS CHURCH, INC.,
Plaintiff – Appellant,
v.
CHEROKEE COUNTY BOARD OF COMMISSIONERS,
Defendant,
HARRY JOHNSTON, STEVE WEST, RAY GUNNIN, BENNY CARTER, COREY RAGSDALE, both individually and in their official capacities as members of the Cherokee County Board of Commissioners, et al.
Defendants – Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, 1:19-cv-03205-MHC

APPELLANT'S OPENING BRIEF

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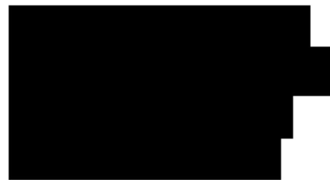

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No. 22-10773, *Vision Warriors Church, Inc. v. Harry Johnston, et al.,*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26, counsel for Appellant Vision Warriors Church, Inc., certifies that the following have or may have an interest in the outcome of this case/appeal:

- American Center for Law & Justice (law firm for Appellant)
- Carter, Benny
- Chapman, Michael
- Cherokee County, a municipal corporation
- Cohen, Mark H., presiding district court judge
- Compagnone, Christina (Counsel for Appellant)
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Dated: May 20, 2022

Respectfully submitted,

/s/ Abigail Southerland
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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that the law as it applies to the facts in the present case clearly supports reversal of the district court's order. If however, the Court believes it would benefit from hearing oral argument on this matter, Appellant would welcome the opportunity.

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JURISDICTIONAL STATEMENT

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C. §3601 et seq., 42 U.S.C. §2000cc et seq., and 28 U.S.C. §§1367 and 1441. This Court has jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. Plaintiff-Appellant timely filed its appeal on March 3, 2022. *See* Doc. 135 (notice of appeal dated March 3, 2022). Plaintiff-Appellant appeals the final order of the district court disposing of all parties' claims dated February 17, 2022. *See* Doc. 132 (Order denying partial summary judgment to Plaintiff and granting summary judgment to Defendants on all claims).

STATEMENT OF THE ISSUES

The issues presented on appeal are:

1. Whether the district court erred in finding there was no genuine issue of material fact as to whether the Defendants-Appellees intentionally discriminated against Plaintiff-Appellant in violation of the Fair Housing Act (FHA) and Americans With Disabilities Act (ADA).
2. Whether the district court erred in finding that Plaintiff-Appellant failed to present sufficient evidence to demonstrate a violation of the FHA and ADA's reasonable accommodation provision.
3. Whether the district court erred in finding that Plaintiff-Appellant failed to present sufficient evidence to demonstrate a violation its rights under the Equal Protection Clause of the Fourteenth Amendment.

4. Whether the district court erred in finding that Plaintiff-Appellant failed to demonstrate a violation of its rights under the Georgia Constitution?

STATEMENT OF THE CASE

I. Procedural Background

Vision Warriors filed suit against the County and various county officials on July 15, 2019, for the deprivation of its rights secured under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act Amendment (FHA or FHAA) and Americans With Disabilities Act (ADA), Religious Land Use and Institutionalized Persons Act (RLUIPA), and Georgia state law. (Doc. 1) An Amended Complaint was filed on October 11, 2019. (Doc. 33) On May 19, 2020, Vision Warrior's RLUIPA claim was dismissed for failure to state a claim. (Doc. 52) On June 4, 2021, Vision Warriors filed a motion for partial summary judgment on its reasonable accommodation claim under FHA and ADA, Fourteenth Amendment equal protection claim, and Georgia constitutional law claim. (Doc. 104) On the same date, Defendants filed their motion for summary judgment on all claims. (Doc. 105) On February 17, 2022, the district court granted summary judgment to the County Defendants on all claims. (Doc. 132)

II. Statement of Facts

A. Background

Vision Warriors is a religious non-profit corporation focused on creating lasting recovery through a "faith community that focuses on community, accountability and transparency." Doc. 104-2 (Plaintiff's Statement of Undisputed Material Facts (hereinafter "PSUMF"), at 1-3, 11.[1] Its Founder, Kirk Driskell, is the Executive Director and has been working with men in recovery for more than twenty-six years. PSUMF 12; Driskell Dec. (Doc. 126-1), at ¶¶n 3-7. Vision Warriors provides a residential program with the following necessary components for long-term recovery (1) a family-like environment proven to lead to better recovery; (2) location in a residential community; (3) affordability to residents (cost is often a hindrance for those seeking recovery); and (4) on-site recovery meetings and religious services. PSUMF 48-62.

Defendant Johnston served on the Board of Commissioners (hereinafter "Board") from 2000 to 2014, and has served as Chairman of the Board since January 2019. PSUMF 5. Defendants West, Gunnin, Carter and Ragsdale served on the Board at all times relevant to this case. PSUMF 6-9. Defendant Michael Chapman is the County's current Zoning Administrator. PSUMF 10. Vicki Lee is Chapman's predecessor and served as Zoning Administrator from August 2002 to November 2018.

[1] Citations to PSUMF are to each numbered paragraph and/or fact, not page number.

PSUMF 35.

The Property at issue in this case is currently owned by Vision Warriors and is located at 1709 Old Country Place. PSUMF 13, 47. The Property is made up of two parcels. PSUMF 13. The current zoning for Parcel 1 is R-80, whereas Parcel 2 is Zoned R-80 and R-20. *Id.*

Prior to Vision Warriors' acquisition of the Property, it was owned by the Youngs/Happy Acres Mission Transit from 1972 to December 2017 and was utilized to house missionaries (approximately four families at a time) and to host retreats for up to 50 people and various other events in a dormitory/chapel building. PSUMF 15, 17, 22-24. The Youngs obtained a building permit to build the main building which was utilized as a dormitory and chapel. PSUMF 18. A certificate of occupancy was issued for the main building in 1989. PSUMF 19. In addition, the Youngs obtained building permits for two other structures on the Property: a warehouse and detached garage. PSUMF 18, 20. The Youngs utilized the auto garage to repair vehicles for missionaries, widows, etc., in exchange for donations, PSUMF 25, and the warehouse and woodshop to build and shipping crates, repair furniture and store items for missionaries. PSUMF 26. The Youngs received assurances from the County Attorney in 1996 that its use of the warehouse/woodshop in the manner describe above "for the manufacture of wooden pallets for shipment" was permissible. PSUMF 27.

Vision Warriors has continued the same or similar uses in the same existing buildings on the Property since purchasing it from Happy Acres in December 2017.

PSUMF 64-66.

B. Before Neighborhood Opposition Arose

In July 2017, a representative of Happy Acres, Tori Young, and Kirk Driskell (CEO for Vision Warriors) met with the County's then-Zoning Administrator Vicki Lee[2] to discuss Vision Warriors' proposed use of the Property and to obtain assurances that its use would be permitted. PSUMF 37-38. Shortly thereafter, Ms. Lee issued a certificate of zoning acknowledging the two parcels containing "a primary home, a detached garage, a dormitory and chapel and another accessory structure" and stating that "as a legal non-conforming use, you may continue to house guests in the dormitory for short periods of time. You cannot expand the use of a different land use or increase the number of people served." PSUMF 40. On August 4, 2017, Tori Young emailed Ms. Lee's to clarify that Vision Warriors' use would be geared around men, and this references only women-related use. Could it be more specific to Vision Warriors?" Ms. Lee confirmed that it would, stating "I am the interpreter of land use and I assure you this meets Vision Warriors use." PSUMF 41. Ms. Lee was then put on notice that Vision Warriors was moving forward with the purchase of the Property and she told Driskell, "You are good to go," and notified Driskell that he would need to obtain a tenant occupancy permit, PSUMF 42-43, which he later obtained. PSUMF 67 In December

[2] Vicki Taylor Lee recently married and now goes by Vicki Smith. Doc. 132, at 6 n. 3. She is referred to as "Lee" herein consistent with the district court in its order.

2017, Vision Warriors purchased the Property and began operating a residential ministry shortly thereafter. PSUMF 47.

Pursuant to Section 14.1 of the Zoning Ordinance, "[e]xcept as otherwise provided in these regulations the Zoning Administrator shall administer, interpret and enforce this Ordinance." PSUMF 44. Ms. Lee and the Director of Planning and Zoning, Mr. Watkins ("hereinafter Director Watkins") have confirmed that Ms. Lee had authority to issue the certification of zoning to Vision Warriors. PSUMF 45-46. Additionally, Director Watkins has confirmed he is not aware of any information to indicate Ms. Lee was misinformed regarding Vision Warriors' use before issuing the certification of zoning. PSUMF 89.

C. After Neighborhood Opposition Arose

After Vision Warriors obtained a tenant occupancy change (TOC) permit in April 2018 (which Director Watkins confirmed was filled out correctly, *see* PSUMF 68), the County – in response to unfounded accusations by neighbors – contacted Vision Warriors and began asking questions regarding its use. PSUMF 76-81. Following several communications with County officials and ongoing neighborhood opposition based on unfounded and discriminatory concerns, PSUMF 74-79, the County Attorney notified Vision Warriors that it was revoking the TOC permit and advised Vision Warriors that it should immediately find alternative housing for its residents. PSUMF 82-84. In this same letter, the County also informed Vision Warriors that it deemed its use a "temporary shelter" and that such a use was not permitted in residential zoning districts

within the County. Doc. 102-1.

Vision Warriors appealed the County's determination and challenged the Commissioners' authority to revoke a TOC permit. Doc. 102-1. On August 9, 2018, and in response to these concerns, Chapman (Lee's successor) issued his own determination affirming the County's notice of June 12, 2018. *Id.; see* e.g., PSUMF 86-87. Chapman has since admitted that he is unsure whether he has authority to revoke a TOC permit. PSUMF 146. In his August 9, 2018, letter to Vision Warriors, Chapman asserts Ms. Lee was misinformed and that Vision Warriors likely provided her with erroneous information; however, Chapman has since acknowledged that he has never spoken with Ms. Lee. PSUMF 88. Numerous County officials have confirmed that the revocation/invalidation of a TOC permit and certification of zoning was unprecedented and has not occurred, except in regards to Vision Warriors. PSUMF 91-94.

In October 2018, the County amended its zoning ordinance to add definitions for "parsonage," "place of worship," and "religious organization" and to allow for accessory uses by places of worship via special permit, including "temporary shelters, transitional housing, and other similar facilities." Stipulated Exhibit 19H (Doc. 101-32) at 4-5.[3]

In November 2018, Vision Warriors filed applications for a special use permit to

[3] These accessory uses are permitted so long as they are "provided free of charge in furtherance of the ministry and/or goals of the Place of Worship." Doc. 101, at 5.

operate a dormitory and church as well as its accessory uses, or, in the alternative, for a rezoning. PSUMF 113. At the time Vision Warriors purchased the Property, a dormitory was an "open use" and did not require a special use permit. PSUMF 70 (identifying the date on which the zoning ordinance was amended to change "dormitories, fraternities & sororities" from an open use to a special use).

On March 5, 2019, a public hearing before the Planning Commission was held on Vision Warriors' zoning applications. PSUMF 115. On April 16, 2019, and prior to the Board's hearing on its zoning applications, the County was again notified that "Vision Warriors' submission of a special use permit application, or in the alternative, a rezoning request, is a request for reasonable accommodation in the zoning regulations under the FHA and ADA." PSUMF 126.

Prior to the Board's hearing and vote on Vision Warriors' application, and in an email dated March 31, 2019, Commissioner Johnston informed a neighbor that he "plan[ned] to vote to sustain the denial recommendations, and I think its likely the other commissioners will do the same." PSUMF 127. On April 1, 2019, also prior to the Board's hearing, Johnston informed a neighbor opposed to Vision Warrior's use, "I don't think they'll get anything from the BOC. Maybe through the courts." PSUMF 128. On July 16, 2019, Defendant Commissioners heard Vision Warriors' administrative appeal (filed on July 11, 2018) and voted unanimously to deny its appeal. PSUMF 130. As the Chair, Johnston is expected to provide leadership to the Board, to preside over meetings, and declare emergencies. PSUMF 131. In response to the question regarding

whether it would be fair to the applicant if a Commissioner indicated how he would vote before a hearing, Director Watkins indicated it "would seem to be unfair to render a decision before hearing everything." PSUMF 132. Chapman also testified it would not be fair if a Commissioner "determine[d] how they will vote before even attending the appeals hearing and hearing the information." PSUMF 133.

Nonetheless, on April 16, 2019, both land use applications submitted by Vision Warriors were heard by the Board, and it voted unanimously to deny both applications. PSUMF 125. Staff Reports prepared by Chapman for the County officials relating to the zoning applications, *see* PSUMF 117, confirmed that traffic and parking would not be an issue. PSUMF 119. Chapman also indicated that the future land uses for the residential zoning classification of both parcels making up the Property included "residential uses, as well as semi-public and institutional uses." PSUMF 121-122. Chapman has acknowledged the County received more than average number of emails and letters from neighbors regarding Vision Warriors. PSUMF 118.

On July 16, 2019, the same Board involved in the process to have Vision Warriors' TOC permit rescinded, and to deny it a special use permit, heard Vision Warriors appeal. PSUMF 130 Commissioners Johnston, West, Gunnin, Carter and Ragsdale voted unanimously to affirm Chapman's determination and deny Vision Warriors' requested relief. PSUMF 137.

III. Standard of Review

This Court reviews the district court's dismissal of Vision Warriors' claim under RLUIPA for failure to state a claim *de novo*. *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005).

This Court "review[s] the district court's ruling on a motion for summary judgment *de novo*, and adhere[s] to the same legal standards that bound the district court." *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1265 (11th Cir. 2007). "A motion for summary judgment should be granted when 'the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Id.* "The record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party." *Id.*

SUMMARY OF ARGUMENT

The district court erred in failing to consider material facts presented by Vision Warrior disputing the County Defendants' contention that it did not act at the behest of neighbors and/or with discriminatory animus in violation of the FHA and ADA's intentional discrimination claim. Specifically, the district court failed to consider facts relating to the historical background and sequence of events, as well as conflicting testimony undermining the County Defendants' attempt to legitimize their actions.

In addition, the district court erroneously held that Vision Warriors had not demonstrated necessity in support of its request for reasonable accommodation under the FHA and ADA. Among other things, the district court misunderstood the accommodation requested by Vision Warriors to operate like a dormitory and church rather than to operate as a single-family dwelling.

The district court also erred in concluding that Vision Warriors failed to identify a similarly situated use treated differently and for which the County Defendants had actual knowledge of and/or decision making authority. The district court failed to consider evidence demonstrating other similarly situated uses, as well as material facts demonstrating the County Defendants' awareness of and perpetuation of differential treatment.

The district court also erred in dismissing Vision Warriors' substantial burden RLUIPA claim on motion to dismiss by failing to adhere to the proper standard of review and incorrectly applying Eleventh Circuit case law governing the test employed to determine a substantial burden.

Finally, the district court erred in concluding that Vision Warriors' use was neither a conforming or legal nonconforming use and no due process rights were violated under Georgia law.

ARGUMENT

I. Vision Warriors' FHA and ADA Claims

The FHA and ADA prohibit housing discrimination by governmental entities against handicapped persons or persons with disabilities. The FHA makes it unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). "Handicap" is defined as

> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

42 U.S.C. § 3602(h). The FHA's implementing regulations further define physical and mental impairment to include "drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism." 24 C.F.R. §100.201.

Similarly, the ADA prohibits discrimination by public entities based on a disability and provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132.[4]

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[4] Akin to the FHA's interpretation of "handicap," "disability" under the ADA is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1). The

"Due to the similarity of the ADA and the FHA's protections of individuals with disabilities in housing matters, courts often analyze the two statutes as one." *Caron Found. of Fla., Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353, 1364 (S.D. Fla. 2012) (citing *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 n.4 (2d Cir. 2003); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 782-83 (7th Cir. 2002)). "Sober living homes can constitute a dwelling," and both the ADA and FHA apply to municipal zoning decisions. *Id.* at 1364 (citing *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212-16 (11th Cir. 2008) (other citations omitted)). On summary judgment, the parties did not dispute the protected status of Plaintiff and its residents. The parties agree that the FHA and ADA apply here and that the residents of Vision Warriors are "handicapped" within the meaning of the statute. *See generally* Doc. 132, at 18-20.

Three theories of discrimination are available to a protected individual or an organization associated with disabled individuals: (1) intentional discrimination (or disparate treatment); (2) discriminatory impact; and (3) a refusal to make a reasonable accommodation. *Schwartz*, 544 F.3d at 1213. Plaintiff appeals the district court's grant of summary judgment to Defendants on two theories: intentional discrimination and refusal to make a reasonable accommodation.

ADA specifically notes that qualified individuals include those "participating in a supervised rehabilitation program and is no longer engaging in such use." 42 U.S.C. § 12114(b)(2).

A. A Genuine Issue of Material Fact Remains As to Whether the County Intentionally Discriminated Against Vision Warriors in Violation of the FHA and ADA.

In order to succeed on an intentional discrimination claim, a plaintiff must show that its protected status "played some role"' in the zoning decisions challenged by plaintiff or that defendant(s) "acted for the sole purpose of effectuating the desires of private citizens, that [discriminatory] considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizens." *Hallmark Developers, Inc. v. Fulton Cnty.* 466 F.3d 1276, 1283 (11th Cir. 2006) (noting further that explicit discriminatory statements are decreasing and circumstantial evidence must often be used to establish requisite intent).

A plaintiff may meet this burden by presenting facts to support that the "decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial [or other improper] considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizens." *Id.* (internal quotations and citations omitted); *see e.g.*, *Bonasera v. City of Norcross*, 342 F. App'x 581, at 584 (11th Cir. 2009). Relevant facts to consider in "determining whether 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." *Hallmark Dev., Inc.,* 466 F.3d at 1283 (citation and internal quotation marks omitted).

The district court found that the County's conduct was a departure from normal criteria, Doc. 132 at 24, but erroneously concluded that no other evidence demonstrated Defendants may have been improperly motivated in their decision to discriminate against Vision Warriors. *Id.* at 28. The district court failed to consider facts presented by Vision Warriors relating to the discriminatory effect and impact of the County's actions and the sequence of events.

1. Discriminatory effect.

The discriminatory effect of the County's zoning determinations – decisions the County has been unable to support with logical explanation, and which is contradicted by testimony given by top zoning officials for the County. *See infra* Sections I.A.2-3. The effect of the County's decision is a complete ban on Vision Warriors' operation in all residential zoning districts in the County. PSUMF 82-83, 86-88 (identifying the County's June 12, 2018 and August 9, 2018 letters which expressly stated its use is not permitted in residential zoning districts"); Doc. 102-1 (June 12, 2018 letter) (emphasis added). This is precisely what the FHA and ADA were enacted to prevent. As the court in *Hovsons, Inc. v. Township of Brick* explained,

> We have previously emphasized that the enactment of the FHAA was "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Hellen L. v. DiDario*, 46 F.3d 325, 333 n.14 (3d Cir.) (quoting H.R. Rep. No. 711, 100th Cong., 2d Sess. 18, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179), *cert. denied*, 116 S. Ct. 64 (1995). The House Report further states that the FHAA "is intended to prohibit the application of special requirements through land-use regulations . . . that have the effect of limiting the ability of such individuals *to live in the residence of their choice in the*

> *community*." H.R. Rep. No. 711, 100th Cong., 2d Sess. 24, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185 (emphasis added). Moreover, the FHAA was intended to "require that changes be made to . . . traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." *Id.* at 2186.

89 F.3d 1096, 1105 (3d Cir. 1996).

2. Historical background and sequence of events

"The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes," where "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *City of S. Miami v. DeSantis,* No. 19-cv-22927, 2021 U.S. Dist. LEXIS 179452, at *103-04 (S.D. Fla. Sep. 21, 2021). Likewise, in applying the sequence of events factor, "courts often consider evidence of community animus preceding—and perhaps explaining (or even propelling)—a city's actions." *Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale*, 479 F. Supp. 3d 1298, 1330 (S.D. Fla. 2020) (citing *Caron*, 879 F. Supp. 2d at 1369) (finding support for intentional discrimination where "[c]ommunity outrage erupted" after a sober home "applied for a reasonable accommodation"). "Even where individual members of government are found not to be biased themselves," plaintiffs may demonstrate a violation of the FHAA if they can show that "discriminatory governmental actions are taken in response to significant community bias." *Cmty. Hous. Tr. v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 227 (D.D.C. 2003); *see also Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991) (zoning officer's reversal of initial decision that group home

for recovering substance abusers was permitted following expression of neighborhood and City Council opposition evidenced discriminatory animus in violation of the Act).

In the present case, the background and sequence of events demonstrate that the County's treatment of Vision Warriors changed once neighbors began expressing unfounded concerns and opposition to Vision Warriors' presence nearby. From that point on, County officials engaged in a series of zoning decisions to ensure that Vision Warriors could no longer operate on its current Property or in any residential district in the County.

Revocation of TOC permit and certification of zoning

In April 2018, more than four months after Vision Warriors obtained a certification of zoning from the County's top zoning official, and immediately following issuance of the TOC permit, the County decided to "investigate" Vision Warriors after admittedly receiving complaints from neighbors. Doc. 132, at 11 (citing Arp. Dep. at 27; Watkins Dep. at 28-29, 36). In the month that follows and leading up to the County's decision to rescind its TOC permit, Vision Warriors was asked to attend a meeting with the County whereby the County officials specifically mentioned the neighborhood opposition. PSUMF 76. It was also visited by several County officials for a fire inspection – one that was, by Arp's own testimony, unusual in regards to those who attended with him. PSUMF 74-75. And it was asked to address accusations made against Vision Warriors in a petition circulated with the County's seal and stating, "We all have a huge neighborhood problem!" and that Property values would decrease and children

would be unsafe because of Vision Warriors. PSUMF 78-80.

Shortly thereafter, on June 12, 2018, the County Attorney notified Vision Warriors that its TOC permit and zoning certification issued by Lee were "void" and "hereby rescinded" and informed it that its use was deemed by the County to be temporary shelter and thus *prohibited in residential zoning districts*." Doc. 102-1 (June 12 letter) (emphasis added); *see e.g.*, PSUMF 82-83. Vision Warriors was instructed to find other housing for its residents. The County also asserted without support that Vision Warriors' use was different from Happy Acres, *id.*, – an assertion that the County has since been unable to support. PSUMF 22-26, 28-30 (detailing activities of Happy Acres including housing of four families and up to 50 people for retreats; operations in car garage and woodshop building); PSUMF 63-66 (detailing same activities of Vision Warriors except that Vision Warriors ministers to recovering addicts).

In July 2019, Vision Warriors appealed the County's determination and notified the County that it acted without proper authority pursuant to Cherokee County Zoning Ord. 14.1. Doc. 102-2 (August 9, 2018 from Chapman acknowledging Vision's challenge). The County then re-issued its June 12 determination – this time under Chapman's signature. Doc. 102-2 (August 9, 2018 letter); PSUMF 85-87. In his letter, Chapman accused Vision Warriors of providing "erroneous or incomplete information to Lee. Doc. 102-2 (asserting that Ms. Lee issued the certification "erroneously and likely due to erroneous or incomplete information provided by [Vision Warriors]."). *Id.* Chapman has since admitted that he never spoke with Ms. Lee regarding the zoning

certification, PSUMF 88, and Director Watkins has refuted Mr. Chapman's earlier assertion – testifying that he is not aware of any information that would suggest Ms. Lee was misinformed when issuing the certification. PSUMF 89.

Denial of zoning applications and appeal

Left with no other alternative but to close its doors, Vision Warriors submitted a request for reasonable accommodation in the form of two zoning applications: a special use permit to operate as a dormitory and religious institution, or in the alternative, a rezoning application.

Prior to the hearing on Vision Warriors' applications, the Chair of the Board of Commissioners, Johnston, informed neighbors that he had already decided to vote against Vision Warriors and that he believed the other Commissioners would do the same. PSUMF 127. He assured another neighbor, "I don't think they'll [Vision Warriors] get anything from the BOC [Board of Commissioners]. Maybe through the courts." PSUMF 128. Commissioner Johnston testified that it is his job to provide leadership to the Board. PSUMF 131. Two other County officials have confirmed that it would be unfair for a member of the Board to indicate how he will vote before the hearing. PSUMF 132-133. County officials acknowledge that Vision Warriors' application generated significant neighborhood opposition compared to other zoning applications. PSUMF 118.

On April 16, 2019, the County Board voted to deny Vision Warriors' special use application, PSUMF 125. And on July 16, 2019, the same County Board presided over

Vision Warriors' appeal and voted to deny its appeal. PSUMF 130. The County's attempts to legitimize their decision to classify Vision Warriors as a "temporary shelter" which is prohibited in all residential districts, rather than a "dormitory," and deny it a special use permit fails based on the following facts:

(1) both a dormitory and church were permitted uses under the zoning code at the time Vision Warriors began operating on the Property.[5] Doc. PSUMF 70-71 (citing relevant ordinance provisions and demonstrating the ordinance was amended to change "dormitory" from a use permitted by right to a special use *after* Vision Warriors purchased the Property and thus its use should have been deemed an approved "grandfathered" use); Doc. 101-30, at 79, 96 (Section 7.7 outlining permitted uses with additional requirements; Section 7.7-18 identifying religious institutions). Under the NAICS code (listed in the County's use tables), "dormitories" are defined as

> establishments primarily engaged in operating rooming and boarding houses and similar facilities . . . These establishments provide temporary or longer-term accommodations, which, for the period of occupancy, may serve as a principle residence. These establishments also may provide complementary services, such as housekeeping, meals and laundry services."

PSUMF 98. Some of the uses falling under "dormitories" include "boarding houses," "clubs, residential," and "rooming and boarding houses." PSUMF 99.

In April 2018, the County amended its zoning ordinance to change "dormitory" from a use permitted by right, to one permitted by special use permit. PSUMF 70.

(2) Various County officials regularly referred to Vision Warriors use as a dormitory and chapel. *See* PSUMF 34, 36, 40 (former Zoning Administrator Lee referring to use of the main building as dormitory/chapel); PSUMF 124 (Director Watkins testifying that he considered Plaintiff's use to be more like a residence hall or dormitory); Watkins Deposition (Doc. 104-7) at 38 (Director Watkins testifying that Vision Warriors' use did not sound like a temporary shelter); PSUMF 129 (Comm'r Johnston referring to Plaintiff's use as dormitory and chapel in correspondence with neighbors); PSUMF 134 (Comm' Johnston acknowledging "So what is the use? You could loosely use the term dormitory,").

(3) No legitimate reason for denial was presented by the County. Chapman's report indicated no issues with traffic or parking, PSUMF 119, and confirmed that compatible and/or contemplated future uses for the area included "residential uses, as well as semi-public and institutional uses" as well as "recreational/parks" and some "commercial development." PSUMF 121-122. Chapman's report on "impact" is devoid of any assertion that Vision Warriors' use would have an adverse effect on the surrounding area. PSUMF 123.

(4) Testimony offered later by County officials in an attempt to explain their support for denying Vision Warriors' zoning application is also inconsistent and illogical. "Temporary shelter" is defined under the NAICS Code (the code consulted by the County in determining land use definitions) as "establishments primarily engaged in providing (1) short-term emergency shelter for victims of domestic violence, sexual

assault, or child abuse and/or (2) temporary residential shelter for homeless individuals or families, runaway youth, and patients and families caught in medical crisis." PSUMF 95-96. However, Chapman testified that he did not consult any information that would have led him to believe that residents of Vision Warriors are homeless. PSUMF 100, 106. Chapman also admitted that he was familiar with the application process for a resident at Vision Warriors (negating any suggestion that it provided shelter on an emergency basis like homeless shelters do) and could not provide a logical answer to how Vision Warriors' use was akin to an "emergency situation." PSUMF 103. In addition, he also confirmed that he knew that Vision Warriors does not provide any medical treatment to its residents. PSUMF 101-102.[6]

These facts were largely ignored by the district court when analyzing Vision Warriors' intentional discrimination claim. The impact of the decision, together with the historical background of the decision and the sequence of events strongly supports that the County acted with an improper discriminatory motive.

3. Departure from normal criteria.

While the district court acknowledged that there were "several unprecedented actions taken by Defendants," the court nonetheless found the evidence "insufficient to save [Plaintiff's] intentional discrimination claims from summary judgment." Doc.

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[6] Chapman's explanation regarding Happy Acres' use is icing on the cake. Chapman indicated that Happy Acres' use was a temporary shelter/stopover for missionaries and that he would have classified their use as "worker dorms or dormitories," not as a temporary shelter. PSUMF 104-105.

132, at 24-25. Curiously, the district court opined that the evidence failed to "show that the actions taken were particularly unusual in the wider context of the County's operations" because "the testimony on this issue is provided by a handful of individuals as to whether specific actions had occurred in other circumstances." Doc. 132, at 25. However, Defendants failed to present any evidence to dispute the uncorroborated testimony of these County officials, and it is hard to imagine what other evidence would prove be more compelling – especially given the fact that some of the County officials had been employed by the County for more than ten (10) years. County officials including Lee, Director Watkins (employed by the County for more than 17 years) and Commissioner Johnston testified that they were not aware of any other instance in which the County had pulled or revoked a certification of zoning. PSUMF 91-93. And Chapman's inability to point to a provision in the zoning ordinance that would have designated him with the authority to revoke the TOC permit – as he did in August 2018 – further demonstrates the unprecedented nature of Defendants' actions. PSUMF 94; 146 (indicating he is unsure whether he even has that authority).

Other incidences demonstrating departures from normal criteria or procedure included the County Commissioners' attempts to revoke the TOC permit without proper authority; and the fire marshal's inspection of the Property with six County officials in tow. *See* supra.

The facts in this case are similar to those in *Caron Found. of Fla., Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353 (S.D. Fla. 2012) and support reversal of the district

court's decision here. In *Caron*, a substance abuse rehabilitation center, applied for a reasonable accommodation for a home it purchased. Shortly thereafter, community outrage ensued. In response to the public outcry, the city re-drafted its ordinances, and subsequently denied Caron's request. *Caron*, 879 F. Supp. 2d at 1369. The court held that "[t]his sequence is highly suspect and strongly suggests that the City acted with an improper discriminatory motive." *Id.* at 1370.

The sequence of events here demonstrating that the County acted amid strong, discriminatory opposition,[7] together with the County's shifting justifications and inconsistent testimony by officials forecloses any possibility of summary judgment in favor of the County Defendants and/or that a reasonable jury could not find by inference that Defendants intentionally discriminated against Vision Warriors.

B. Vision Warriors Has Demonstrated It Is Entitled to a Reasonable Accommodation under the FHA and ADA.

The FHA and ADA's reasonable accommodation provision prohibits the "[1] refusal to make [2] reasonable accommodations in rules, policies, practices, or services, when such accommodations [3] may be *necessary to afford such person equal opportunity* to

[7] "A decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision-makers personally have no strong views on the matter." *Innovative Health Sys, Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997); *see also Samaritan Inns*, 1995 U.S. Dist. LEXIS 9294, 1995 WL 405710 at *27 (D.D.C. June 30, 1995) (finding a violation of the FHAA when government officials were influenced by political pressure exerted by the area residents); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 134 (N.D. N.Y. 1992) (finding that zoning officials violated the FHAA when they bowed to political pressure exerted by those hostile to persons with alcohol and drug-related disabilities).

use and enjoy a dwelling[.]" *Schwarz*, 544 F.3d at 1218 (quoting 42 U.S.C. § 3604(f)(3)(B) (emphasis added); *see also Akridge v. City of Moultrie*, 2006 U.S. Dist. LEXIS 7428, at *25 (M.D. Ga. Feb. 7, 2006). In the present case, the parties do not dispute whether an accommodation was requested and refused. The only issues in dispute are whether the request was reasonable and necessary. Doc. 132 at 35 (noting the same).

As explained below, the district court's determination that Vision Warriors failed to demonstrate necessity was in error and based on a mistaken understanding of the accommodation actually requested.

1. Necessity

The Eleventh Circuit has explained that necessity focuses on "whether . . . stays in the halfway houses contribute in a meaningful way to an addict's recovery." *Schwarz*, 544 F.3d at 1227.[8] Importantly, courts have explained that the appropriate consideration in this context is "whether the handicapped [will] have an equal opportunity to live in the dwellings *of their choice*, not simply an opportunity to live somewhere in the City." *Schwartz*, 544 F.3d at 1225. In other words, the term "necessary" is linked to "the goal of equal opportunity," and thus "plaintiff must show that, but for the accommodation, they will likely be denied an equal opportunity to

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As another appellate court similarly noted, "[t]he concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir.1995)).

enjoy the *housing of their choice*." *Smith & Lee Assocs v. City of* Taylor, 102 F.3d 781, 795 (6th Cir. 1996) (emphasis added); *see e.g.*, Doc. 132, at 35 ("'[t]o be necessary, there must be a direct linkage between the proposed accommodation and the equal opportunity provided.' *Caron*, 879 F. Supp. 2d at 1366").

The district court erroneously concluded that Vision Warriors failed to demonstrate "necessity" – not because it failed to present evidence that living together would contribute in a meaningful way to an addict's recovery – but because it did not present "any authority establishing a minimum size for such group homes or requiring groups of Vision Warrior's proposed size to be permitted as a necessity." Doc. 132 at 36. The court misunderstood the accommodation requested by Vision Warriors to be like the one in *Oxford House, Inc. v. Town of Babylon* 819 F. Supp. 1179, 1185 (E.D.N.Y. 1993), involving a request that its residents be deemed a "family" – a definition that limits the number of unrelated individuals living together in a single-family home.

Vision Warriors is not requesting an exemption to the occupancy limit placed on individuals living as a single-family unit. Nor is it requesting to occupy a single-family residence in a traditional neighborhood.[9] Instead, Vision Warriors has requested that it be permitted to use the Property in the same manner it has been used for thirty or more years, and that it be treated the same as a dormitory and religious institution – uses

[9] Vision Warriors has simply requested that it be permitted to continue to operate on its multi-acre Property situated outside a neighborhood and to use the pre-existing buildings (including –and in the County's own words – a dormitory and church) in the same manner they have been used in prior decades.

permitted in the R-20 and R-80. Thus, an assertion by Defendants that the issue here is one involving an increase in occupancy is disingenuous. *See City of Cleburne v. Cleburne Living Ctr.*, 473, 449 (1985) (noting that while the defendant raised concerns regarding the number of the people that would occupy the home, such a concern was disingenuous absent similar occupancy restrictions on other dwellings permitted such as boarding and fraternity houses and dormitories).[10]

In support of its request, Vision Warriors has provided more than sufficient evidence to demonstrate that such an accommodation will contribute in a meaningful way to residents' recovery and provide them an equal opportunity to live in the dwelling of their choice in the community. *See* PSUMF 48 (explaining with extensive testimony that this Property provides residents with the necessary components of the program including (1) a family-like living environment that has been proven to lead to better recovery;[11] (2) location in a residential area far from distractions and environments that facilitate addiction;[12] (3) affordability for residents (something that is often a hindrance

[10] Once more, in the instant case, the number of individuals permitted on the Property has never been finalized and would be decided by fire and building codes, or by the County as a condition of granting a special use permit. Vision Warriors never made it that far in the zoning process

[11] *See also* PSUMF 51-52, 54 (explaining that residents coming to Vision Warriors don't have a safe living environment and have lost family relationships, and Vision Warriors provides community and a safe place where everyone supports one another – an essential element to long-time recovery).

[12] *See e.g.*, PSUMF 59 (explaining that location in a residential community is crucial because it removes residents from chaos and clutter and provides a place to connect and forces new habits). Driskell Depo. at 398:14-400:25).

for those seeking long-term care;[13] and (4) on site recovery meetings and religious services).[14] Every activity on the Property – from weekly recovery meetings, worship services and opportunities to serve the community, to learning a skill (in the woodshop or the garage) – facilitates recovery and seeks to set up each member up for success upon transitioning to normal life. PSUMF 48, 51-54. The County does not properly dispute any of these facts.[15] Further, courts have consistently recognized "the efficacy of group living arrangements for recovering substance abusers." *Schwartz*, 544 F.3d at 1227 (citing *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 132 (D. Conn. 2001); *Oxford House, Inc.*, 819 F. Supp. at 1185); *see also id.* at 1227 n. 16 (also noting that Congress has recognized the same in that the statute regulating the use of federal money

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[13] *See* PSUMF 49-50 (explaining further that financial barriers can hinder individuals from seeking lasting recovery and that Vision Warriors works to provide an affordable option to residents)

[14] Vision Warriors is the only Christ-centered, faith-based recovery program in Cherokee County. PSUMF 55 (Driskell Depo. 318:1-4). *See also* PSUMF 60 (Exhibit F, ¶ 8) (all residents are required to attend faith-based meetings on a weekly basis).

[15] While the County objected to Driskell's testimony because he was not certified as an expert, the County has not presented any case law to support the contention that expert testimony is required to make out a reasonable accommodation case. The *Schwarz* court deemed persuasive the testimony of its clinical director (not qualified as an expert) regarding necessity. *Schwarz*, 544 F.3d at 1228 (finding that there could be a genuine issue of material fact regarding necessity based in part on the testimony of the clinic's director and "a series of federal decisions addressing the efficacy of group living arrangements for recovery substance abusers"). *See also Oxford House, Inc.*, 819 F. Supp. at 1185 (cited by the district court and finding necessity based on director's testimony that Oxford House "seeks to provide a stable, affordable, and drug-free living situation so as to increase the likelihood that a person will stay sober."). Driskell provided testimony based on his own personal knowledge as the director for Vision Warriors and long-time personal experiences working with those in recovery. PSUMF 24; Driskell Decl. (Doc. 126-1) at ¶¶ 3-4.

allows grants "'to support group homes for recovering substance abusers.' 42 U.S.C. § 300x-25(a))."); *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002) ("often a community-based residential facility provides the only means by which disabled persons can live in a residential neighborhood, either because they need more supportive services, for financial reasons, or both") (collecting cases).

Finally, even if the appropriate analysis centered around whether Vision Warriors sufficiently demonstrated that the residents in its ministry benefit from a larger community, it has presented sufficient evidence to succeed on summary judgment. Driskell specifically explained that the size of the group must be large enough to provide diversity for residents so everyone can find "your people"[16] and that a larger group allows Vision Warriors to run a cost-effective program (which always remains a challenge because Vision Warriors charges 50% less than other programs). PSUMF 57-58; *see e.g.*, PSUMF 50 (explaining cost is an obstacle to many seeking long-time sobriety);[17] PSUMF 49 (Vision Warriors is able to provide an affordable option because

[16] The district court cited testimony by Driskell that he did not know an exact minimum number of residents that needed to live together in a community, and that quality, rather than size is what mattered. Doc. 132, at 37 (citing Driskell Dep. at 166). However, Driskell's inability to provide an exact number does not undermine his undisputed testimony that there must be at least "enough brothers and enough diversity where you can find your people and where you are in your journey when you walk in the door." Nor does it undermine his testimony regarding suitability of the property and importance of keeping costs low.

[17] The district court suggestion that Driskell's testimony that residents need to demonstrate a willingness to maintain financial stability somehow conflicts with Vision Warriors' assertion of the importance of keeping costs low for residents because costs

the Property already contains the existing buildings and "provide[s] everything needed for a dormitory-like living environment (including large kitchen, dining hall, bedrooms, sufficient bathrooms," *etc.*). While the district court discounted the importance of cost effectiveness for Vision Warriors and its residents, courts have recognized that cost – "while not [a] therapeutic necessity in the strictly medical sense, evidence of such benefits to the residents does tend to establish that an accommodation is necessary under § 3604(f)(3)(B)." *ReMed Recovery Care Ctrs. v. Twp. of Willistown*, 36 F. Supp. 2d 676, 685-86 (E.D. Pa. 1999).

2. Reasonableness[18]

An accommodation is reasonable "if the requested accommodation does not impose significant financial or administrative burdens upon the defendants, or substantial modifications to existing programs or policies that would fundamentally change the nature of the function of the program or policy." *Akridge,* 2006 U.S. Dist. LEXIS 7428, at *25; *see e.g.*, *Schwarz,* 544 F.3d at 1220. The court in *Schwartz* provided the following guidance:

> if the proposed use is quite similar to surrounding uses expressly permitted by the zoning code, it will be more difficult to show that a waiver of the rule would cause a 'fundamental alteration' of the zoning scheme. Similarly, if the municipality routinely waives the rule upon request, it will be harder to show that the rule is "essential."

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can serve as a barrier to recovery. Doc. 132, at 37 (citing Driskell Dep. at 205-206). There is no conflict here.

[18] Upon concluding that Vision Warriors did not demonstrate necessity, the district court determined it need not decide the issue of reasonableness. Doc. 132, at 35.

544 F.3d at 1221. In *Schwartz*, the court found that where the plaintiff sought to use its houses in the same manner as it could use an apartment building across the street, the plaintiff's requested accommodation was reasonable. 544 F.3d at 1225. Likewise, in *Hovsons, Inc. v. Township of Brick*, the court held that allowing a developer to build nursing homes would not fundamentally alter the zoning code where similar uses such as planned residential retirement communities were permitted. 89 F.3d 1096 (3d Cir. 1996).

There is ample evidence in this case that Plaintiff's requested accommodation is reasonable. Just as in *Schwartz* and *Hovsons*, dormitories and religious institutions (with or without accessory temporary shelters) are permitted in the R-20 and R-80 zoning districts. Vision Warriors' request was even more reasonable here where it simply requested to use the Property in the same manner it had been used for decades by Happy Acres. *See Akridge*, 2006 U.S. Dist. LEXIS 7428, at *25-26 (finding that a jury could conclude that the accommodation was reasonable and necessary where Akridge provided assurances that the internal and exterior structures of the home on the property would not be disturbed, and thus, her operation would not alter the character of the neighborhood).

County documents further support the reasonableness of Vision Warriors' request. In Chapman's report to the Planning Commission and Board, he confirms that the proposed use will not present any traffic or parking issues, *see* PSUMF 119, and that anticipated future land uses for the same area include "residential uses, as well as semi-

public and institutional uses." PSUMF 121-122. In fact, the only issue raised in Chapman's report is that of the septic system, wherein he states, "the septic system may require upgrades." PSUMF 120. This, however, could be easily remedied at Vision Warriors' expense and would not pose a financial burden to the County.

Based on the facts above, Vision Warriors' has demonstrated beyond dispute that its request was both necessary and reasonable under the FHA and ADA, and the County Defendants' failure to grant its request is in violation of federal law. Vision Warriors is entitled to summary judgment on this claim.

II. Vision Warriors Has Demonstrated the County Defendants Violated the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment "commands that no State shall deny to any person within its jurisdiction the equal protection of the laws." *City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 439 (1985). "The Equal Protection Clause requires the government to treat similarly situated persons in a similar manner." *Leib v. Hillsborough Ctny. Pub. Transp. Comm'n*, 558 F.3d 1301, 1305 (11th Cir. 2009). *See e.g., Campbell v. Rainbow City,* 434 F.3d 1306, 1313-1314 (11th Cir. 2006) (explaining that in the zoning context, a violation of the equal protection clause occurs where similarly situated property owners are treated differently and there is no rational basis for the different treatment).

In order to prevail on an as-applied challenge, a plaintiff must "show (1) that [it was] treated differently from other similarly situated individuals, and (2) that

Defendant[s] unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiff." *Chabad of Nova*, 575 F. Supp. 2d 1280, at 1292 (S.D. Fla. 2008). "The idea of [the] intention or purpose" element of the equal protection claim "means that 'the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Corey Airport Servs. v. Clear Channel Outdoor, Inc.*, 682 F.3d 1293, at 1297 (11th Cir. 2012).

The evidence presented by Vision Warriors identified several similarly situated uses treated differently or more favorably and demonstrated that Defendants' unequal treatment was for the purpose of discriminating against Plaintiff. These similar uses, together with the disparate treatment are provided below.

Happy Acres

The first similar comparator identified by Vision Warriors is Happy Acres. There is little dispute regarding Happy Acres similar uses especially given that they shared the same Property and thus the zoning, property layout and buildings and use of those buildings were the same. *See* PSUMF 22-26, 28-30 (detailing activities of Happy Acres including housing four families and up to 50 people for retreats; operations in car garage and woodshop building); PSUMF 63-66 (detailing similar activities of Vision Warriors – i.e. future intended potential use of up to 50 residents, but maximum potential capacity of 36 currently and similar activities in woodshop and garage); *see e.g.*, PSUMF 141-143 (same). Indeed, according to Chapman, the main difference was the type of

people each ministry served. PSUMF 104 ("with Happy Acres, it was a temporary stopover for missionaries . . . whereas, Vision Warriors is a temporary shelter for those recovering from addiction").

There is also no dispute that the treatment of Happy Acres was wildly different. Happy Acres operated for approximately thirty years (30) without objection from the County or its residents. Vision Warriors, on the other hand, was banned entirely from operating on the Property in any capacity or in any residential zoning district for that matter. Doc. 102-1 (June 12 letter from County designating Vision Warriors' use a 'temporary shelter which is prohibited in residential zoning districts").

Notwithstanding this evidence, the district court held that Defendants' differential treatment could not be deemed "intentional" because certain County officials did not have decision making authority at the time Happy Acres operated and/or because they claimed ignorance as to Happy Acres' use. The district court's reasoning is flawed. First, the record severely undermines the County's narrative that Happy Acres operated for thirty (30) years without the County's knowledge. Over the years, the County issued various building, electrical and plumbing permits to Happy Acres, together with a certificate of occupancy for the dormitory/chapel and a letter from the then-County Attorney in 1996. Doc. 132 at 5 (citing Doc. 101-7, 101-8, 101-9); *see e.g.*, Doc. 101, # 7, 10). As Happy Acres also testified, regular inspections by the fire marshal were also conducted. Jewel Young Deposition (Doc. 110) at p. 191 .

Nonetheless, whether the Commissioners were personally aware of Happy Acres' use in prior years, is not dispositive here. Dkt 132 at 30. Even if not all of the current County Commissioners and decisionmakers participated in permitting and approving activities involving Happy Acres, once they became aware, they nonetheless proceeded with and remained the driving force behind the unequal treatment. They "selected [and] reaffirmed a particular course of action." *Corey Airport Servs*, 682 F.3d at 1297. The County Defendants were also fully aware of its obligations under the law and the legal ramifications of their actions. PSUMF 135; Exhibit N1 and N2 (presenting evidence that just a few years prior to Vision Warriors' zoning dispute, the County settled a lawsuit filed by another recovery center alleging discrimination under the FHA and ADA); PSUMF 77, 85, 112 (Exhibit 27A to SF), 126 (SF 47, Exhibit 38D to SF) (establishing the County was notified on at least four occasions of the applicable laws that applied and the unequal treatment of Vision Warriors).[19]

<u>Dormitories, Religious Institutions/Places of Worship and residential accessory uses</u>

Even if the Court was persuaded by Defendants' claim of ignorance relating to Happy Acres, Vision Warriors identified other similar comparators that receive more

[19] *Saucier v. Katz*, 533 U.S. 194, at 202 (2001) ("In determining whether a constitutional right was clearly established at the time of violation, '[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'").

favorable treatment under the zoning ordinance. At the time Vision Warriors purchased the Property and began operating, the County permitted dormitories by right. PSUMF 70-71 (explaining the ordinance was later amended in April 2018 to remove dormitory as open use and that Section 13.3 provides that a lawful use existing at the time of enactment of an amendment may be continued). Religious institutions/places of worship are also permitted by right, and accessory uses to places of worship (including both "temporary shelters, transitional housing and similar facilities") are permitted by special use permit. PSUMF 18, 19, 27.

Case law is clear. The County's attempts to distinguish Vision Warriors and ban its use altogether while permitting substantially similar uses is a violation of the Equal Protection Clause. In *Cleburne*, the Supreme Court affirmed the lower court's determination that the city's differential treatment of a home for the "mentally retarded" compared to boarding and lodging homes and dormitories violated the equal protection clause and was without rational basis. The Court explained that while "the mentally retarded as a group are indeed different from others not sharing their misfortune and in this respect may be different from those who would occupy other facilities" permitted in the same R-3 zone without a special permit, such a difference

> is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

City of Cleburne, 473 U.S. at 448.[20] The court rejected the city's justifications for differential treatment, including concerns raised by property owners, the location of the home near a school and on a flood plain, and the number of people to occupy the home and potential traffic on streets, where similar uses would potentially pose these same problems. *Id.* at 449-50. The Court concluded, "requiring the permit in this case appears to rest on an irrational prejudice against the mentally retarded." *Id.* at 450. As the Court further noted,

> negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate . . .could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic."

Id. at 448 (internal citations omitted).[21]

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[20] *See also Griffin Indus. v. Irvin*, 496 F.3d 1189, 1202 (11th Cir. 2007) (evaluating "what degree of similarity is required for two entities to be considered 'similarly situated'" and explaining that neither too broad nor too narrow a definition of "similarly situated" must be applied because if the comparison was too broad, all decisions could be subject to challenge, but if too narrow, those plainly treated disparately would be excluded from the zone of equal protection).

[21] *See also Open Homes Fellowship, Inc. v. Orange County,* 325 F. Supp. 2d 1328, 1364 (M.D. Fla. 2004) (finding equal protection violation where no rational basis existed for requiring a ministry to obtain a special use permit when other similarly situated uses such as a fraternity, sorority or other club were not required to do the same); V*ineyard Christian Fellowship of Evanston, Inc. v. City of Evanston,* 250 F. Supp. 2d 961, 978 (N.D. Ill. 2003) (finding equal protection violation where city sought to require a religious institution to obtain a special permit while other similar uses, including cultural facilities, were permitted as of right).

Similarly, in *Chabad*, the court found that a city's differential treatment of religious assemblies compared to day care centers and retail businesses in a business district constituted an equal protection violation. 575 F. Supp. 2d at 1293. Just like the County in this case, the city in *Chabad* pointed to the different definitions utilized in its zoning code, together with inconsequential differences (i.e. that day care centers are licensed by the state and religious assemblies are not, or that permitted uses were designed to meet personal needs and provide local shopping options). 575 F. Supp. 2d at 1293-94. The court noted, however, that definitions in a zoning code "do not control the Court's evaluation and [] do nothing to explain how the differences relate to the stated purpose of the distinction," and that the city had failed to provide "meaningful explanation" as to how the permitted uses were different. *Id.*

Just as in *Cleburne* and *Chabad*, the County's justification for treating Vision Warriors differently than dormitories and religious institutions with or without accessory uses lacks a plausible explanation. As summarized *supra* in Section I. A., more often than not, County officials have referred to Vision Warriors' use as that of a dormitory and church in official documentation and communications – not a temporary shelter. Second, the County's top zoning officials disagree on whether Vision Warriors' is appropriately defined as a dormitory or a temporary shelter, and Chapman is unable to support his zoning determination with any logic.

The County has also failed to present any evidence to demonstrate that Vision Warriors and its residents would threaten legitimate interests in a way that a dormitory

or religious institution would not. *See* supra (Chapman's staff report confirmed that the proposed use would not pose traffic or parking issues, and that anticipated future land uses for the same area include "residential uses, as well as semi-public and institutional uses").

There is simply no legitimacy to the explanations proffered by the County to justify its unequal treatment of Vision Warriors. The Defendants' actions bespeak discrimination and entitle Vision Warriors to summary judgment on its equal protection claim.

III. Vision Warriors Sufficiently Stated A Claim under RLUIPA's Substantial Burden Provision.

The district court dismissed Vision Warrior's RLUIPA claim at the outset on the grounds that it did not allege that Defendants' actions would "remove[] *any possibility* that Vision Warriors could continue to operate its ministry." D.C. Order of Dismissal (Doc. 57), at 34-35 (citing a Fourth Circuit opinion for the proposition that plaintiff establishes a substantial burden only where it shows it will (1) meet an unmet religious need, (2) the restriction is absolute rather than conditional and (3) the organization will be forced to acquire a different property altogether) (emphasis added). *See also id.* at 35 (suggesting further that "even if Vision Warriors is not permitted to provide housing to any number of men, Defendants' actions do not prevent Vision Warriors from providing weekly services and faith-based meetings" and thus, the burden is not a substantial one."). In dismissing Plaintiff's RUIPA claim on motion to dismiss, the

district court failed to adhere to the proper standard of review and incorrectly applied Eleventh Circuit substantial burden precedent.

First, the district court failed to accept as true the well-pleaded facts presented by Plaintiff and construe them in a light most favorable to plaintiff. *See Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011). Plaintiff alleges that it is a faith-based *residential* ministry for individuals recovering from addiction, Doc. 33, at ¶¶ 13, 19-21 and that Defendants' retaliatory zoning decisions have frustrated its mission, *id.* ¶111, and "effectively shut[] down Plaintiff's ministry," *id.* at ¶129. Nothing in the allegations can be read – as the district court suggested – to support an assertion that there is still *some possibility* Vision Warriors can continue to operate, as the district court suggested. Doc. 57, at 34-35 (adopting summary arguments presented by Defendants which consisted of a twisting of the facts and/or inadmissible assumptions; *id* at 35 (suggesting that even if Vision Warriors is not permitted to operate as a dormitory, it may still hold weekly services and faith-based meetings). As Plaintiff clearly alleged, Defendants not only revoked its zoning certification, but they also subsequently denied Plaintiff's zoning applications to operate as a dormitory and *religious institution*. Doc. 33, at ¶92-94, 100-105, 109.

Second, case law in this Circuit does not require Plaintiff to demonstrate that it will meet an "unmet" religious need in the community and its religious exercise rendered entirely impossible to make out a claim under RLUIPA. As this Court recently clarified, a plaintiff need not establish "a complete, total or insuperable" burden to meet

this standard. *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 830 (11th Cir. 2020) (stating further that in *Midrash*, "we didn't say that to count as a 'substantial burden' government conduct must 'completely prevent' religious exercise. Nor did we say . . . that the government must 'impose pressure so significant as to require Plaintiffs to forego their religious beliefs.'"). In sum, while a "a complete prevention of religious exercise is sufficient, *[it is] not necessary*, to establish a substantial burden." *City Walk-Urban Mission Inc., v. Wakulla Cty. Fla.*, 471 F. Supp. 3d 1268, 1283 (N.D. Florida 2020) (emphasis added). "Modified behavior, if the result of government coercion or pressure, can be enough." *Thai Meditation Ass'n*, 980 F.3d at 831. This test is consistent with the stated purpose of RLUIPA which is to "RLUIPA offers greater protection to religious exercise than the First Amendment offers." *See Smith v. Allen*, 502 F.3d 1255, 1277 n.5 (11th Cir. 2007), *abrogated on other grounds by Sossamon v. Texas*, 563 U.S. 277, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011).

In City Walk-Urban Mission, Inc., the court, applying the aforementioned standard, found that even where plaintiff's mission to house individuals would be diminished (forcing it to reduce its capacity down to one-third), the zoning action taken without any compelling interest constituted a substantial burden. *Id.* at 1285.

The burden imposed on Vision Warriors is neither self-imposed[22] nor inconsequential and is greater than those in both *City Walk-Urban Mission* and *Midrash*.

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[22]*SeeThai Meditation Ass'n of Ala., Inc.*, 980 F.3d at 830 (indicating that one factor the court should consider is whether the burden is self-imposed). Vision Warriors made

Not only will its residents be forced from their current place of residence and the ministry shut down, but Vision Warriors will also be "prohibited [from operating] in all residential districts" in the County. Doc. 33, at ¶ 84.

Vision Warriors sufficiently stated a claim for violation of RLUIPA's substantial burden provision.

IV. Vision Warriors' State Law Claims

A. Vision Warriors' Vested Rights.

The Georgia Constitution prohibits "the passage of retrospective laws which injuriously affect the 'vested rights' of citizens." *S. States-Bartow Cty., Inc. v. Riverwood Farm Homeowners Ass'n*, 797 S.E.2d 468, 471 (Ga. 2017); *see also* Ga. Const. Art. I, Sec. I, Para. X. ("No bill of attainder, ex post facto law, [or] retroactive law…shall be passed."). A retrospective law is a law that "takes away or impairs vested rights acquired under existing laws." *Id.* at 612. "This prohibition against retroactive impairment of vested rights extends to the enactment of zoning regulations." *Id.* at 612. Once a property owner acquires a vested right, "the [local government] cannot legally divest the right by the subsequent adoption of another ordinance prohibiting such use." *Spalding Cty. v. E. Enters., Inc.*, 209 S.E.2d 215, 217 (Ga. 1974).

A landowner acquires vested rights, among other ways, "by making 'a substantial change in position by expenditures in reliance upon…an existing zoning ordinance and

every effort to comply with the zoning ordinance before it purchased the Property and began operating.

the assurances of zoning officials.'" *Barker v. County of Forsyth*, 281 S.E.2d 549, 552 (Ga. 1981). Once a party acquires a vested right, the owner indisputably has a right to use the Property for the vested use, and "the [local government] cannot legally divest the right by the subsequent adoption of another ordinance prohibiting such use." *Spalding Cty.*, 209 S.E.2d at 217.

The Georgia Supreme Court "has recognized four different scenarios wherein a landowner could acquire a vested right to initiate a specific use of a property despite a change in zoning laws." Those instances are when the landowner relies upon (1) issued building and other permits, (2) the law in existence at the time a landowner properly files an application for a permit, (3) formally and informally approved development plans, or (4) official assurances that a building permit will probably issue. *Brown v. Carson*, 2022 Ga. LEXIS 129, at *3-*4 (Ga. Supreme Ct, May 3, 2022) (citing *WMM Properties, Inc. v. Cobb County*, 339 S.E.2d 252, 254-255 (Ga. 1986)). However, land use rights do not vest based upon improperly issued permits, even if such permits have been relied upon and money has been expended. *Corey Outdoor Advertising v. Bd. of Zoning Adjustments*, 327 S.E.2d 178, 183 (Ga. 1985). Thus, it must be established the use in which a property owner asserts a vested right must have been lawful at the time of its inception. *Ralston Purina Co. v. Acrey*, 142 S.E.2d 66, 69 (Ga. 1965).

In this case, and in support of summary judgment for Defendants, the district court erroneously determined that Vision Warriors' use was neither a conforming use at the time of its inception, nor a legal nonconforming one.

The evidence presented demonstrates that Vision Warriors' use was, in fact, a legal conforming use at the time it began using the Property as a dormitory. As argued *supra*, while Defendants insisted on classifying Vision Warriors' use as "temporary shelter," it has been unable to support this determination with any logic, and it is clear that the intent behind the County's selection of this definition was to ban Vision Warriors from all residential zoning districts in the County. As Director Watkins testified, however, Vision Warriors' use is properly classified as a "dormitory" and a dormitory was an open use – one permitted by right – at the time Vision Warriors purchased the Property and began its ministry. This testimony is supported by other evidence including the NAICS code definitions and County documents specifically referring to Vision Warriors' use as a dormitory.

There is no dispute that Vision Warriors relied upon this determination in acquiring the Property and has incurred a *substantial* change in position by expenditures and physical relocation. To allow the County to continue to rely on the unsupported assertion that Vision Warriors' use is an illegal one, will result a manifest injustice to Vision Warriors and the men residing in the dormitory. As such, the District Court erred in failing to consider Zoning Administrator Lee's classification of the use of the Property was based upon its use a dormitory.

B. Due Process Violation under the Georgia Constitution.

Under Georgia law, a challenge to a zoning decision that does not seek compensation as a taking sounds in due process and must be asserted as a constitutional

challenge under Article I, Section I, Paragraph I of the Georgia Constitution of 1983. *Diversified Holdings, LLP v. City of Suwanee,* 807 S.E.2d 876, 889 (Ga. 2017). Zoning appeals are challenges to the constitutionality of the zoning of the Property left *after* the zoning decision and are reviewed *de novo*. *States-Bartow Cty., Inc.*, 797 S.E.2d at 471; s*ee City of Atlanta v. McLennan*, 226 S.E.2d 732, 733-734 (Ga. 1976); *see also Diversified Holdings, LLP v. City of Suwanee,* 807 S.E.2d 876, 889 (Ga. 2017). Such challenges are "claims for *prospective* remedies against the [local government's] enforcement of the allegedly unconstitutional classifications, not on their earlier votes in connection with those classifications." *Dawson County Bd. of Comm'rs v. Dawson Forest Holdings, LLC*, 850 S.E.2d 870, 876 (Ga. Ct. App. 2020) (citing *Lathrop v. Deal*, 801 S.E.2d 867, 891 (Ga. 2017).

Prior to a 2021 amendment to the Georgia Constitution (Ga. Const. Art. I, § II, Para. V), and at the time Vision Warriors filed the present action, sovereign immunity barred declaratory judgment actions directly against local governments, but allowed such claims against officials in their individual capacities enforcing unconstitutional zoning regulations. *Dawson Forest Holdings, LLC*, 850 S.E.2d at 876.

In the current case, the District Court erroneously determined Vision Warriors attempted to "use a request for declaratory judgment as a work-around for the time bar of any appeal of the County's decision." Doc. 132, at 48. To the contrary, Vision Warriors exhausted its administrative remedies by timely submitting appeals of the County's actions each step of the way, PSUMF 85, 111, 128, and obtained final

decisions on separate rezoning and conditional use permit applications. PSUMF 113, 114. Vision Warriors then timely appealed each to the District Court asserting an action for declaratory relief against the Cherokee County Commissioners in their individual capacities and challenging the prospective enforcement of the current zoning of the Property. Doc. 1 (Complaint filed one day after appeal); Doc. 33 (Amended Complaint). Vision Warriors asks that this claim be remanded to the District Court for adjudication.

CONCLUSION

This Court should reverse the district court's grant of summary judgment in Defendants' favor and remand the case for entry of summary judgment in favor of Appellant Vision Warriors on its FHA and ADA reasonable accommodation claim, equal protection clause claim, and Georgia state law claims. This Court should also reverse the district court's dismissal of Appellant Vision Warriors' RLUIPA claim.

May 20, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(g) because it contains 11,823 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Garamond font.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on May 20, 2022 using CM/ECF, which then served such filing upon the following registered counsel of record for Plaintiffs-Appellees:

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