UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80178-CIV-PAINE

Magistrate Judge Johnson

JEFFREY O., et al.,

Plaintiffs,

v.

CITY OF BOCA RATON,

Defendant.
_____/

CITY OF BOCA RATON'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, City of Boca Raton (the "City"), through undersigned counsel, submits its memorandum in support of its Motion for Partial Summary Judgment[1] as to Counts 1-6 and 8-12 of the Third Amended Complaint (the "Complaint") raised by the Plaintiffs, Bobby Hoover, Todd Conroy, Doug Byers, and Matthew Wolf (collectively, the "Individual Plaintiffs"),[2] Regency Properties of Boca Raton, Inc. ("Boca House") and Awakenings of Florida, Inc. ("Awakenings")(Boca House and Awakenings will be collectively referred to as the "Corporate Plaintiffs"), and as grounds states:

OVERVIEW

In this action, the Individual Plaintiffs, who contend that they are "disabled" and "handicapped" because they are recovering substance abusers, and the Corporate Plaintiffs, who

[1] The City's Statement of Material Facts in Support of Motion for Summary Judgment has been filed contemporaneously herewith.

[2] Various individual plaintiffs, including "Jeffrey O." and Richard Cohen have dismissed their claims against the City [DE 49, 51, 53 and 86]. As such, only Bobby Hoover, Todd Conroy, Doug Byers and Matthew Wolf remain as individual plaintiffs.

provide housing to allegedly "disabled" and "handicapped" recovering substance abusers, claim that certain City ordinances violate both the Americans with Disabilities Act (the "ADA") and the Fair Housing Amendments Act (the "FHAA"). However, the Individual Plaintiffs cannot, as a matter of law, establish the basic predicate for their ADA and FHAA claims – that their alleged "disability" or "handicap" substantially limits them from performing a major life activity (i.e. caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, bathing, household chores and brushing one's teeth). Rather, it is indisputable that each of the Individual Plaintiffs can do each of these things and live in the same manner as persons without disabilities.

The Corporate Plaintiffs likewise cannot avail themselves of the ADA and FHAA because they, as a matter of law, cannot show that their residents' alleged "disability" or "handicap" substantially limits them from performing any major life activity. Rather, the owner of the Corporate Plaintiffs affirmatively conceded the exact opposite - they do not and will not accept individuals that cannot "function." In fact, there is no major life activity that the Corporate Plaintiffs' residents cannot perform or engage in, as they admittedly can and do live "normal" lives.

Thus the City is entitled to summary judgment as to all of the Plaintiffs' ADA and FHAA claims in the Plaintiffs' Complaint.

PLAINTIFFS' CLAIMS

On or about March 26, 2004, the Individual Plaintiffs and the Corporate Plaintiffs served their Third Amended Complaint (the "Complaint") to the City.[3] In the Complaint, the Plaintiffs

[3] In response to various motions to dismiss filed by the City, the Plaintiffs twice amended their complaint [DE 14 and 58]. The Second Amended Complaint was then dismissed in part by this Court on February 20, 2004 [DE 76].

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.A.
200 EAST BROWARD BOULEVARD, SUITE 1900, FORT LAUDERDALE, FLORIDA 33301 • TEL. 954-763-4242 • FAX 954-764-7770

assert that the Individual Plaintiffs as well as the individuals residing at Boca House and Awakenings are actually "disabled" and "handicapped" under the ADA and FHAA by virtue of their status as recovering alcoholics and/or drug addicts. Complaint, ¶¶4-6, 8, 13. No other purported disability or handicap was alleged by the Plaintiffs.

The Plaintiffs assert that City Ordinance No. 4649, as amended by City Ordinance No. 4701, (the "City Ordinance") bans persons recovering from drug or alcohol addiction from residing in any residential neighborhood within the City, and therefore violates the ADA, FHAA and the 14th Amendment to the Constitution (Counts 1 through 7). The Plaintiffs next assert that the City's purported limitation on four or more unrelated persons living together in a single dwelling unit, which is set forth in Section 28-2 of the City's Code of Ordinances (the "City's Unrelated Person Limitation"), likewise violates the ADA, FHAA and the 14th Amendment to the Constitution (Counts 8 through 13).

All of the Plaintiffs' claims in Counts 1-6 and 8-12[4] of the Plaintiffs' Complaint are predicated and fully dependent upon the untenable position that the Individual Plaintiffs and the other residents of Boca House and Awakenings are "disabled" and "handicapped" only by virtue of their status as recovering substance abusers.

STANDARD OF REVIEW

Summary judgment should be granted if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Evans v. City of Neptune Beach*, 61 F. Supp. 2d 1245, 1247 (M.D. Fla. 1999). The movant bears the initial responsibility of asserting the basis for its motion. *See Celotex Corp. v.*

[4] Counts 7 and 13 are Equal Protection claims against the City arising out of the City Ordinance and City's Unrelated Person Limitation, respectively, and are not subject to the instant motion for summary judgment.

Catrett, 477 U.S. 317, 323 (1986); *see also, Apcoa, Inc. v. Fidelity Nat'l Bank*, 906 F.2d 610, 611 (11th Cir. 1990). The movant, however, may discharge its burden by merely "'showing" that there is an absence of evidence to support the nonmoving party's case." *See Celotex Corp.*, 477 U.S. at 325. After the movant has carried its burden, the nonmoving party is then required to "go beyond the pleadings" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Id.* at 324. While the Court is to view the evidence produced and all factual inferences rising from it in a light most favorable to the nonmoving parties, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Barfield v. Brierton*, 883 F.2d 923, 934 (11th Cir. 1989) (emphasis added); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). If the nonmoving party's "response consists of nothing more than a repetition of [its] conclusory allegations, the district court must enter summary judgment in the moving party's favor." *Barfield*, 883 F.2d at 934.

MEMORANDUM OF LAW

I. The City is Entitled to Summary Judgment as to all of the Individual Plaintiffs' Claims in Counts 1-6 and 8-12 Because They are not "Disabled" or "Handicapped" under the ADA or FHAA

A. Existence of a Disability and Handicap under the ADA and FHAA

The threshold requirement in any case brought under the ADA is a showing that the plaintiff suffers from a disability protected under the Act. *Lottinger v. Shell Oil Co.*, 143 F.Supp. 2d 743, 758 (S.D. Tex. 2001). The ADA defines a disability as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. *See* 42

U.S.C. § 12102(2). A plaintiff asserting a claim under the FHAA based upon a handicap must likewise demonstrate one of these three elements. *See* 42 U.S.C. § 3602(h). [5]

B. Being a Recovering Substance Abuser is not a *Per Se* Disability

Neither the ADA nor the FHAA specifically designate any impairment, let alone being a recovering alcoholic or drug addict, as a disability *per* se. *See Lottinger, supra* (declining to find alcoholism to be a *per se* disability under the ADA); *see Burch,* 119 F.3d at 316 (same); *McKey v. Occidental Chem. Corp.,* 956 F.Supp. 1313, 1317 (S.D.Tex.1997) (same); *Adams v. Rite Aid of Maine, Inc.*, 2001 WL 111314, *12 (D. Me. 2001)(drug addiction and alcoholism are not *per se* disabilities).

Rather, the determination of whether an individual, such as a recovering substance abuser, is disabled under the ADA or FHAA is done on a case-by-case basis. *Roig v. Miami Federal Credit Union*, 353 F.Supp.2d 1213, 1215 (S.D. Fla. 2005)(individualized determination required by ADA); *United States v. Southern Management Corp.*, 955 F.2d 914, 918 (4th Cir. 1992)(under the FHAA, "[w]hether or not a particular person is handicapped is usually an individualized inquiry"). In fact, a court from the Southern District of Florida (Judge Seitz), stated that:

> Although alcoholics may be detrimentally impacted in many facets of their lives by their addiction, the ADA requires an individualized determination of impact, not simply an assumption.

Goldsmith v. Jackson Memorial Hospital Public Health Trust, 33 F.Supp.2d 1336, 1341 (S.D. Fla. 1998).

---

[5] Because the definitions of "handicap" in the FHAA and "disability" in the ADA are "virtually identical," courts utilize the terms interchangeably and conduct the same analysis to determine whether a plaintiff is handicap or disabled under the ADA and FHAA. *See, e.g., Cohen v. Township of Cheltenham*, 174 F.Supp. 2d 307, 324 (E.D. Pa. 2001).

Therefore, plaintiffs claiming to be disabled or handicapped because of alcoholism or drug addiction must still establish that they satisfy the requirements of the definitions of a disability under the ADA and handicap under FHAA and their respective regulations. Specifically, plaintiffs asserting that they are actually disabled from their substance addiction, as the Plaintiffs have asserted in the instant case,[6] must establish that their alleged alcoholism or drug addiction substantially limits one or more major life activities. *See Roig,* 353 F.Supp.2d at 1216-1217; *Lottinger*, 143 F.Supp. 2d at 761; *McKey,* 956 F.Supp. at 1318.

Although neither the ADA nor the FHAA explain what is meant by a "substantial limitation" or "major life activity," the regulations and judicial construction provide significant guidance. A substantial limitation is one that renders an individual unable to perform, or significantly restricts an individual's ability to perform a major life activity that the average person in the general population could perform. *See* 29 C.F.R. 1630.2(j)(1).

The U.S. Supreme Court has defined "major life activities" as "activities that are of central importance to daily life," such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, bathing, household chores and brushing one's teeth. *See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197, 202; 122 S.Ct. 681, 691, 694 (2002); *see also*, 29 C.F.R. 1630.2(i); 24 C.F.R. § 100.201(b).

"Substantial limitation" and "major life activity" must be interpreted strictly "to create a demanding standard for qualifying as disabled." *Williams*, 534 U.S. at 197, 122 S.Ct. at 691. Such strict construction is confirmed by the first section of the ADA, which lays out the

---

[6] The Plaintiffs have only asserted violations of the ADA and FHAA based upon the first category of the ADA and FHAA - that they and/or their residents are actually disabled. *See* Complaint, ¶¶4-8, 13 and 33. The Plaintiffs have not asserted nor have they presented any evidence of violations of the ADA or FHAA based upon the second (having record of impairment) or third (being regarded as having impairment) categories.

legislative findings and purposes of the ADA:

> When it enacted the ADA in 1990, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities." § 12101(a)(1). If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher. *Cf. Sutton v. United Air Lines, Inc.*, 527 U.S. at 487, 119 S.Ct. 2139 (finding that because more than 100 million people need corrective lenses to see properly, "[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number [than 43 million] disabled persons in the findings").

Williams, 534 U.S. at 197-198, 122 S.Ct. at 691.

None of the Individual Plaintiffs, as demonstrated below, have met their burden of showing that their alcoholism and/or drug addiction have hindered, much less substantially limited, their ability to perform any major life activity. It is indisputable (as they all have admitted) that they can care for themselves, perform manual tasks, walk, see, hear, speak, breath, learn, work, bath and conduct household chores. In fact, all of the Individual Plaintiffs (as well as all of the residents in Boca House and Awakenings), are able to drive, shop and engage in normal life activities just like anyone who is not a substance abuser or recovering substance abuser. Manko, T.(1/14/04), pp.122-126[7]; *see* pp.8-14, *infra.*

Numerous courts, including courts from the Southern District of Florida, have granted summary judgment against recovering alcoholics and substance abusers, finding that they were not substantially limited in major life activities. *See Roig*, 353 F.Supp.2d at 1216 (Judge King granted summary judgment because the plaintiff admitted that his alcoholism and treatment for alcoholism did not prevent him from engaging in any major life activity); *Goldsmith*, 33

[7] A transcript of the sworn deposition of Steven Manko, the sole owner of Plaintiffs, Boca House and Awakenings of Florida, Inc. ("Awakenings"), taken on January 14, 2004, along with all of the referenced exhibits have been filed concurrently herewith and will be cited as "Manko, T.(1/14/04), p.__."

F.Supp.2d at 1342 (Judge Seitz granted summary judgment because plaintiff's temporary limitations arising from alcohol consumption were not substantial limitations); *see also, McKey, supra* (granting summary judgment because plaintiff admitted that his alcoholism did not affect his ability to perform major life activities, including hearing, speaking, breathing, learning, dressing, bathing, concentrating and holding down a job); *Burch*, 119 F.3d at 316 (affirming summary judgment because plaintiff's temporary inebriation did not substantially limit major life activities).

The Individual Plaintiffs' own testimony demonstrates that their substance abuse and recovery therefrom does not substantially limit any major life activity, and thus is fatal to their claims of being disabled under the ADA and FHAA. Accordingly, summary judgment should be entered in favor of the City as to all of their claims under the ADA and FHAA.

C. The Individual Plaintiffs are not disabled under the ADA or FHAA

1. Bobby Hoover is not disabled or handicapped under the ADA or FHAA

Plaintiff Bobby Hoover was previously addicted to both alcohol and cocaine. Hoover, T.(11/7/03), p.34.[8] He has been completely sober (no alcohol or drugs) and has not received any treatment or counseling for his substance abuse for three and a half years. *Id.*, pp.34, 40, 47, 55-56. Bobby Hoover admits that he had a "strong recovery" from his substance abuse and is able to live anywhere he chooses. In fact, Bobby Hoover currently resides in a residence of his own and

[8] All assertions regarding Plaintiff Bobby Hoover, unless otherwise noted, are as of November 7, 2003, the date of his deposition. A transcript of his deposition has been filed concurrently herewith and will be cited as "Hoover, T.(11/7/03), p.__."

does not rent from Boca House, Steven Manko individually (Boca House's owner), or any entity controlled by Manko. Hoover, T.(11/7/03), p.106; Wolf, T.(12/17/04), p.202.[9]

There is no life activity, let alone a major life activity, that Bobby Hoover cannot do because he is a recovering substance abuser. Manko, T.(1/14/04), p.122. On a daily basis, Bobby Hoover is able to use the bathroom, shower, dress, pray, and go to work. Hoover, T.(11/7/03), pp.47-48. Bobby Hoover works between 50 and 55 hours per week and has done so on a consistent basis for the past three and a half years. *Id.*, pp.22, 28. He also exercises frequently, lifts weights every other day, and has been actively driving since he received his driver's license on October 29, 2002. *Id.*, pp.16, 28, 47-48.

Bobby Hoover, on a regular basis, engages in recreational and social activities, and he is not limited from engaging in those activities in any fashion. Specifically, Bobby Hoover frequently dines in restaurants, attends sporting events, concerts and nightclubs, and he does not feel any temptation to have alcohol despite its availability to him at such venues. *Id.*, pp.50-52. Furthermore, the fact that other people are drinking alcohol at such venues does not prevent or impede him from attending such venues or from fully enjoying himself. *Id.*, pp.50-52, 172. Lastly, there is nothing that prevents Bobby Hoover from having a relationship with his daughter or maintaining his relationship with his girlfriend. *Id.*, pp.19, 49. In fact, Bobby Hoover has been dating his girlfriend for a year and considers the relationship to be a "very good relationship." *Id.*

Clearly, Bobby Hoover's own admissions and actions demonstrate that his substance abuse does not substantially limit any major life activity. Therefore, he cannot demonstrate that

---

[9] All assertions regarding Plaintiff Matthew Wolf, unless otherwise noted, are as of December 17, 2004, the date his deposition was concluded. Transcripts of his deposition (taken on July 16, 2004 and December 17, 2004) have been filed concurrently herewith and will be cited as "Wolf, T.(7/16/04), p.__" or "Wolf, T.(12/17/04), p.__."

he is disabled under the ADA or handicapped under the FHAA as a matter of law. Accordingly, summary judgment should be entered in favor of the City as to all claims under the ADA and FHAA brought by Bobby Hoover in the instant lawsuit.

2. Doug Byers is not disabled under the ADA or FHAA

Plaintiff Doug Byers was addicted to cocaine, but he has been completely sober (no drugs) for almost three years. Byers, T.(11/19/03), pp.14, 22, 25.[10] Doug Byers has not received any treatment or counseling for his substance abuse for more than one and a half years. *Id.*, p.36.

On a daily basis, Doug Byers eats, watches television, socializes with his roommates, and goes to work. *Id.*, pp.25-28. He is physically able to exercise, though he chooses not to do so, regularly plays Bingo, goes to the movies and participates in church activities. *Id.*, pp.25-28. Doug Byers affirmatively stated that he has no impairments that prevent or limit his ability to participate in any recreational activity that he wishes to engage in. *Id.*

For the past three years, Doug Byers has been consistently working between 25-30 hours per week as a limousine driver as well as an approximate 8 additional hours per week as a church singer. *Id.*, p.17-19. Doug Byers also has a driver's license and has been actively driving for nine years. *Id.*, p.10.

Doug Byers' status as being a recovering drug addict does not impair his ability to form or maintain relationships. He actively dates (approximately twice a week), enjoys a good relationship with his family, and there is nothing impeding him from forming friendships and relationships with other people. *Id.*, pp. 28-29; 71-72.

[10] All assertions regarding Plaintiff Doug Byers, unless otherwise noted, are as of November 19, 2003, the date of his deposition. A transcript of his deposition has been filed concurrently herewith and will be cited as "Byers, T.(11/19/03), p.__."

While Doug Byers testified that he feels unable to live alone, he also testified that he does not need to live at his current residence (or rent from the Corporate Plaintiffs). *Id.*, pp.47-48, 106-107, 113. In fact, Doug Byers testified that he could live elsewhere and rent from another landlord so long as he is with at least one other person who abstained from drugs and alcohol. *Id.*

Clearly, Doug Byers' own admissions and actions demonstrate that his substance abuse does not substantially limit any major life activity. Therefore, he cannot demonstrate that he is disabled under the ADA or handicapped under the FHAA as a matter of law. Accordingly, summary judgment should be entered in favor of the City as to all claims under the ADA and FHAA brought by Doug Byers in the instant lawsuit.

3. Todd Conroy is not disabled under the ADA or FHAA

Plaintiff Todd Conroy was addicted to alcohol. Conroy, T.(3/16/04), pp.45-46.[11] However, he has been completely sober (no alcohol) and has not received any treatment or counseling for his substance abuse for more than three years. *Id.*, p. 50.

On a daily basis, Todd Conroy wakes up in the morning, goes to the gym (about 5 times per week), gets ready for work, goes to work, comes home and studies for his graduate school entry exam, watches television and goes to bed. *Id.*, pp.53-54. For the past three years, Todd Conroy has held several jobs in which he has consistently worked between 35 and 45 hours per week, and nothing has impaired his ability to fully perform his duties in the various occupations he held during that time. *Id.*, pp.33-37. Todd Conroy has been actively driving for a year and a half, and nothing impedes his ability to drive. *Id.*, pp.31-32.

[11] A transcript of the sworn deposition of Plaintiff Todd Conroy, taken on March 16, 2004, along with all of the referenced exhibits have been filed concurrently herewith and will be cited as "Conroy, T.(3/16/04), p.__."

Todd Conroy states that the only purported limitation stemming from him being a recovering alcoholic is that he purportedly cannot go to bars. *Id.*, p.148. However, Todd Conroy denied any limitation from being able to socialize or date as he frequently socializes with his friends, spends time with his family and goes to restaurants. *Id.*, pp.56-59. In fact, he is able to socialize with friends that consume alcohol in his presence and goes to restaurants that serve alcohol, and he does not feel tempted to have alcohol. *Id.*

Lastly, Todd Conroy does not need to live at his current residence or any residence owned by the Corporate Plaintiffs. In fact, Todd Conroy can live elsewhere and rent from another landlord so long as he was with at least one other person that abstained from drugs and alcohol. *Id.*, pp.73-75. Furthermore, even if he were subjected to random alcohol testing (which he is not), the idea of being randomly tested does not have any effect on his abstinence from alcohol. *Id.*, pp.73, 88.

Thus, Todd Conroy's own admissions and actions demonstrate that his substance abuse does not substantially limit any major life activity. Therefore, he cannot demonstrate that he is disabled under the ADA or handicapped under the FHAA as a matter of law. Accordingly, summary judgment should be entered in favor of the City as to all claims under the ADA and FHAA brought by Todd Conroy in the instant lawsuit.

4. Matthew Wolf is not disabled under the ADA or FHAA

Plaintiff Matthew Wolf was addicted to alcohol and cocaine. Wolf, T.(7/16/04), p.58. He has been completely sober for 1 year and denied any desire or urge to consume alcohol or use cocaine. Wolf, T.(12/17/04), pp.145-146. Importantly, Matthew Wolf denied that being a recovering substance abuser impairs his ability to do anything that he wants to do. Wolf, T.(7/16/04), p.95.

Specifically, Matthew Wolf, on a daily basis, wakes up in the morning, gets ready for work, goes to work, comes home, eats dinner, showers, then goes to his second job (or on nights he is not working his second job, he attends Alcoholics Anonymous meetings), socializes with his friends, goes out for coffee, uses his computer and/or reads books. Wolf, T.(12/17/04), pp.139-141. Nothing impairs Matthew Wolf's ability from going out and socializing, and he can go to bars and clubs without feeling tempted to consume alcohol. Wolf, T.(7/16/04), pp.90-92. Matthew Wolf also plays softball, and nothing, including the fact that he is a recovering substance abuser, impairs him from exercising or playing sports. Wolf, T.(7/16/04), pp.48-49, 88-89; Wolf, T.(12/17/04), p.145.

Furthermore, Matthew Wolf has worked at least 50 hours per week over a one year period (and currently works upwards towards 70 to 77 hours per week). Wolf, T.(7/16/04), pp.44, 47; Wolf, T.(12/17/04), pp.123-125. He has denied that being a recovering substance abuser impedes or impairs his ability to perform any of his employment duties. Wolf, T.(7/16/04), pp.44, 47; Wolf, T.(12/17/04), p.133. Matthew Wolf has also been driving continuously for more than two years, and being a recovering substance abuser does not prohibit him from being able to drive. Wolf, T.(7/16/04), p.40.

Moreover, Matthew Wolf is not limited by his prior substance abuse from maintaining relationships. Specifically, being a substance abuser does not prevent Matthew Wolf from seeing his son or from being able to foster a father/son relationship with his son. Wolf, T.(7/16/04), pp.94-95. Furthermore, Matthew Wolf has a girlfriend, and being a recovering substance abuser does not affect his relationship with his girlfriend. Wolf, T.(12/17/04), pp. 146-147.

Though Matthew Wolf resides at a residence owned by Boca House, neither he nor any of his roommates have been tested for drugs or alcohol, and drug and alcohol testing (or the threat

of such testing) does not prevent Matthew Wolf from using or having any desire to use alcohol or drugs. *Id.*, pp.182-183, 237. As such, Matthew Wolf does not need to live at a residence owned by Boca House because he can live elsewhere and rent from another landlord (other than the Corporate Plaintiffs) so long as he was with at least one other person who voluntarily abstains from drugs and alcohol. *Id.*, pp.154-155, 233.

Thus, Matthew Wolf's own admissions and actions demonstrate that his substance abuse does not substantially limit any major life activity and that he is not disabled under the ADA or handicapped under the FHAA, and, accordingly, summary judgment should be entered in favor of the City as to all claims under the ADA and FHAA brought by Matthew Wolf in the instant lawsuit.

III. The City is Entitled to Summary Judgment as to the Corporate Plaintiffs' Claims because their Residents are not Disabled or Handicapped under the ADA or FHAA

Like the Individual Plaintiffs, the Corporate Plaintiffs are asserting claims under the ADA and FHAA based solely upon the purported actual disabilities of their residents. Complaint, ¶¶13, 33. Therefore, a threshold issue to determine whether the Corporate Plaintiffs' may assert claims under the ADA or FHAA is whether their residents actually have physical or mental impairments that substantially limit major life activities. *Cohen*, 174 F.Supp.2d at 323-324. The Corporate Plaintiffs have not produced a shred of evidence demonstrating that even one of their residents have impairments that affect major life activities, and thus the City is entitled to summary judgment as to the Corporate Plaintiffs' claims under the ADA and FHAA.

The facts in the instant case are similar to those in *Cohen, supra.* There, the plaintiff, an operator of a proposed group home for abused, neglected and abandoned children sued the Town of Cheltenham and its zoning board (collectively, the "Town") for violation of the FHAA based

upon the Town's denial of certain zoning approvals for the proposed use. 174 F.Supp.2d at 310-312.

At the outset, the court in *Cohen* was mandated to conduct an individualized inquiry to evaluate whether the potential residents of the proposed group home were in fact handicapped under the FHAA (i.e. having physical or mental impairments that substantially limited one or more major life activities). *Id.* at 324-325. The court found that the evidence presented by the plaintiff consisted of mere conclusory assertions that abused, abandoned and/or neglected children are handicapped and did not contain any evidence that a specific child who would reside in the group home was in fact mentally or physically impaired. *Id.* at 327-328 (rejecting the plaintiff's suggestion that abused, abandoned and/or neglected children might generally be handicapped because it "directly contradicts the United States Supreme Court's declaration that courts must conduct an individualized inquiry in deciding the question of disability and/or handicap"). In addition, the court found that the plaintiff failed to produce evidence showing how the proposed impairment of the intended group residents (assuming it was an impairment) substantially limited the major life activities of such residents. *Id.* at 329-330. Accordingly, the court entered summary judgment in favor of the Town. *Id.* at 332.

Here, the Corporate Plaintiffs, just like the plaintiff in *Cohen*, have not offered or produced any evidence demonstrating that any of their residents are in fact disabled or handicapped. Rather, the testimony of Steven Manko, the owner of the Corporate Plaintiffs, demonstrates quite the opposite.

Manko testified that Boca House and Awakenings will not accept individuals who are unable to "function." Manko, T.(1/14/04), p.150. In addition, the residents at a Boca House or Awakenings facility (in housing known as Phase I/Level I, Phase II/Level II, and Phase III/Level

III), must: cook for themselves, clean for themselves, and perform the same functions and activities as people who are not recovering substance abusers. [12] In fact, there is nothing that the residents of Boca House and Awakenings cannot do as they can and do live "a normal life." Manko, T.(1/14/04), pp.150-152, 166, 237, 331.

Specifically, Manko testified:

> Q. With the exception of drinking and doing drugs -- just take them off the table -- do the people in Boca House do the same types of functions and activities --
>
> A. Absolutely.
>
> Q. -- that just normal people do?
>
> A. Absolutely. That's what I said.
>
> Q. And there's nothing -- nothing that they can't do; is that correct?
>
> A. There's nothing they can't do. They can do anything. It's suggested they don't hang around bars or hang out with people who are active, but otherwise, they do; they live a normal life.

Manko, T.(1/14/04), pp.151-152. [13]

---

[12] As of the date of their depositions, Bobby Hoover, Doug Byers and Todd Conroy resided in housing known as "graduate houses" or "Phase IV"/ "Level IV." Hoover, T.(11/7/03), p.29; Byers, T.(11/19/03), p.46; Conroy, T.(3/16/04), pp.70-71. This type of housing is not owned by the Corporate Plaintiffs, but instead, by the Corporate Plaintiffs' owner, Steven Manko or another entity controlled by Manko. Manko, T.(1/14/04), pp.74, 78, 120-121, 183, 335-336. Residents in this type of housing are not tested for drugs or alcohol. *Id.* Like the Corporate Plaintiffs' residents, residents in "graduate house" are able to drive, shop and do normal life activities just like anyone who is not a recovering substance abuser. *Id.*, pp.122-126.

[13] While group home operators could prove that their residents are disabled by virtue of setting admission standards that require as a condition for residency, the existence of an impairment that substantially limits major life activities, the Corporate Plaintiffs cannot do so as Manko's sworn testimony demonstrates that residents can only be admitted if they do not have any substantial limitations of major life activities.

Thus, the fact that all of the Corporate Plaintiffs can and do live "a normal life" (which is also demonstrated by Plaintiff Matthew Wolf, the only Resident Plaintiff that still resides in a property owned by Boca House), affirmatively demonstrates that none of its residents have impairments that substantially limit major life activities. Accordingly, summary judgment should be entered in favor of the City as to all claims brought by the Corporate Plaintiffs under the ADA and FHAA.

WHEREFORE, the City respectfully requests an order from the Court granting summary judgment as to all claims against the City under the ADA and FHAA (Counts 1-6 and 8-12), attorneys' fees under the ADA and FHAA, reasonable costs, and for such additional relief as the Court deems appropriate.

Respectfully submitted,

Diana Grub Frieser
City Attorney
City of Boca Raton
201 W. Palmetto Park Road
Boca Raton, FL 33432

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.A.
Co-Counsel for the City of Boca Raton
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, FL 33312
Telephone: (954) 763-4242
Telecopier: (954) 764-7770

By: _____
Jamie Alan Cole
Florida Bar No.: 767573
Matthew H. Mandel
Florida Bar No.: 147303

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular mail this 14th day of September, 2006, to William Hill, Esq., 200 South Biscayne Boulevard, Suite 2500, Miami, Florida 33131, (305) 374-7593, and James K. Green, Esq., Suite 1630, Esperanté, 222 Lakeview Avenue, West Palm Beach, Florida 33401, (561) 655-1357.

Jamie A. Cole
Matthew H. Mandel

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.A.
200 EAST BROWARD BOULEVARD, SUITE 1900, FORT LAUDERDALE, FLORIDA 33301 • TEL. 954-763-4242 • FAX 954-764-7770