UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 08-457 JVS (RNBx) Date October 28, 2008

Title Pacific Shores Properties LLC, et al. v. City of Newport Beach

Present: The Honorable	James V. Selna	
	Karla J. Tunis	Not Present
	Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Not Present		Not Present

Proceedings: (IN CHAMBERS) Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Portions of the Third Amended Complaint (fld 9-9-08)

Defendant City of Newport Beach ("Newport Beach") moves to dismiss portions of the first through sixth claims of Plaintiffs Pacific Shores Properties, LLC, et al.'s ("Pacific Shores") Third Amended Complaint ("Complaint") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Pacific Shores opposes the motion. The motion is GRANTED in part and DENIED in part.

I. Background

In the Complaint, Pacific Shores alleges as follows:

Pacific Shores operates a sober house for more than seven unrelated recovering alcoholics and substance abusers who live together as a single housekeeping unit. (Compl. ¶ 12.) Residents are required to share household facilities, to perform household chores, to abstain from using drugs or alcohol, to submit to drug testing (and to vacate if they test positive), and to go to work or school. (Id. ¶ 13.) The house, which is not intended for transitory uses, is located in one of Newport Beach's residential districts. (Id. ¶ 15.)

In 2007, Newport Beach enacted a series of moratorium ordinances to prevent new "transitory uses" in residential districts. (Id. ¶¶ 18-27.) On October 23, 2007, Newport Beach issued a letter to Pacific Shores alleging that the sober house was in violation of these ordinances. The letter requested full abatement of transitory uses and threatened

litigation. (Id. ¶ 28.) On November 6, 2007, Newport Beach sued Pacific Shores in Orange County Superior Court seeking to enforce the moratorium and enjoin operation of the sober house. (Id. ¶ 30.) On December 10, 2007, Pacific Shores served Newport Breach with a written request for reasonable accommodation – namely, an exception to zoning regulations to permit Pacific Shores to continue to provide housing for disabled persons. (Id. ¶ 31.) Newport Beach denied that request on February 7, 2008. (Id. ¶ 32.)

On January 20, 2008, Newport Beach enacted Ordinance 2008-05 ("Ordinance"), imposing limitations on group living in residential districts, and creating a new classification for groups of unrelated, disabled persons known as "general residential care facilities" and defined as:

> Any place, site or building, or groups of places, sites or buildings, licensed by the state or unlicensed, in which seven or more individuals with a disability reside who are not living together as a single housekeeping unit and in which every person residing in the facility (excluding the licensee, members of the licensee's family, or persons employed as facility staff) is an individual with a disability.

(Id. ¶ 34.) Not subject to limitations on group living, "single housekeeping units" are defined as:

> The functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit, including the joint use of and responsibility for common areas, and sharing household activities and responsibilities such as meals, chores, household maintenance, and expenses, and where, if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, under a single written lease with joint use and responsibility for the premises, and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager.

(Id. ¶ 36.) On May 24, 2007, Newport Beach served Pacific Shores with an "abatement notification" demanding that Pacific Shores abate its group residential use of the sober house in accordance with the Ordinance. Pacific Shores alleges that Newport Beach

enacted the Ordinance with a discriminatory purpose and has applied it to discriminate against persons with disabilities, including Pacific Shores. (Id. ¶¶ 10, 38.) Pacific Shores further alleges that the only households that have received notice from Newport Beach for violating the Ordinance because they are not single housekeeping units are sober houses for persons with disabilities. (Id. ¶ 38.) In other words, Newport Beach's enforcement of the Ordinance presumes that households of disabled persons are not "single housekeeping units" and demands that they submit to a burdensome and discriminatory "use permit" requirement to avoid abatement, whereas it presumes that groups of non-disabled persons living together are "single housekeeping units" allowed to live in any residential zone without the need for a permit of any kind. (Id. ¶ 39.)

Presently before the Court is Newport Beach's motion to dismiss portions of Pacific Shores's Complaint. By its own terms, the motion does not address the merits of the moratorium ordinances adopted in 2007; nor does it address the alleged denial of reasonable accommodation.[1]

I. Legal Standards

A. Federal Rule 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, -- U.S. --, 127 S. Ct. 1955, 1974 (2007). In resolving a Rule 12(b)(6) motion, the Court must construe the Complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). The Court must also accept as true all reasonable inferences to be drawn from the material allegations in the Complaint. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998).

Because factual challenges have no bearing under Rule 12(b)(6), generally speaking, the Court may not consider material beyond the pleadings in ruling on a motion

[1] Since the parties take up a discussion about the moratorium ordinances and reasonable accommodation under Pacific Shores's state law claims, the Court notes that Newport Beach presumably meant to apply these limitations only with respect to the federal law claims.

to dismiss for failure to state a claim. There are, however, two exceptions to this general rule which do not demand converting the motion to dismiss into one for summary judgment. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir.2001). First, a court may consider material that is either attached to the complaint or material upon which the complaint relies, provided the material's authenticity is not contested. Id. Second, under Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record if the facts are not subject to reasonable dispute. Id.

B. Federal Rule 12(b)(1)

Dismissal under Rule 12(b)(1) is proper when the plaintiff fails to properly plead subject matter jurisdiction in the complaint. The plaintiff always bears the burden of establishing subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994); Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1223, 1225 (9th Cir. 1989). A jurisdictional attack pursuant to Rule 12(b)(1) may be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the challenge is based solely upon the allegations in the complaint (a "facial attack"), the Court generally presumes the allegations in the complaint are true. Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003); see White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). If instead the challenge disputes the truth of the allegations that would otherwise invoke federal jurisdiction, the challenger has raised a "factual attack," and the Court may review evidence beyond the confines of the complaint without converting the motion to dismiss into a motion for summary judgment. Safe Air, 373 F.3d at 1039. The court need not presume the truthfulness of the plaintiff's allegations. Id.

II. Discussion

There are two sets of issues here – federal law and state law claims. The latter closely track the former. For each, Pacific Shores appears to assert both facial and as-applied challenges.[2] The Court will address each issue in turn.

[2] Insofar as both facial and as-applied challenges are alleged in each claim, Newport Beach contends that the Complaint is contrary to Federal Rule of Civil Procedure 10(b). Rule 10(b) requires that "each claim founded on a separate transaction or occurrence . . . must be stated in a separate count or defense," but only "if doing so would promote clarity." Based on the face of the Complaint, and on

A. Federal Law Claims

The Complaint includes three federal law claims for relief. Pacific Shores's first and second claims asserts facial and as-applied challenges under the Fair Housing Act, 42 U.S.C. §§ 3601, et seq. (collectively, "FHA"), and the Americans with Disabilities Act, 42. U.S.C. §§ 12131 et seq. (collectively, "ADA"), respectively. The fifth claim for relief asserts a facial and as-applied challenge under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

1. Facial Challenge

Newport Beach contends that Pacific Shores fails to state viable facial challenges to the Ordinance under the FHA, the ADA and the Equal Protection Clause. Pacific Shores's only rebuttal is that the Ordinance is void for vagueness. The Court finds that Pacific Shores has not alleged facts sufficient to state a facial challenge under federal statutory and constitutional law.

To state a facial challenge under the FHA or the ADA, the plaintiff must allege and establish that the regulation discriminates between similarly situated uses. Newport Beach cites two Ninth Circuit opinions for this proposition. In Community House, Inc. v. City of Boise, the circuit held a men-only policy at a homeless shelter facially invalid under the FHA because it treated women and families differently from men. 490 F.3d 1041, 1051 (9th Cir. 2007). A similar analysis under the ADA occurred in Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 735 (9th Cir. 1999) (comparing an ordinance's treatment of methadone clinics to that of similar medical clinics). Indeed, the relevant inquiry appears to be whether a policy applies less favorably to a protected group than to other similarly situated groups. Pacific Shores offers no countervailing precedent on this issue. Nor does it dispute that the Ordinance facially treats residential care facilities more favorably than all other group residential uses: among all non-single housekeeping units, only residential care facilities – for which Pacific Shores may well qualify – are eligible for a use permit. Thus, the Ordinance does not facially discriminate against Pacific Shores under the FHA and the ADA.

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the party papers, the assertion of facial and as-applied challenges appears clear. And there is no confusion as to the fifth claim for relief, asserting both due process and equal protection challenges under 42 U.S.C. section 1983. Thus, there is no violation of Rule 10(b).

A facial challenge to the Equal Protection Clause likewise requires Pacific Shores to show that similarly situated groups are treated differently under the Ordinance. For the same reason it is facially valid under the FHA and the ADA, the Ordinance is facially valid under the Equal Protection Clause. In rebuttal, Pacific Shores argues that the purpose of the Ordinance is to restrict sober housing, and points to enumerated concerns about residential group uses in the Ordinance's preamble. (Opening Br., Ex. B at 2-3 ¶¶ 6, 7 & 12.) But these concerns, without more, are insufficient to make out a facial challenge under the Equal Protection Clause. Such was the Supreme Court's holding in Village of Belle Terre v. Boraas:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . . The police power is . . . ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

416 U.S. 1, 9 (1974). In addition, the Court expressly noted that "boarding houses, fraternity houses, and the like present urban problems." Because the Ordinance facially sought to preserve the residential character of neighborhoods and to reduce the negative secondary effects from group uses therein (Opening Br., Ex. B at 3 ¶ 9, 4 ¶¶ 13-14), Pacific Shores cannot make out a facial challenge under the Equal Protection Clause. Pacific Shores even concedes that the Ordinance is "carefully crafted to appear neutral" on its face. (Opposition Br. p. 8.)

Instead, Pacific Shores rests its entire argument for facial invalidity on void for vagueness grounds. The Court notes that this argument is properly situated under the Due Process Clause. Indeed, Pacific Shores's two cited cases for the rule on vagueness – Hill and Kolender – both involve due process challenges. See Hill v. Colorado, 530 U.S. 703 (2000); Kolender v. Lawson, 461 U.S. 352 (1983). Under Hill, a statute can be impermissibly vague for either of two independent reasons: (1) "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits"; and (2) "if it authorizes or even encourages arbitrary and discriminatory enforcement." Hill, 530 U.S. at 732. According to Pacific Shores, the compelling factor here is whether the Ordinance establishes minimal guidelines for its enforcement. Kolender, 461 U.S. at 357-58.

The argument turns on the meaning of "single housekeeping unit." Pacific Shores contends that the definition is impermissibly vague. But Pacific Shores does not allege facts to establish this claim, neither on the two factors in Hill nor on the Kolender factor. The Court finds that "single housekeeping unit" contains sufficiently objective components for a reasonably intelligent person to understand: a group must jointly occupy a single dwelling; it must jointly use and be responsible for common areas; and it must share activities such as preparing meals, performing chores, maintaining the household, and paying expenses. And if the unit is rented, the residents rather than the landlord must determine household membership; there must be a single written lease; and tenants must have joint use of, and responsibility for, the premises. (Opening Br., Ex. B at 7.) These components are surely no less definitive than the "close proximity to" language upheld by the Ninth Circuit in Hotel & Motel Association of Oakland v. City of Oakland, 344 F.3d 959, 972 (9th Cir. 2003). Thus, the Ordinance is not void under the first Hill factor.

Nor is the Ordinance void under the second Hill factor, which in turn is related to the Kolender factor. The Court agrees that, without minimal guidelines, a statute may well invite arbitrary or discriminatory enforcement. But this is not the case here. In addition to the objective components set forth above, the Ordinance provides examples of the types of residential uses that it proscribes: "boarding or rooming houses, dormitories, fraternities, sororities, and private residential clubs." (Id. at 8.) And it expressly excludes "residential care facilities." (Id.) This provides sufficient guidance to law enforcement officers, and is no more subject to "sidewalk speculation" (Opposition Br. p. 16.) than other restrictive zoning measures that have been upheld. See, e.g., Boraas, 416 U.S. at 7-8 (upholding a village zoning ordinance that limited, with certain exceptions, the occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons).

Finally, the Court agrees with Newport Beach that Pacific Shores cannot transform the Complaint into a First Amendment case for purposes of relaxing the burden in a vagueness challenge. The Complaint itself makes no mention of the First Amendment. Pacific Shores's hypothetical references to California landlord-tenant law are also unavailing. The Supreme Court in Hill was clear that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" 530 U.S. at 733 (citation omitted). The Hill Court specifically frowned upon

"hypertechnical theories as to what the statute covers." Id. Thus, the Ordinance need not be perfectly aligned with state landlord-tenant law. Insofar as Hoffman Estates applies,[3] the Supreme Court noted that "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.7 (1982) (citation omitted).

Therefore, Pacific Shores has failed to state a facial challenge under federal statutory and constitutional law, and the facial components of its first, second, and fifth claims should be dismissed.

2. As-Applied Challenge

Newport Beach contends that Pacific Shores's as-applied challenges under the FHA, the ADA, and the Equal Protection Clause should be dismissed under Rule 12(b)(1) as not ripe for review. As clarified during oral argument, there are two issues here.[4] The first is whether challenges to the Ordinance's use permit process are ripe. The second is whether challenges to the permit requirement are ripe. The Court finds for Newport Beach on the first issue, and for Pacific Shores on the second.

Insofar as Pacific Shores never applied for a use permit, the Court finds that the Complaint is not ripe as to the permit process. But Pacific Shores also alleges that the requirement itself is burdensome and discriminatory in application. The Complaint includes allegations that: "the only households that have received notice from [Newport Beach] that they are in violation of the 2008 ordinance because they are not a 'single housekeeping unit' are persons with disabilities residing in sober houses" (Compl. ¶ 38);

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[3] The challenged ordinance in Hoffman Estates was admittedly "quasi-criminal." Here, Pacific Shores contends that the Ordinance provides for imprisonment, fines, or both. 455 U.S. at 499-500. Newport Beach counters that no criminal action has been threatened. The Court need not decide this issue, but cites Hoffman Estates as additional authority to support its holding on the vagueness issue.

[4] According to Newport Beach, the Complaint's "as-applied claims are not ripe to the extent they challenge the use permit requirement." (Reply Br. p. 14.) But Newport Beach acknowledges that Pacific Shores "assert[s] a separate as-applied challenge in alleging [that Newport Beach] assumes households with non-disabled people are single housekeeping units, while assuming household with disabled people are not." (Id. p. 14 n.2.)

the enforcement of the Ordinance "presumes that households of disabled persons . . . are not 'single housekeeping units' and demands that they submit to an overly burdensome and discriminatory 'use permit' process in order to avoid abatement" (id. ¶ 39); such enforcement also "presumes that groups of non-disabled persons living together are 'single housekeeping units' allowed to live in any residential zone without the need for a permit of any kind" (id.); and the permit application thus "applies only to certain types of dwellings based solely upon the disability of the residents of those dwellings" (id. ¶ 40). Against this backdrop, the Court finds that Pacific Shores has alleged sufficient facts to show ripeness as to the permit requirement.

Pacific Shores sets forth five arguments to establish ripeness. First, Pacific Shores asserts that its federal as-applied challenges are ripe because Newport Beach has threatened it with enforcement of the Ordinance. This makes certain aspects of the Complaint ripe, such as the allegation that the permit requirement is only enforced against sober houses for persons with disabilities (Compl. ¶ 39). But it says nothing about whether a challenge to the permit process is ripe. Discrimination in that process can occur only if Newport Beach discriminated in administering that process.

Second, Pacific Shores contends that it need not "exhaust" remedies for ripeness, and hence need not comply with the Ordinance's permit process. Newport Beach counters that exhaustion doctrine is inapposite. Insofar as the Complaint challenges the use permit process, Pacific Shores must "exhaust" that process – by applying for a permit. But there is no need to do so when challenging the enforcement of the permit requirement.

Third, Pacific Shores points out that, in the context of a claimed threat of prosecution, courts are to consider "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past persecution or enforcement under the challenged statute." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (citation omitted). Pacific Shores persuasively argues each of the three requirements of the Thomas test as to the permit requirement. But these arguments are misplaced when the issue becomes not whether Pacific Shores can challenge the permit requirement, generally, but only whether it can challenge the permit process, specifically.

Fourth, Pacific Shores contends that Newport Beach's citation to Action Apartment is inapplicable. See Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020 (2007). To the extent Newport Beach only moves to dismiss the as-applied challenge to the Ordinance's permit requirement, Action Apartment is instructive: where the challenged "government action has not yet occurred," the "claim is not yet ripe for review." Id. at 1028. By contrast, the threatened enforcement of the permit requirement constitutes government action within the meaning of Action Apartment. The challenge to that requirement is thus ripe.

Fifth, Pacific Shores further contends that Newport Beach's "takings" cases are inapposite as well. But Pacific Shores misreads these cases, which in fact reject due process and equal protection claims as unripe, and also happen to involve separate takings claims. See Southern Pacific Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990) (holding as-applied due process and equal protection claims are unripe under the "final determination" requirement which requires that plaintiff must have submitted a meaningful development application); Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989) ("This court has held that the final decision requirement is applicable to substantive due process and equal protection claims brought to challenge the application of land use regulations."); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 507 (9th Cir. 1987) (takings, due process, and equal protection claims not ripe where planning authorities had not made a final determination of the status of the property). The Court finds these cases instructive to the extent they set forth a "final decision" rule for challenging certain statutory requirements. This rule renders the challenge to the permit process unripe, but does not alter the ripeness of the challenge to the permit requirement.

Where a constitutional claim is unripe, the Court lacks subject matter jurisdiction and the Complaint must be dismissed under Rule 12(b)(1). See Shelter Creek Development Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988), cert. denied, 488 U.S. 851 (1988). Therefore, the Court dismisses the as-applied components of Pacific Shore's first, second, and fifth claims insofar as they challenge the Ordinance's use permit process, but retains those claims insofar as they challenge the use permit requirement.

B. State Law Claims

The Complaint also includes three state law claims, which closely track the federal law claims discussed above. The third and fourth claims assert challenges under the California Fair Employment and Housing Act, Cal. Gov't Code §§ 12926 et seq. (collectively, "FEHA"), and California Government Code section 65008, respectively. The sixth claim asserts privacy, equal protection, and due process challenge under provisions of the California Constitution. See Cal. Const., art. 1, §§1 & 7.

Newport Beach contends that the Court should decline to exercise supplemental jurisdiction over Pacific Shores's state law claims. Alternatively, Newport Beach seeks the dismissal of these claims on the same grounds as the federal law claims, or on state procedural grounds. To the extent that aspects of the federal law claims survive, such as the moratorium ordinances and reasonable accommodation, the Court refuses to dismiss the state law claims on the basis of supplemental jurisdiction. Instead, the Court finds that most of the state law claims rise or fall with the federal law claims. Pacific Shores effectively concedes this point. (Opposition Br. pp. 20 (state and federal claims arise out of same facts and constitute a single case or controversy), 21 (FEHA construed in light of FHA), 21 (federal and California equal protection guarantees substantially equivalent), 21 (California courts follow federal law in construing facial vagueness challenges under the state due process clause).) Therefore, the Court dismisses Pacific Shores's state law claims as to the FEHA, equal protection, and due process.

The only remaining state law claims relate to California Government Code section 65008 (fourth claim) and privacy under the California Constitution (sixth claim). The Court is not persuaded that the language of section 65008 sufficiently approximates that of the FHA to be dismissed purely on that basis. Although the Court notes that Pacific Shores's challenges to the three moratorium ordinances are time-barred under section 65008, Newport Beach admits that the section 65008 claim is not time-barred as to the Ordinance itself. (Reply Br. p. 15.) Thus, the Court finds no reason to dismiss the section 65008 claim, but notes that Pacific Shores cannot seek damages under that section. Pacific Shores effectively concedes this damages issue. (Opposition Br. p. 24.) The Court also finds no reason to dismiss the privacy claim.

Therefore, the Court dismisses the Complaint's third claim, but does not dismiss the fourth claim to the extent it challenges the Ordinance. The Court dismiss the sixth claim insofar as it involves equal protection and due process challenges, but does not dismiss the that claim with respect to the privacy issue.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 08-457 JVS (RNBx) Date October 28, 2008

Title Pacific Shores Properties LLC, et al. v. City of Newport Beach

III. Conclusion

For the foregoing reasons, the Court GRANTS the motion to dismiss the facial components of the Complaint's first, second, and fifth claims for relief as they relate to the Ordinance. The Court further GRANTS the motion to dismiss the as-applied components of the first, second, third, and fifth claims insofar as they challenge the Ordinance's use permit process, but DENIES those claims insofar as they challenge the use permit requirement. The same is true of the sixth claim with respect to the equal protection and due process challenges. The Court DENIES the motion to dismiss the fourth claim and the privacy component of the sixth claim.

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