

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT

RESILIENT HOMES, LLC,

Plaintiff

v.

**CITY OF FALL RIVER, CITY OF FALL RIVER
ZONING BOARD OF APPEALS, by and through its
Members, Joseph Pereira, John Frank III, Daniel
D. Dupere, James C. Calkins, Ricky P. Sahady,
Eric Kelly, and John Sylvia,**

Defendants

C.A. No.: 2373CV00166

BRISTOL, SS SUPERIOR COURT
FILED

MAR 13 2023

JENNIFER A. SULLIVAN, ESQ.
CLERK / MAGISTRATE

COMPLAINT AND JURY DEMAND

Plaintiff, Resilient Homes, LLC ("Plaintiff"), by and through its undersigned counsel, by way of Complaint against Defendants, the City of Fall River ("City" or "Fall River") and the Fall River Zoning Board of Appeals (the "ZBA"), alleges as follows:

I. PARTIES

1. Plaintiff, Resilient Homes, LLC is a Massachusetts limited liability corporation with a principal office located at 555 Eastern Avenue, Fall, River, MA.
2. The City of Fall River is a municipal corporation in the Commonwealth of Massachusetts with City Hall located at One Government Center, Fall River, MA.
3. Defendant, Joseph Pereira, is the Chairperson of the ZBA with a work address of One Government Center, Fall River, MA, whose home address is unknown and for which the City refused to provide.
4. Defendant, John Frank III, is the Vice Chairperson of the ZBA with a work address of One Government Center, Fall River, MA whose home address is unknown and for which the City refused to provide.

5. Defendant, James Calkins, is the Clerk of the ZBA with a work address of One Government Center, Fall River, MA whose home address is unknown and for which the City refused to provide.

6. Defendant, Daniel Dupere, is a Member of the ZBA with a work address of One Government Center, Fall River, MA whose home address is unknown and for which the City refused to provide.

7. Defendant, Rickey Sabady, is a Member of the ZBA with a work address of One Government Center, Fall River, MA whose home address is unknown and for which the City refused to provide.

8. Defendant, Eric Kelly, is a Member of the ZBA with a work address of One Government Center, Fall River, MA whose home address is unknown and for which the City refused to provide.

9. Defendant, John Silvia, is a Member of the ZBA with a work address of One Government Center, Fall River, MA whose home address is unknown and for which the City refused to provide.

II. FACTS

10. Drug and alcohol abuse is wreaking havoc on public health and safety in communities across the United States, with more than 64,000 lives lost to drug overdoses in 2016 alone. In an effort to recognize and combat this growing epidemic, on March 10, 2016, the United States Senate passed the Comprehensive Addiction and Recovery Act of 2016, which documented the abuse of heroin and prescription opioid painkillers as having “a devastating effect on public health and safety in communities across the United States,” with the number of drug overdose deaths now surpassing the number of traffic accident deaths:

According to the Centers for Disease Control and Prevention, drug overdose deaths now surpass traffic accidents in the number of deaths caused by injury in the United States. In 2014, an average of more than 120 people in the United States died from drug overdoses every day.

Comprehensive Addiction and Recovery Act of 2016, S.524, 114th Cong., § 2.

11. The overdose death rate in Massachusetts is more than two times the national average.

12. In the year 2021, opioid-related overdose deaths in Massachusetts were 2,281 people up from 547 in 2010.

13. Resilient Homes, LLC purchased the subject property located at 555 Eastern Avenue, Fall River, MA (the "Property") by a deed recorded on September 19, 2022 (the "Deed"). See Exhibit A hereto.

14. The Deed is subject to a ZBA decision recorded at Book 9999, Page 164 (the "Variance"). See Exhibit B hereto.

17. The application dated November 20, 2019 (the "Application") that resulted in the Variance, sought: "Permission to waive use and dimension requirements of the Apartments Zoning District to divide the current single lot which contains 3 structures (a church and two multi-family dwellings) into three individuals lots, and waiver minimum front yard, minimum side yard, minimum rear yard, minimum area requirements, and minimum lot coverage." See Exhibit C hereto.

18. The Application that resulted in the Variance also stated: "we are keeping the current non-conforming use of each structure" and "the continuation of the current use and the proposed subdivision of the lot is consistent with the neighborhood."

19. By letter dated November 20, 2019, the City of Fall River Director of Inspectional Services framed the issue on appeal pursuant to the Application as follows: "Applicant is requesting permission to divide the current property into three (3) separate properties leaving each structure on separate lots. Waiving all set-back and dimensional requirements in a A-2 apartment district as per lot plan dated 11/18/19 with parking." See Exhibit C hereto.

20. By letter dated December 13 2022, Glenn Hathaway issued a "cease and desist" letter with respect to the occupancy of the Property, taking the position that the Variance limited the use of the Property to six – two bedroom units, which the Property is not, making the occupancy as the Property as it exists *allegedly* in violation of the Variance. See Exhibit C hereto.

21. The Variance does not, as a condition or otherwise, limit or prevent the continued use and occupancy of the Property as it existed and/or was allowed prior to the Variance.

22. On December 22, 2022, Resilient Homes, LLC appealed the December 12, 2022 "cease and desist" letter to the ZBA (the "Cease and Desist Appeal"). See Exhibit C hereto.

23. Pursuant to the Cease and Desist Appeal, Resilient Homes, LLC sought a favorable interpretation of the Variance, that such did not impose as a condition that the existing Property could only be used as a six unit, each with 2 bedrooms, apartment building. Alternatively, a reasonable accommodation was sought under Federal Law to allow the use by unrelated disabled

individuals, who are living in a congregate living arrangement.

24. On February 16, 2023, the ZBA heard Resilient Homes, LLC's Cease and Desist Appeal and refused to overturn the December 12, 2022 cease and desist letter and denied the requested reasonable accommodation (the "ZBA Decision"). See Exhibit D hereto.

25. The reasonable accommodation sought, in the form of allowing the Property to be occupied as a single-family occupancy by unrelated disabled individuals was reasonable and necessary given the Property was previously occupied by the same number of unrelated occupants, who were not disabled, and given the City has taken the position that the Property could be converted to a 6 unit 2 bedroom apartment complex, that would result in a similar number of occupants and impact upon the neighborhood, with the same "dimensional" variance issues.

26. The City has wrongfully denied the requested reasonable accommodation and improperly interpreted the Variance and issued a baseless "cease and desist" notice.

27. As a result of the wrongdoing alleged herein, Resilient Homes, LLC seeks compensatory damages, punitive damages, injunctive relief, and attorneys' fees and costs, and asserts claims under 42 U.S.C. § 12132 (the "Americans with Disabilities Act" or "ADA"), 42 U.S.C. § 3601 (the "Fair Housing Amendments Act" or "FHAA"), the Zoning Act's anti-discrimination provision in G.L. c. 40A, Section 3, the Massachusetts anti-discrimination act, G.L. c. 151B, and review under G.L. c. 40A, Section 17.

III. CLAIMS FOR RELIEF

COUNT 1: VIOLATION OF THE ADA

28. Paragraphs 1 through 27 above are incorporated by reference, as if fully set forth herein.

29. The American with Disabilities Act (the "ADA") 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 service, program, or activity of a public entity, or be subjected to discrimination by any such entity. The ADA makes it unlawful for a public entity, in determining the site or location of a facility, to make selections that have the purpose or effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination. 28 C.F.R. § 35.130(b)(4).

30. Resilient Homes, LLC's residents are qualified persons under the ADA with disabilities that substantially impair one or more major life activities.

31. Residents of the Property are screened to confirm that are disabled and applicable law.

32. Residents of the Property are not allowed to use illegal substances or alcohol while residing at the Property.

33. The Defendants are qualifying public entities within the meaning of the ADA. See 42 U.S.C. § 12131(1)(A).

34. Section 12132 of the ADA constitutes a general prohibition against discrimination on the basis of disability by public entities. Federal law declares that discrimination is prohibited in failing to provide a reasonable accommodation or in effectuating discriminatory goals of others, or those of a municipality, through the use of or imposition of rules, laws or zoning, whether legal or otherwise, if done with discriminatory animus or without animus if done in a way that effectuates the discriminatory goals of others.

35. Resilient Homes, LLC is associated with and/or provides services to disabled individuals protected under the ADA.

36. The Defendants have violated, and are continuing to violate the ADA, by, inter alia: (i) refusing to provide reasonable accommodations to disabled individuals or those that provide services to them (i.e. the Plaintiff); (ii) allowing prejudice against disabled individuals to dictate the outcome of zoning decisions and hearings; and (iii) discriminating against disabled individuals or those providing services to them (i.e. the Plaintiff).

WHEREFORE, Resilient Homes, LLC demands judgment in its favor and against the Defendants, jointly and severally, and requests that the Court grant the following relief:

- (1) Declaratory relief stating that the Defendants' discriminatory zoning decisions and improper denial of Plaintiff's ZBA application constituted violations of the ADA, and that Resilient Homes, LLC and its patients are entitled to a reasonable accommodation as requested;
- (2) Preliminary and permanent injunctive relief allowing Plaintiff to use the Property for congregate housing for the disabled;
- (3) Compensatory damages;
- (4) Punitive damages;
- (5) Attorneys' fees and costs; and
- (6) Such other and further relief as the Court deems necessary and appropriate.

**COUNT 2:
VIOLATION OF THE FHAA**

37. Paragraphs 1 through 36 above are incorporated by reference, as if fully set forth herein.

38. The Fair Housing Amendments Act, 42 U.S.C. § 3601, et seq., (the "FHAA") guarantees fair housing to handicapped individuals.

39. Under the FHAA, the term “handicap” means, with respect to a person, a “physical or mental impairment which substantially limits one or more of such person’s major life activities, a record of such impairment, or being regarded as having such an impairment.” 42 U.S.C. § 3602(h). The term “physical or mental impairment” includes “alcoholism” and “drug addiction (other than addiction caused by current, illegal use of a controlled substance).” 24 C.F.R. § 100.201.

40. Resilient Homes, LLC’s residents and prospective residents are qualified individuals with disabilities within the meaning of 42 U.S.C. § 12101.

41. Under the FHAA, it is unlawful to discriminate against or otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap of that buyer, renter, or person residing in or intending to reside in that dwelling after it is sold, rented, or made available. 42 U.S.C. § 3604(f)(1). Municipalities are required to make reasonable accommodations with respect to zoning to provide equal access to dwellings for disabled individuals.

42. Resilient Homes, LLC’s Property qualifies as a dwelling under the FHAA.

43. The Defendants have violated, and are continuing to violate the FHAA, by, inter alia: (i) refusing to provide reasonable accommodations to disabled individuals or those that provide services to them; (ii) allowing prejudice against disabled individuals to dictate the outcome of zoning decisions and hearings; and (iii) discriminating against disabled individuals or those providing services to them.

WHEREFORE, Resilient Homes, LLC demands judgment in its favor and against the Defendants, jointly and severally, and requests that the Court grant the following relief:

- (1) Declaratory relief stating that the Defendants’ discriminatory zoning decisions and improper denial of Plaintiff’s ZBA application constituted violations of the ADA, and that Resilient Homes, LLC and its patients are entitled to a reasonable accommodation as requested;
- (2) Preliminary and permanent injunctive relief allowing Plaintiff to use the Property for congregate housing for the disabled;
- (3) Compensatory damages;
- (4) Punitive damages;
- (5) Attorneys’ fees and costs; and
- (6) Such other and further relief as the Court deems necessary and appropriate.

**COUNT 3:
VIOLATION OF STATE LAW – G.L. c. 40A, SECTION 17**

44. Paragraphs 1 through 43 above are incorporated by reference, as if fully set forth herein.

45. As detailed above, the ZBA was wrong as a matter of law, palpably abused its

discretionary authority and acted in an arbitrary and capricious manner in its interpretation of the "Variance," in upholding the "cease and desist" notice, and when it denied Resilient Homes, LLC's request for a reasonable accommodation to use the property as a single-family occupancy as congregate housing for the disabled.

46. G.L. c. 40A, s. 17 states that "[a]ny person aggrieved by a decision of the board of appeals or any special permit granting authority" may appeal to a court of competent jurisdiction. In such appeal "[t]he court shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require."

47. The ZBA Decision was arbitrary and capricious and ignored the uncontroverted evidence that the Variance did not limit or prevent the prior use or occupancy of the Property to a newly developed 6 unit 2 bedroom apartment complex. The ZBA did not make adequate findings and ignores the uncontroverted evidence establishing the intent and meaning of the Variance as written. The ZBA Decision exceeds the authority of the ZBA and should be annulled.

WHEREFORE, Resilient Homes, LLC demands judgment in its favor and against the Defendants, jointly and severally, and requests that the Court grant the following relief:

- (1) Declaratory relief stating that the ZBA's actions were arbitrary, capricious, unreasonable, and in violation of the Zoning Act and the local Zoning By-laws;
- (2) Entry of an Order annulling and/or overturning the ZBA's denial of the Cease and Desist Appeal;
- (3) Preliminary and permanent injunctive relief to allow Resilient Homes, LLC's occupancy of the Property for unrelated disabled individuals;
- (4) Compensatory damages;
- (5) Punitive damages;
- (6) Attorneys' fees and costs; and
- (7) Such other and further relief as the Court deems necessary and appropriate.

COUNT 5

VIOLATION OF MASSACHUSETTS LAW AGAINST DISCRIMINATION G.L. c. 151B et seq.

48. Paragraphs 1 through 47 above are incorporated by reference, as if fully set forth herein.

49. G.L. c. 151B, s. 4 makes it unlawful "[f]or any person to directly or indirectly induce, attempt to induce, prevent, or attempt to prevent the sale, purchase, or rental of any dwelling or dwellings by: (a) implicit or explicit representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped

person, or a person having a child, or implicit or explicit representations regarding the effects or consequences of any such entry or prospective entry....”

50. All political subdivisions of the Commonwealth are “persons” for the purposes of Chapter 151B. See Section 1.

51. G.L. c. 151B, s. 1 defines the term “handicap” to mean “(a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment, but such term shall not include current, illegal use of a controlled substance as defined in section one of chapter ninety-four C.”

52. The ZBA violated Resilient Homes, LLC’s rights and violated Chapter 151B by denying it relief in contravention of Chapter 40A and the local Zoning By-law, and G.L. c. 40A, s. 3.

53. The ZBA has exercised its powers to regulate land use in a way that discriminates against disabled persons without justification or cause by preventing legal occupancy of the Property that is reasonable and necessary.

54. The ZBA’s conduct was arbitrary, capricious, unreasonable, malicious and in bad faith, and shocks the conscience.

55. The ZBA’s wrongful actions prohibit Resilient Homes, LLC from providing access to the disabled of much needed housing, an action that is discriminatory on its face against persons with disabilities, a discrete and insular minority that faces restrictions and limitations and has been subjected to a history of purposeful unequal treatment.

56. The ZBA’s violation of G.L. c. 40A, Section 3 constitutes discrimination and therefore is a violation of G.L. c. 151B.

57. Because of the ZBA’s denial of Resilient Homes, LLC’s Cease and Desist Appeal and request for reasonable accommodation, Resilient Homes, LLC has expended significant time and financial resources, has lost the opportunity to timely conduct their business and provide a much-needed service, and is incurring substantial damages.

WHEREFORE, Resilient Homes, LLC demands judgment in its favor and against the Defendants, jointly and severally, and requests that the Court grant the following relief:

- (1) Declaratory relief stating that the ZBA’s actions were arbitrary, capricious, unreasonable, and in violation of Chapter 151B;
- (2) Entry of an Order overturning the ZBA’s improper denial of its appeal and/or request for reasonable accommodation;
- (3) Preliminary and permanent injunctive relief permitting Resilient Homes, LLC’s occupancy and the Property for unrelated disabled individuals;
- (4) Compensatory damages;
- (5) Punitive damages;

- (6) Attorneys' fees and costs; and
- (7) Such other and further relief as the Court deems necessary and appropriate.

Plaintiff demands a trial by jury.

Dated: March 13, 2023.

Plaintiff, by counsel,

/s/Andrew J. Tine

Andrew J. Tine (BBO#633639)
18 Maple Avenue, Suite 267
Barrington, RI 02806
(401) 396-9002 - Tel.
atine@tinelaw.com