IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REMED RECOVERY CARE CENTERS	:	CIVIL ACTION
	:	
v.	:	
	:	
TOWNSHIP OF WORCESTER,	:	
MONTGOMERY COUNTY, PENNSYLVANIA	:	
and	:	
ZONING HEARING BOARD OF THE	:	
TOWNSHIP OF WORCESTER	:	NO. 98-1799

MEMORANDUM AND ORDER

Norma L. Shapiro, J. July 29, 1998

Remed Recovery Care Centers, ("Remed") filing this action, seeks a declaratory judgment and injunctive relief under the Fair Housing Act, 42 U.S.C. § 3601 et seq. ("FHA"), and the Worcester Township Zoning Ordinance of 1973 ("the Ordinance"). Defendant Township of Worcester ("the Township") filed a motion to dismiss the injunction portion of Count I, and the entirety of Count II; defendant Zoning Hearing Board of the Township of Worcester ("the Board") filed a motion to dismiss all claims against it. Because abstention is not warranted, the claims are ripe, and both defendants are proper parties, the court will deny the motions to dismiss.

BACKGROUND

I. Facts

Remed is a Pennsylvania corporation providing treatment and therapy to handicapped persons with brain injuries, autism, and

other disabilities through residential, independent life style programs conducted in supervised group homes and apartment settings, as well as on an outpatient basis. Remed owns and operates a home at 1251 Quarry Hall Road, in Worcester Township, Montgomery County ("Worcester Home"). Worcester Home is the residence of three unrelated, autistic, adult males under supervision of Remed's trained employees at all times.

Worcester Home is located in a Residential Agricultural District ("R-AG-175"). Under the Township Zoning Ordinance, the R-AG-175 classification permits a "...single family detached dwelling." The Township of Worcester, Zoning Code, § 150-27 (1973). The Ordinance defines "single family detached dwelling" as "[a] building designed for and occupied exclusively as a residence for only one family and having no party wall in common with an adjacent building." The Township of Worcester, Zoning Code, § 150-9. "Family" is defined:

> FAMILY-Any number of individuals living together as a single, non-profit housekeeping unit and doing their cooking on the premises, provided that not more than two of such number are unrelated to all others by blood, marriage, or legal adoption. As a special exception, the Zoning Hearing Board may interpret 'family' to include:
>
> A. A group of individuals, not exceeding four, not related by blood, marriage, or legal adoption, living and cooking together as a single housekeeping unit;...

II. Procedural History

On July 15, 1997, the Township issued Remed a cease and desist letter stating that Worcester Home was in violation of the Ordinance and directing Remed to stop the use of the Home for more than two unrelated persons. Remed then filed an application for a special exception to obtain:

> (a) an interpretation of the Ordinance to the extent that the three unrelated autistic men residing at the Worcester Home constitute a "family" under the Ordinance;
>
> (b) a special exception from the Ordinance to the extent that the residents of the Worcester Home are a group of fewer than four unrelated individuals who live and cook together as a single housekeeping unit; or
>
> (c) an exception and/or a variance from the Ordinance in accordance with the anti-discrimination provisions of the FHA, 42 U.S.C. § 3604.

The Board held four days of public hearings. On February 23, 1998, the Board, denying Remed's application, determined that the three autistic males did not qualify as a "family" under the Ordinance. Remed's appeal (pursuant to 53 Pa. C.S.A. §§ 10101, et seq.) to the Court of Common Pleas, Montgomery County, No. 98-0550, is pending.

On April 6, 1998, Remed filed this action alleging: (1) autism is a handicap and enforcement of the Ordinance without a special exception against its autistic residents constitutes unlawful discrimination under the FHA, 42 U.S.C. §§ 3604(f)(1) and 3604(f)(3); and (2) an injunction against enforcement should

issue because there is no adequate remedy at law. Count I of the complaint claims housing discrimination in violation of the FHA; Count II claims violation of the Ordinance. Remed seeks injunctive relief, punitive damages, attorney's fees, and any other relief the court deems appropriate.

Each defendant filed a timely motion to dismiss asserting:

(1) The court should abstain because of the pending parallel state proceedings; Younger v. Harris, 401 U.S. 37 (1971);

(2) The claims are not ripe;

(3) The Board is not a proper party.

Although both defendants assert abstention only under Younger, other abstention doctrines have also been considered, see, e.g. Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976), but abstention is not appropriate. The claims are ripe; the Board is a proper party because it can be enjoined from denying equal housing in violation of the FHA.

DISCUSSION

I. Abstention is Inappropriate

A. Younger Abstention

Abstention is a "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Gwynedd Property Inc. v. Lower Gwynedd Township, 970

F.2d 1195, 1199 (3d Cir. 1992) (quoting Colorado River Water Conservation District v. United States, 424 U.S. at 813). Younger abstention originates in the concept of comity and is appropriate only if: (1) there is an ongoing or pending state judicial proceeding; (2) the state proceeding implicates an important state interest; and (3) the state proceeding affords an adequate opportunity to raise federal or constitutional claims. See O'Neill v. City of Philadelphia, 32 F.3d 785, 789 (3d Cir. 1994); Gwynedd, 970 F.2d at 1200.

Even if these three criteria have been met, Younger abstention is still inappropriate if the state proceedings are "remedial," rather than "coercive." See Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619, 627 n. 2 (1986)(Younger abstention was appropriate in § 1983 action when the administrative proceedings were coercive); Patsy v. Florida Board of Regents, 457 U.S. 496 (1982)(Younger was inappropriate for remedial § 1983 proceedings); O'Neill, 32 F.3d at 791 n. 13 (district court abused its discretion in not abstaining in § 1983 action when state court proceeding was coercive); Independence Public Media of Philadelphia v. Pennsylvania Public Television Network Comm'n, 813 F. Supp. 335 (E.D. Pa. Feb. 10, 1993)(Younger abstention was inappropriate where state action was remedial and initiated by federal plaintiffs); Tinson v. Commonwealth of Pa., 1995 WL 581978, *4 (E.D. Pa. Oct. 2, 1995)(abstention was

inappropriate in § 1983 action when state court proceeding was remedial and initiated by federal plaintiffs); Assisted Living Associates of Moorestown v. Moorestown Township, 1998 WL 129956 (D.N.J. March 19, 1998)(Younger abstention was inappropriate where cause of action under the FHA was remedial and initiated in federal court by state court plaintiffs).

In remedial state proceedings, the plaintiff is attempting in both state and federal courts to vindicate a wrong inflicted by the state; in coercive state proceedings, the federal plaintiff is the state court defendant, and the state proceedings were initiated to enforce a state law. See O'Neill, 32 F.3d at 791 n. 13; Tinson, 1995 WL 581978 at *4; Assisted Living Associates of Moorestown, 1998 WL 129956 at *23.

When plaintiff in the subsequent federal action has also initiated the state court remedial proceeding, the federal proceeding parallels but does not interfere with the state court proceeding; "...the principles of comity which underlie the Younger abstention doctrine are not implicated." Marks v. Stinson, 19 F.3d 873, 882 (1994)(quoting Gwynedd Properties, 970 F.2d at 1201). But if the state proceedings are coercive, in the subsequent federal action the federal plaintiff is "...seeking to avoid an administrative proceeding into which it [was] unwillingly embroiled." Independence Public Media, 813 F. Supp. at 342. Younger abstention is then appropriate. Id. at 343.

Here, Remed, the federal plaintiff, instigated the state administrative proceedings and court appellate proceedings. The proceedings are remedial not coercive. They are parallel and adjudication of the federal claims would not interfere with the adjudication of the state claims; Younger abstention is not appropriate.

B. Abstention to avoid duplicative litigation

"Colorado River abstention allows a district court to stay or dismiss pending litigation 'out of deference to ... parallel litigation brought in state court.'" Skipper v. Hambleton Meadows Architectural Review Committee, 1998 WL 100423, *8 (D. Md. February 24, 1998) (quoting Moses H. Cone Memorial Hospital, 460 U.S. 1 (1983)). This abstention doctrine lies not on foundations of comity, as does Younger, but rather on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River, 424 U.S. at 817.

Actions are considered parallel if the same parties are litigating substantially the same claims. See Skipper, 1998 WL 100423 at *8. The action pending in the Court of Common Pleas is an appellate action; that court has jurisdiction pursuant to 53 P.S. § 11002-A. In an appeal from the Zoning hearing Board, the court cannot hear issues that were not raised below to the Board. See Ramsey v. Zoning Hearing Board of the Borough of Dormont, 466

A.2d 267, 269 n.3 (Pa. Cmwlth. 1983)(court would not rule on the constitutionality of a Borough Ordinance because it had not been raised as an issue before either the Zoning Hearing Board or the court below); See also Sojtori v. Zoning Hearing Board and Moyer, 296 A.2d 532 (Pa. Cmwlth. 1972)(court refused to hear issue when it had not been raised to the Board or to the court below and therefore did not come into their scope of review). The scope of review is limited to whether or not the Board abused its discretion, committed a legal error, or made improper findings of fact. See Id. at 268.

The Board, citing Printz v. U.S., 117 S.Ct. 2365 (1997), said the FHA did not require them to grant the requested relief. Printz broadly holds that the federal government may not unconstitutionally compel state officials to execute federal law, even though they are required to comply with it. See Id. at 2384. By citing this case, they addressed the issue, but did not decide it.

It is not clear to this court whether the Court of Common Pleas would find that Remed had raised the FHA as a defense. The Court of Common Pleas may find that what was raised was only whether the Zoning Board had to comply with the FHA, not whether the application of the ordinance to the residents was, in fact, a violation of the FHA. If the Court of Common Pleas were to find that the FHA had not been raised before the Zoning Board, it

might not consider Remed's FHA claims, and this would not be parallel litigation. Abstention is improper where the federal plaintiffs are unable to request in the state proceeding all relief available in federal court. See Sullivan v. City of Pittsburgh, 811 F.2d 171 (3d Cir. 1987)(district court did not abuse its discretion in failing to abstain where the federal plaintiff did not have opportunity to raise claims in state court).

If, on the other hand, the Court of Common Pleas were to find the FHA defense had been raised by Remed, it could consider Remed's FHA arguments, and this action would be parallel litigation. However, even if this action is parallel litigation, "...the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction." Id. at 817.

"It was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a state court could entertain it." Colorado River, 424 U.S. at 814. District courts have a "...virtually unflagging obligation ... to exercise the jurisdiction given them." Colorado River, 424 U.S. at 817. Only "exceptional circumstances" warrant abstention. See Colorado River, 424 U.S. at 818 (factors considered for abstention include: (a) the assumption by either court of jurisdiction over property; (b) the

inconvenience of the federal forum; (c) the desire to avoid piecemeal litigation; (d) the order in which the courts obtained jurisdiction; and (e) the source of applicable law).

When considering abstention, “the decision whether or not to dismiss ... does not rest on a mechanical checklist, but on a careful balancing of important factors ... with the balance heavily weighed in favor of the exercise of jurisdiction.” Moses H. Cone Memorial Hosp. v. Mercury Construction Co., 460 U.S. 1, 16 (1983). "The presence of a federal basis for jurisdiction may raise the level of justification needed for abstention." Izzo v. Borough of River Edge, 843 F.2d 765 (3d Cir. 1988). The exceptional circumstances necessary to abstain under Colorado River are not present here because: (1) the courts' jurisdiction is not over property; (2) the federal forum is no more inconvenient than the state forum in this district; (3) the state court had jurisdiction first, but only by about three weeks; (4) the source of applicable law is federal--the action is under the FHA. The only factor suggesting dismissal is the desire to avoid piecemeal litigation. This alone is not an “exceptional circumstance;” it does not convince the court to abstain from its unflagging obligation to exercise jurisdiction. See Izzo, 843 F.2d at 769 ("the mere existence of land use regulation will not automatically mandate federal court abstention;" circumstances may require the court to adjudicate the dispute).

II. The Claims are Ripe.

Defendant Zoning Board argues that plaintiff's claims are not ripe. The Board also alleges that the federal court is not the proper forum in which to bring this claim, because plaintiff should have made a validity challenge to the Ordinance before the Board of Supervisors.

The rationale behind the doctrine of ripeness is to “prevent the courts through the avoidance of premature adjudication from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Abbott Laboratories v. Gardner, 387 U.S. 136, 148, (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977); Commonwealth of Pa. Dep't. of Pub. Welfare v. U.S. Dep't. of Health and Human Serv., 101 F.3d 939, 945 (3d Cir. 1996).

The legislative purpose of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The FHA makes it unlawful to "discriminate in the sale or rental, or otherwise to make unavailable or deny, a dwelling to any buyer or renter because of a handicap of that buyer or renter." 42 U.S.C. § 3604(f)(1)(A). Under the FHA, discrimination includes "a refusal to make

reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to enjoy the dwelling." 42 U.S.C. § 3604(f)(3)(b). As a broad remedial statute, the FHA should be liberally construed. See Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). Federal courts have not hesitated to do so, especially when local land use regulations have been in contravention of the FHA. See, e.g. City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995)(Court precluded Zoning Hearing Board from interpreting zoning rules that group homes were not permitted in residential neighborhoods).

Defendant may be arguing that plaintiff must first bring its claim to state court. Exhaustion of state remedies is not required to state a federal cause of action under the FHA. The FHA permits an "aggrieved person" to commence a federal civil action whether or not a state complaint has been filed or state remedies have been exhausted. 42 U.S.C. § 3613(a)(2). See Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Bryant Woods Inn Inc. v. Howard County, Md., 124 F.3d 597, 601 (4th Cir. 1997). The FHA defines “aggrieved person” as “any person who ... believes that such a person will be injured by a discriminatory housing practice that is about to occur.” 42 U.S.C. § 3602(i); See Horizon House Developmental Serv. v. Township of Upper Southampton, 804 F. Supp. 683, 691 (E.D. Pa.

1992). Remed is an aggrieved person. The Zoning Board cease and desist letter was a threat of injury to Remed if this claim were not adjudicated.

If the court finds a discriminatory housing practice has occurred or is about to occur, the court may award actual or punitive damages, injunctive relief, or other relief. 42 U.S.C. § 3613(c)(1). No present injury is necessary; the threat of a future one is sufficient for adjudication. Id. The controversy would be ripe even if plaintiff had not applied to the Zoning Board for a variance or special exception. See Assisted Living Associates of Moorestown v. Moorestown Township, 1998 WL 129956, *15 (D.N.J. March 19, 1998).

Defendant may be arguing that the action does not present a controversy under Article III. The test for ripeness under Article III is two-fold. The court must (1) evaluate the fitness of issues for judicial decision; (2) evaluate the hardship to the parties in withholding court consideration. See Abbott, 387 U.S. at 149; Assisted Living Assoc., 1998 WL 129956 at *15.

When evaluating fitness for judicial decision, the "litigants are not required to make futile gestures to establish ripeness." Assisted Living Assoc., 1998 WL 129956 at *16. Here, plaintiff has attempted to remedy the controversy in other ways to no avail. Plaintiff has a cause of action under the FHA; there is no requirement to pursue other remedies before bringing

a federal court action.

The court must also evaluate the hardship to the parties if the controversy is not considered. There is a stipulation between the parties that no further action will be taken without 30 days written notice, but this stipulation does not prevent adverse action. Adverse action is still possible on 30 days written notice; the residents may be forced out if this matter is not adjudicated. The application for the variance and the subsequent denial have delayed the resolution of federal question; a swift adjudication of whether the Ordinance violates federal law is desirable.

Injury is not remote or uncertain; plaintiffs have a ripe cause of action under the FHA.

III. The Board is a Proper Defendant.

Defendant Zoning Hearing Board contends that it is only authorized to conduct hearings and promulgate decisions and cannot depart from the authority given to it by law; therefore, it cannot violate the FHA and is not a proper party defendant.

The Board has the exclusive jurisdiction to hear and render final decisions regarding special exceptions and variances. The Township of Worcester, Zoning Code, § 150-217; See also 53 P.S. § 10909.1 (West 1997). Remed is not challenging the validity of the Ordinance; it is challenging the Ordinance as applied to the three residents of Worcester Home. It seeks an Ordinance

interpretation or special exception allowing its three residents to live in Worcester Home; the Board can make interpretations and allow special exceptions. It is a proper party in an action to enforce the FHA; injunctive relief may be required to ensure the Board's compliance with the federal statute.

In Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3d Cir. 1996), the Zoning Board was enjoined from applying the Ordinance to a group home after it had denied a variance. The injunction had a narrow impact on the Ordinance because it did not invalidate the entire zoning scheme but only prevented enforcement at a specific location. Id. at 1106 n.5. The same would be true here. See also Izzo v. Borough of River Edge, 843 F.2d 765 (3d Cir. 1988)(Board is a proper party).

In Assisted Living Associates of Moorestown v. Moorestown Township, 1998 WL 129956 at *6, the court affirmed an injunction against the Zoning Board as a result of zoning restrictions against a group home. The court reasoned that "proper parties to be enjoined are those parties who were, have been, or will be involved in the evaluation, passage, enforcement, and promulgation of the requirements...." Id. at *6. See also Judy B. v. Borough of Tioga, 889 F. Supp. 792 (M.D. Pa. 1995)(zoning board having power only to grant variances and exceptions was defendant in an action seeking injunctive relief and declaratory judgment where plaintiff prevailed); Support Ministries for

Persons with AIDS, Inc. v. Village of Waterford, 808 F. Supp. 120 (N.D.N.Y. 1992)(zoning board was defendant in action establishing liability for denial of variance and permanently enjoined from interfering with residence of plaintiffs).

The court will retain the Board as a party defendant.

CONCLUSION

Defendants' claims are without merit. Abstention is not warranted, the claims are ripe, and the Board can be enjoined as a party defendant. Plaintiff is entitled to have this cause of action under the FHA heard. The defendants' motions to dismiss will be denied. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REMED RECOVERY CARE CENTERS	:	CIVIL ACTION
	:	
v.	:	
	:	
TOWNSHIP OF WORCESTER, MONTGOMERY COUNTY, PENNSYLVANIA and ZONING HEARING BOARD OF THE TOWNSHIP OF WORCESTER	:	No. 98-1799

ORDER

AND NOW, this 29th day of July, 1998, upon consideration of the motions to dismiss of defendants Township of Worcester and Zoning Hearing Board of the Township of Worcester, and plaintiff's consolidated response in opposition thereto, it is **ORDERED** that:

1) Defendants' motions to dismiss are **DENIED.**

2) Defendants shall file answers within 10 days of the date of this Order.

Norma L. Shapiro, J.