SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5141-13T2

DEPARTMENT OF COMMUNITY AFFAIRS, BUREAU OF ROOMING AND BOARDING HOUSE STANDARDS,

Petitioner-Respondent,

v.

HANSEN HOUSE, LLC, THE HANSEN HOUSE, and THE HANSEN FOUNDATION, INC.,

Respondents-Appellants.

Argued September 20, 2016 – Decided August 30, 2017

Before Judges Messano, Espinosa and Guadagno.

On appeal from the New Jersey Department of Community Affairs, Agency Docket No. RBHS-018-09/0601-0058.

Steven G. Polin (Law Office of Steven G. Polin) of the Washington, D.C. bar, admitted pro hac vice, argued the cause for appellants (Mr. Polin and Nehmad, Perillo & Davis, attorneys; Mr. Polin and Michael R. Peacock, on the brief).

Leonard Leicht argued the cause for respondent (Morgan, Melhuish, Abrutyn, attorneys; John D. North, of counsel and on the brief; Emily A. Kaller and Irene Hsieh, on the brief).

PER CURIAM

The Randy Scarborough Serenity House (RSS House) provides housing and support services to those recovering from drug and alcohol addiction. RSS House is owned and operated by Hansen House, LLC (HHLLC), a limited liability corporation that is a subsidiary of the Hansen Foundation (the Foundation), a non-profit organization created to help recovering addicts. Ole Hansen and Sons, Inc., another affiliated entity, is the mortgagee of the property.[1]

RSS House is a three-story building with eight bedrooms, housing eight to twelve residents, along with a shared kitchen, living room and laundry room. The residents pay a security deposit and monthly rent to HHLLC, and enter into individual leases for the occupancy of their room and use of the common areas. The Foundation pays the utilities, real estate taxes and other operating expenses for the property. There are a limited number of staff members at RSS House who provide supportive services, such as driving residents to meetings, assisting in administering their medication, supervising visitors and facilitating interaction with other service providers.

[1] Except when distinctions are necessary, we refer to these related entities collectively as "Hansen House" throughout this opinion.

Responding to a complaint lodged by the Department of Human Services, the Department of Community Affairs (DCA) conducted a field inspection of RSS House. DCA concluded RSS House was a rooming/boarding house subject to licensure under the provisions of the Rooming and Boarding House Act of 1979, N.J.S.A. 55:13B-1 to -21 (the Statute). DCA issued a notice of violation and imposed a $5000 penalty. Hansen House objected and requested a hearing, which was conducted before an administrative law judge (ALJ) in the Office of Administrative Law over four non-consecutive days spanning eight months.

Hansen House asserted that RSS House operated as a single housekeeping unit and the relationship among its residents was akin to a family. Hansen House also argued DCA's enforcement action violated the federal Fair Housing Act (the FHA), 42 U.S.C.A. §§ 3601-3619, because DCA refused Hansen House a reasonable accommodation, but nonetheless accommodated another entity, Oxford House, which provided similar services in a similar setting to recovering addicts.

Before the ALJ issued his initial decision, a member and former member of RSS House filed suit against DCA in federal district court alleging various statutory and constitutional

violations that are essentially the same statutory arguments presented to DCA.[2] That action is still pending.

In his initial decision, the ALJ found it was undisputed that residents at RSS House received certain assistance from paid staff members. He also concluded RSS House residents were permitted under their leases to use, and were using, "keyed door locks" on their individual rooms.

The ALJ accepted the testimony of Angelo Mureo, DCA's Enforcement Field Supervisor, who inspected RSS House. Mureo described various features that distinguished RSS House from Oxford House. For example, the charter for the Oxford House entity prohibited it from owning any residential property and, therefore, it signed a lease with the property owner; the individual residents in Oxford House did not sign leases. Additionally, the residents themselves interviewed applicants and selected their fellow residents in an Oxford House. Furthermore, there was no paid staff in an Oxford House, and residents managed their own collective finances from a single checking account.

The ALJ also cited the testimony of Michael Briant, DCA's Supervisor of Enforcement, Bureau of Rooming and Boarding House Standards (BR&BHS). Briant explained that RSS House was not a

[2] Schoenstein v. Constable, No. 3:13-CV-06803 (JAP), 2014 U.S. Dist. LEXIS 165508 (D.N.J. Nov. 26, 2014) (the federal suit).

single-family dwelling, i.e. it was not occupied as a "single housekeeping unit," and therefore it required a license. He acknowledged that in order to secure the license, Hansen House needed to install a sprinkler system.

Briant stated that RSS House might be eligible for exemption from code requirements applicable to rooming and boarding houses if the residents were self-governing and autonomously operated RSS House. Briant claimed that creating a new exemption for RSS House would run contrary to the legislative purposes of the Statute, because DCA would then need to exempt other facilities where the owner of the property controlled the operation of the "recovery house."

The ALJ concluded RSS House operated as an unlicensed boarding house in violation of the Statute. He explained that DCA had "allowed one type of sober recovery facility to avoid regulation" under the Statute, and that was "the Oxford House model." The ALJ referenced various DCA memoranda, in particular, a 2004 memorandum by Raymond A. Samatovicz, DCA's former Director of the Bureau of Rooming & Boarding House Standards (the Samatovicz Memo), setting forth key features of the Oxford House program, and approving exemptions because, as the ALJ summarized, "Oxford House residents are really operating like a family while [Hansen House] is exercising the control of a boarding house operator."

Although the ALJ found it "difficult to see how fire safety [was] an issue" at RSS House, he rejected Hansen House's argument that the FHA required DCA to "carve out a new waiver," noting "where a regulation is not using some other requirement as a proxy for disability, the fact that it happens to cost a particular entity more than another entity does not rise to discrimination." The ALJ affirmed DCA's decision and imposed a $5000 penalty on Hansen House.

The DCA Commissioner adopted the ALJ's initial decision and filed the agency's final decision in May 2014. Hansen House appealed. In October 2014, we granted Hansen House's request to stay all proceedings based on the pending federal lawsuit. When that stay expired, and after the district court judge denied DCA's motion to dismiss the federal suit, Hansen House again sought a stay of the enforcement of DCA's penalty, which we denied by order in February 2015. We heard argument in September 2016, at which time the parties acknowledged the pending federal suit presented the same issues regarding DCA's alleged failure to reasonably accommodate RSS under the FHA. On January 30, 2017, we sua sponte ordered the parties to appear before Judge Joseph A. Lisa (Ret.), as part of the Civil Appeals Settlement Program. At the time, we noted the federal lawsuit was continuing and presented "issues that are inextricably related to the issues raised on appeal."

The parties apparently could not reach consensus regarding any further stay of this appeal. We therefore turn to the arguments raised by Hansen House.

Hansen House argues the FHA applies to RSS House, which serves individuals with a "handicap," 42 U.S.C.A. 3602(h); Hansen House made a reasonable request for an accommodation from DCA that was necessary to the residents' continued recovery; DCA had both the duty and authority to grant the accommodation requested; yet, it failed to do so in violation of the FHA. Additionally, Hansen House contends DCA violated the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15, by adopting the standards set out in the Samatovicz memorandum, and not granting exemptions unless an organization fit the "Oxford model."

We have considered these arguments, in light of the record and applicable legal standards. We affirm, but also remand the matter to DCA for further proceedings consistent with this opinion.

I.

"The scope of appellate review of a final agency decision is limited." In re Carter, 191 N.J. 474, 482 (2007) (citing Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, 186 N.J. 5, 15-16 (2006)). "An appellate court affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219

N.J. 163, 171 (2014) (quoting City of Newark v. Natural Res. Council, Dep't of Envtl. Prot., 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980)).

An agency decision should not be overturned unless there is "a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." In re Carter, supra, 191 N.J. at 482.

> To determine whether an agency decision "is arbitrary, capricious or unreasonable," an appellate court must determine
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> > (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Lavezzi, supra, 219 N.J. at 171-72 (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

We "defer to an agency's expertise and superior knowledge of a particular field." Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992). Furthermore, we "presume that the regulations they pass are valid because 'agencies have the specialized expertise necessary to enact regulations dealing with

technical matters and are "particularly well equipped to read and understand the massive documents and to evaluate the factual and technical issues that . . . rulemaking would invite."'" In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 564 (App. Div.) (quoting N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999)), certif. denied, 208 N.J. 597 (2011). However, we are not "bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue." Norfolk S. Ry. Co. v. Intermodal Props., LLC, 215 N.J. 142, 165 (2013)).

The Statute is "remedial legislation . . . necessary to provide for the health, safety and welfare of all those who reside in rooming and boarding houses in this State." N.J.S.A. 55:13B-2. The Statute defines a "rooming house" as "a boarding house wherein no personal or financial services are provided to the residents." N.J.S.A. 55:13B-3(h). A "boarding house," in turn, is defined as "any building . . . which contains two or more units of dwelling space arranged or intended for single room occupancy . . . and wherein personal or financial services are provided to the residents." N.J.S.A. 55:13B-3(a).

Regulations promulgated under the Statute ensure "the protection and care of the residents of rooming houses, [and] boarding houses." N.J.S.A. 55:13B-2; see also N.J.A.C. 5:27-1.1

to -14.1 ("Regulations Governing Rooming and Boarding Houses"). Those regulations require every rooming and boarding house to be licensed, N.J.A.C. 5:27-1.6(a), and impose general requirements for every building in which a rooming or boarding house operates. N.J.A.C. 5:27-4.1 to -4.10.

DCA argues, and we agree, that RSS House fits the statutory definition of a "boarding house." Hansen House may have asserted otherwise before the ALJ, but it makes no argument on appeal to the contrary. An issue not briefed is deemed waived on appeal. N.J. Dept. of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505-06 n.2 (App. Div.), certif. denied, 222 N.J. 17 (2015). As a result, we conclude that RSS House was a boarding house that operated without a license, and the Commissioner had the authority to impose sanctions.

Instead, Hansen House contends the ALJ, and DCA in turn, misapplied precedent developed under the FHA, which requires a reasonable accommodation from the strictures of the Statute and regulations based upon an individualized assessment. We disagree.

The FHA is broadly construed to effect the goal of eradicating discrimination in housing based upon handicap status. Helen L. v. DiDario, 46 F.3d 325, 333 n.14 (3d Cir.), cert. denied, 516 U.S. 813, 133 L. Ed. 2d 26, 116 S. Ct. 64 (1995). Under the FHA, "a refusal to make reasonable accommodations in rules, policies,

practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling," constitutes illicit "discrimination." 42 [U.S.C.A.] §3604(f)(3)(B). The Third Circuit has said that "the plain language of the statute requires [a court] to focus on all three factors, i.e., whether the requested accommodation is '(1) reasonable and (2) necessary to (3) afford handicapped persons an equal opportunity to use and enjoy housing.'" Lapid-Laurel v. Zoning Bd. of Adjustment, 284 F.3d 442, 457 (3d Cir. 2002) (quoting Bryant Woods Inn, Inc. v. Howard Cty., 124 F.3d 597, 603 (4th Cir. 1997)). See id. at 459 ("[T]he initial burden is on the plaintiff to demonstrate that the accommodations that it requested are 'necessary to afford [handicapped] persons an equal opportunity to use and enjoy a dwelling,' 42 U.S.C.A. § 3604(f)(3)(B), at which point the burden shifts to the defendant to show that the requested accommodations are unreasonable.").

It is not disputed that the residents of RSS House suffer from a handicap as defined by the FHA. 42 U.S.C.A. §3602(h); see also 24 C.F.R. 100.201(a)(2); see also Oxford House, Inc. v. Twp. of Cherry Hill, 799 F. Supp. 450, 459 (D.N.J. 1992) (holding recovering alcoholics and substance abusers are handicapped for purposes of the FHA); Cherry Hill Twp. v. Oxford House, Inc., 263

N.J. Super. 25, 52 (App. Div. 1993) ("[A]lcholism is a handicap covered by the New Jersey Law Against Discrimination . . . .").

Hansen House argues its request for an exemption from the Statute and its regulations is reasonable. For a requested accommodation to be "reasonable" under the FHA, it must be shown that the accommodation does not (1) impose undue financial or administrative burdens on the regulatory agency; (2) impose an "undue hardship" on DCA; or (3) require a fundamental alteration in the nature of the regulatory program. Lapid-Laurel, supra, 284 F.3d at 462.

Here, the ALJ specifically noted there were no particular fire safety concerns at RSS House, implying a core public purpose of the Statute — "protecting the health, safety and welfare of the residents of rooming houses [and] boarding houses" — was not compromised by the request for an exemption. Further, although the DCA raised the specter of having to grant numerous exemptions to programs similar to RSS House if it granted an exemption in this case, the ALJ did not make any specific finding in that regard. Moreover, DCA granted an exemption to Oxford House and, the record reflects, other recovery programs.[3] As a result, at least on the record before us, it is difficult to conclude the

[3] A DCA memo in the record reflects that the exemption applied to Oxford House also applied to two other facilities, "Last Chance Recovery and Half Measures."

accommodation, i.e., exemption, would significantly alter the regulatory scheme any more than it already has been altered.

However, Hansen House failed to demonstrate that exemption from the Statute and its regulations was "necessary to afford [the residents of RSS House an] equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). As the Third Circuit said in Lapid-Laurel, supra, 284 F.3d at 459, "The key . . . is that the plaintiff in an [FHA] reasonable accommodations case must establish a nexus between the accommodations that he or she is requesting, and their necessity for providing handicapped individuals with an 'equal opportunity' to use and enjoy housing." (Emphasis added). "The 'necessary' element . . . requires . . . a direct linkage between the proposed accommodation and the 'equal opportunity' to be provided to the handicapped person." Bryant Woods, supra, 124 F.3d at 604.

The facts in Lapid-Laurel, supra, are demonstrative of this "necessary" nexus. There, the plaintiff argued a use variance was necessary to achieve equal opportunity for elderly handicapped individuals to live in a residential area of Scotch Plains, which zoning ordinance did not permit healthcare facilities. 284 F.3d at 460. Plaintiff produced evidence that the elderly handicapped who need skilled nursing care usually are unable to live in their own homes and must live in an institutional setting in order to

receive the assistance and health care they need. Ibid. Plaintiff proffered expert testimony indicating that one of the objectives of the proposed facility was to allow the elderly to live in a predominately single-family residential zone to normalize their care. Ibid.

Here, Hansen House contends that residents of RSS House will be denied the equal opportunity to live there unless DCA grants an exemption. However, the Statute and applicable regulations requiring licensure do not prohibit Hansen House from operating RSS House. There was, for example, no proof at the hearing regarding the financial impact upon the facility if it had to secure the license. While licensure may require renovations, Hansen House has not demonstrated that the financial burden of compliance would undermine RSS House's therapeutic operations or cause the facility to close.

We also note that the Statute's regulations specifically permit requests for "exception[s] waiving, modifying or postponing the application of any regulation to any owner's rooming or boarding house." N.J.A.C. 5:27-1.9(a). However, Hansen House did not request an exception as required by the regulations. N.J.A.C. 5:27-1.9(c). Nor did it seek an exception from a specific requirement imposed by regulation upon all rooming and boarding houses. For example, Hansen House never sought an exception from

Subchapter 4's regulations regarding general building requirements. N.J.A.C. 5:27-4.1 to - 4.10. Instead, Hansen House defended against the proposed penalty by claiming it was not subject to the statutory and regulatory regime at all, or that its exemption from that regime was a required reasonable accommodation under the FHA.

As a result, we conclude that RSS House was subject to the Statute and its implementing regulations. We therefore affirm DCA's final agency decision.

II.

Hansen House argues DCA used the factors set forth in the Samatovicz Memorandum (the Memo) as a rule of general application to all group recovery homes, while, at the same time, never going through required agency rulemaking. See Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 331-32 (1984). DCA argues the Memo is exempt from rulemaking because it is an "intra-agency statement." The governing provision of the APA is N.J.S.A. 52:14B-2(e), which provides:

> "Administrative rule" or "rule," when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any

> agency; (2) intraagency and interagency statements; and (3) agency decisions and findings in contested cases.
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> [Emphasis added.]

The APA does not define what an "intraagency statement" is, however, the Court defined an "intra-agency statement as (1) a communication between agency members that (2) does not have a substantial impact on (3) the rights or legitimate interests of the regulated public." Woodland Private Study Grp. v. State, 109 N.J. 62, 75 (1987). We have held that

> an agency order will be deemed an exempt intra-agency statement to the extent (1) it is intended to govern the conduct of agency employees, as opposed to members of the regulated public; (2) any impact on the regulated public is incidental or unsubstantial; and (3) that impact is on interests or rights that do not rise to a level needing the protection afforded by the APA rule-making procedures.
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> [N.J. Builders Ass'n v. N.J. Dep't of Envtl. Prot., 306 N.J. Super. 93, 102 (App. Div. 1997).]

The Memo, directed to BR&BHS staff, listed seventeen informational items obtained from Oxford House's "Mission Statement." However, attached to the Memo was a "Notice of Bureau Decision," regarding an Oxford House property in Plainfield. In that decision, DCA cites four particular reasons why it deemed Oxford House was not a boarding or rooming house subject to the Statute. Those factors, discussed in the testimony we cited above,

involve the governance and financial aspects of the facility, and its legal relationship with the property owner. The Memo instructs BR&BHS staff that the decision applies to not only Oxford House, but also two other recovery facilities.

The record also includes two bulletins issued by DCA's Division of Fire Safety and Division of Codes and Standards. Both discuss application of the FHA to Oxford House properties and "Oxford House-like" properties. Each provides guidance for DCA and municipalities to follow on a case-specific basis.

Here, we accept DCA's assertion that the Memo, and its attached final agency decision, were initially "intended to govern the conduct of agency employees, as opposed to members of the regulated public." Ibid. However, it is quite clear from the record before us that DCA has endorsed the factors listed in the Oxford House decision attached to the Memo, as those it generally applies to every recovery house.

Indeed, the record is replete with references to Oxford House or Oxford House-like facilities, and that DCA's agents and officials measured Hansen House's legal position against the factors listed in the Memo and decision. The testimony was essentially undisputed that DCA told Hansen House's representatives it would exempt the property if it adopted the Oxford House model. In other words, this is not like the record

in Builder's Association, supra, 306 N.J. Super. at 103, where we found the record failed to demonstrate the challenged intra-agency order was used "as a dispositive basis for specific applications." The Memo and its attached decision now seemingly govern "the conduct of . . . members of the regulated public." Id. at 102; see also Woodland Private Study Grp., supra, 109 N.J. at 73-76 (acknowledging that interagency memo originally directed to agency members had significant impact on regulated parties and required public notice and hearing).

Based on the record before us, we have no way of discerning whether this impact on recovery houses is "incidental or unsubstantial," or if it impacts "interests or rights that do not rise to a level needing the protection afforded by the APA rule-making procedures." Builder's Ass'n, supra, 306 N.J. Super. at 102. We can state with certainty that Hansen House was not afforded a case-specific evaluation of whether it should be exempt from the Statute. In part, that was due to the procedural aspects we noted above.

We therefore remand the matter to DCA for further proceedings, the focus of which should be Hansen House's specific request for "an exception waiving, modifying or postponing the application of any regulation," including the regulation defining a boarding house, pursuant to N.J.A.C. 5:27-1.9(a). In this regard, the

parties are free to supplement the record as appropriate. We do not foreclose consideration of additional evidence regarding the impact of the Memo on DCA's consideration of other requests for exemption.

Affirmed. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.