UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, and WALLACE RODRIGUE,	*	CIVIL ACTION
	*	NO. 2:06-CV-07185
Plaintiffs,	*	SECTION C
and PROVIDENT REALTY ADVISORS, INC.,	*	JUDGE BERRIGAN
Plaintiff-Intervenor,	*	MAGISTRATE JUDGE SHUSHAN
vs.	*	
ST. BERNARD PARISH and ST. BERNARD PARISH COUNCIL,	*	
Defendants.	*	

****

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR CONTEMPT, INJUNCTIVE RELIEF, AND SANCTIONS

INTRODUCTION

A mere eight days after the Court found for a second time that St. Bernard Parish and the St. Bernard Parish Council (collectively "Defendants") had violated the Fair Housing Act and other civil rights laws and found them in contempt of the 2008 Consent Order, the Defendants once again have acted in blatant defiance of this Court. On August 25, 2009, the St. Bernard Parish Planning Commission ("Commission") voted to uphold the denial of Provident's re-subdivision applications, stating that it was treating Provident's applications as major re-subdivision applications. At the public hearing immediately prior to the vote, counsel for Provident reminded the Commission that the Court had expressly held in its August 17 ruling

that Provident's applications should have been treated as minor re-subdivision applications. (Docket #300 at 29). Earl Dauterive, Chairman of the Commission, responded with an unequivocal statement making clear the Commission's intent to defy this Court's ruling: "The Judge doesn't say what's a major or a minor subdivision in St. Bernard Parish. Unfortunately, the Parish Planning Commission does and that's who you have to answer to." The Commission then backed up its statement with action: it voted to deny Provident's applications on the grounds that they were major re-subdivisions.

This matter has now progressed to the point where the Court must exercise its inherent equitable powers in a clear and decisive fashion to ensure that its prior orders are properly enforced and the rights of Provident and GNOFHAC are protected. Time is running out on Provident's opportunity to use its tax credits to build the proposed developments. Without severe sanctions and direct Court intervention, Provident and GNOFHAC's rights and interests will be irreparably damaged.

There can no longer be any question about the Parish's intent to defy both federal law and this Court. Mr. Dauterive testified before the Court on August 3 and his statements and conduct factored in the Court's finding of racial discrimination. Both he and his fellow Commission members were on full notice of the Court's August 17 ruling when they voted to treat Provident as a major re-subdivision. A Parish Council member who also testified in prior contempt hearings, Mr. Landry, as well as the Parish attorneys, Mr. Gorbaty and Mr. Mulhall, were present at the August 25 meeting. The time has come for the Court to take all necessary steps to ensure that the re-subdivision applications are approved, building permits are issued and construction is commenced before Provident's tax credits are lost. Specifically, the Court should hold the Parish in contempt for the most recent actions of its Planning Commission; impose a severe monetary

sanction on the Parish for its conduct; and directly order the Parish to deem the re-subdivision applications approved and then issue building permits by October 1, and impose coercive daily fines to follow if the deadline is not met.[1]

As was the case twice before, the elements required to find Defendants in contempt are straightforward and easily met. First, two court orders were in effect; the orders required certain conduct by Defendants; and the Defendants failed to comply with those orders. *American Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir. 2000).

Second, the Court has inherent authority and broad discretion to enforce compliance with its orders. The Defendants have demonstrated their intent to continue to defy the Court's Orders by opposing Provident's developments at any cost.

In addition to the sanctions and intervention described, the Court should order the payment of full fees, costs, and damages in bringing this third Motion for Contempt. GNOFHAC and Provident's actions were necessary to enforce the February 2008 Consent Order and the Court's August 17, 2009 Order. This would ensure Plaintiffs the full benefit of the 2008 Consent Order and the Court's August 17, 2009 Order, and prevent them from being left in a worse position for having brought the matter to the Court's attention and prevailed.

For these reasons, and those explained in greater detail below, the Parish and the Council should be held in contempt, sanctioned, enjoined from further interference with Provident's re-subdivision applications, and directed to comply with an Order ensuring that building permits will be issued by October 1.

[1] Plaintiffs respectfully suggest that a significant sanction in the range of $25,000 is appropriate in this case and further that sanctions in the amount of $5,000 per development per day for failure to meet imposed deadlines is appropriate.

BACKGROUND

August 17 Ruling

On August 17, 2009, the Court held that St. Bernard Parish and the St. Bernard Parish Council ("Defendants") violated the 2008 Consent Order, the Fair Housing Act, and 42 U.S.C. §§ 1981, 1982, and 1983 through their subversion of the re-subdivision process with both a discriminatory intent and effect. (Docket # 300 at 25, 29.) The Court further held that the Defendants were in contempt of the Court's 2008 Consent Order and specifically found that

> Provident's re-subdivision applications were initially assessed and recommended by staff for approval as a minor re-subdivision. The objections raised, by both the Planning Commission and the Parish Council, are irrelevant to the re-subdivision process and pretextual. As such, the Court concludes that had the proper procedures been followed, Provident's applications should have been treated as minor re-subdivision applications.

(*Id.* at 29.)

The Court granted Provident Realty Advisors, Inc. ("Provident") and the Greater New Orleans Fair Housing Action Center's ("GNOFHAC") Motion for Contempt, ordered that the issue of damages be referred to Magistrate Judge Shushan, and further ordered that the Planning Commission place Provident's four re-subdivision applications on the next meeting agenda. (*Id.*)[2]

August 25 Planning Commission Meeting

The Planning Commission placed Provident's re-subdivision applications on its agenda for a meeting to be held on Tuesday, August 25.[3] Provident's applications were not listed under a public hearing section for re-subdivision applications, but were instead listed at the end of the

[2] One day after the decision, an attorney for Provident, Robert Voelker, sent the Court's August 17 decision to Jerry Graves, the Secretary of the Planning Commission, and requested that he provide all of the Commissioners with a copy of the decision. (Ex. 4.)

[3] After the hearing on August 3, but prior to the Court's decision, the Planning Commission placed Provident's applications on the agenda for an already scheduled special meeting of the Commission on August 17. The Commission denied Provident's re-subdivision applications at that meeting. (Decl. of M. Harris at ¶ 3.)

agenda under "Other Planning Matters" as "Discussion – Provident Realty's Four Re-subdivision Petitions." (*Compare* Ex. 1 *with* Defs.' Ex. 5.)

At the hearing, the Chairman of the Planning Commission, Earl Dauterive, began the discussion about Provident's applications by noting that "the federal judge ordered us to put Provident back on the agenda in the next Planning Commission Meeting. So here we are. Provident is back on agenda at the next Planning Commission Meeting and if it please the Board, I'd like to get Provident or any of its representatives that might be here to speak." (Harris Decl. at ¶ 7; Ex. 3 at 2:9-19.) Chairman Dauterive noted that the Planning Commission had met on August 17 and denied Provident's re-subdivision applications. (Ex. 3 at 2:5-8.)

A representative for Provident, Robert Voelker, addressed the Commission and explained that the Court's August 17 Order had held that Provident's applications should have been treated as minor re-subdivision applications. Chairman Dauterive responded with the following statement: "I will take exception with you that the judge – the judge doesn't say what's a major or minor subdivision in St. Bernard Parish. Unfortunately, the Planning Commission does and that's who you have to answer to." (Exs. 2 & 3 at 9:1-7.) Chairman Dauterive later went on to state that the Commission was treating Provident's applications as major re-subdivision applications. (Ex. 3 at 20:12-13; M. Harris Decl. at ¶ 10.)

One of the Commissioners suggested that the Commission take the issue under advisement, but that suggestion was roundly criticized and quickly rejected by Chairman Dauterive and other Commissioners. (Ex. 3 at 19:9-23; 22-25.) Another Commissioner then suggested that they move to deny the applications. (*Id.* at 21:22-24.) Chairman Dauterive explained that a motion to deny was not necessary, since the Commission could simply vote to uphold the denial of the applications that occurred at the August 17 meeting. (*Id.* at 22:1-7).

Michael Gorbaty, the Parish counsel, then addressed the Commission. (*Id.* at 25; M. Harris Decl. at ¶ 12.) Mr. Gorbaty suggested to the Commissioners that they take the time to review the Court's August 17 Opinion and ensure that what action they take is consistent with the Court's opinion. (Ex.3 at 25-27; M. Harris Decl. at ¶ 12.) The Commission rejected that advice and voted to uphold the denials of all four of Provident's re-subdivision applications. (Ex. 3 at 32-34.)[4]

Thus, one week after this Court's ruling that Provident's applications should have been treated as minor re-subdivision applications, the Planning Commission has simply refused to obey this Court's Order, again acting in open contempt and defiance of this Court.

ARGUMENT

I. Defendants Are in Contempt of the February 2008 Consent Order, the Court's August 17 Order, and Continue to Violate the Fair Housing Act and 42 U.S.C. §§ 1981, 1982, 1983

Under Fifth Circuit case law, a party is in contempt of a court order when it is established by clear and convincing evidence "1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order." *American Airlines*, 228 F.3d at 581 (5th Cir. 2000) (quoting *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir.1992)) (internal quotation marks omitted). Each of these elements is satisfied here.

A. The February 2008 Consent Order and the August 17, 2009 Order Were in Effect When the Planning Commission Voted to Uphold the Denial of Provident's Re-subdivision Applications

The first element required for contempt is not in dispute. In February 2008, Defendants entered into a Consent Order enjoining them from violating the Fair Housing Act, and 42 U.S.C.

[4] The Commission attempted to go in to Executive Session immediately prior to voting, but then quickly reassembled because the Executive Session had not been placed on the Agenda and therefore was in violation of the Commission's rules. (Ex. 3 at 27-28.)

§§ 1981, 1982, and 1983 for three years. (Docket #114.) The Court signed the Order on February 27, 2008. "A consent order, while founded on the agreement of the parties, is nevertheless a judicial act, enforceable by sanctions including a citation for contempt." *Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987). On August 17, 2009, the Court issued an Order finding that the objections to the re-subdivision applications raised by the Planning Commission and the Parish Council "are irrelevant to the re-subdivision process and pretextual," and ruling that Provident's re-subdivision applications should have been treated as minor re-subdivision applications. (Docket #300 at 29.) Eight days after that Order, the Planning Commission defied the Court's ruling by treating Provident's applications as major re-subdivisions, clearly stated its intent to ignore the Court's order, and voted to uphold the denial of Provident's applications. Thus, there can be no question that the February 2008 Consent Order and the August 17, 2009 Order constitute court orders that were in effect when the Planning Commission voted to uphold the denial of Provident's applications.

B. The February 2008 Consent Order Enjoined Defendants From Discriminating on the Basis of Race and the Court's August 17, 2009 Order Held that Defendants' Concerns Were Pretextual and that Provident's Application Should be Treated as a Minor Re-subdivision

The second element – that the Order required certain conduct by the Parish and the Council – is also clearly met. The Consent Order enjoined Defendants from:

> violating the terms of the federal Fair Housing Act, and 42 U.S.C. §§1981, 1982, and 1983. Specifically, St. Bernard Parish agrees that it shall not:
>
> A. Refuse to rent a dwelling unit, or otherwise make unavailable or deny a dwelling unit, to any person because of race or national origin;
> B. Deny minority citizens the same rights as are enjoyed by white citizens to make and enforce contracts;
> C. Deny minority citizens the same rights as are enjoyed by white citizens to lease, hold and otherwise enjoy real property;
> D. Deny any person equal protection of the law by discriminating on the basis of race and national origin in the leasing of real property; and,

E. Retaliate against Plaintiffs or any other person who alleges that Defendants have violated the Fair Housing Act, 42 U.S.C. §3601 et seq.

(Docket #114.) The Consent Order makes clear that St. Bernard Parish and the Parish Council are prohibited from engaging in racially discriminatory conduct. The Court's August 17, 2009 Order clearly held that by subverting the re-subdivision process, the Defendants had engaged in intentional racial discrimination and that their conduct had a racially discriminatory effect. (Docket #300 at 25, 28.) The Court also held that the concerns expressed by the Defendants were pretextual and that Provident's applications should have been treated as minor re-subdivision applications. The Court's Order clearly prohibited the continued refusal to approve Provident's re-subdivision applications on the basis of pretextual reasons and the classification of its applications as major re-subdivisions. (Docket #300 at 29.)

C. Defendants Failed to Comply With the Consent Order and the August 17, 2009 Order by Voting to Uphold the Denial of Provident's Re-Subdivision Applications

In its Order of August 17, 2009, this Court determined that St. Bernard Parish and the St. Bernard Parish Council violated the terms of the February 2008 Consent Order by subverting the re-subdivision process with the intent to discriminate on the basis of race, and with a discriminatory effect on African Americans. (Docket #300 at 6, 25, 28.) The Court held Defendants in contempt and informed them that the Court found their objections pretextual and that Provident's applications "should have been treated as minor re-subdivision applications." (Docket #300 at 29.)

Defendants then violated the August 17, 2009 Order and the 2008 Consent Order by continuing to treat Provident's application as a major re-subdivision and upholding the denial of its applications on that basis. (Ex. 3 at 20:12-13; 32-34; M. Harris Decl. at ¶ 10, 14.) Chairman Earl Dauterive has made clear that he and the Commission have no intent of complying with the

Court's August 17 ruling. (Exs. 2 & 3 at 9:1-7.) ("I will take exception with you that the judge – the judge doesn't say what's a major or minor subdivision in St. Bernard Parish. Unfortunately, the Planning Commission does and that's who you have to answer to.")

II. The Planning Commission Should Be Ordered to Approve Provident's Re-Subdivision Applications and Sanctioned

The Court has the power to resolve this matter without further delay. Under clear Fifth Circuit precedent, the Court has the power to enjoin the Parish from withholding approval of the re-subdivision applications and to order the Parish to issue building permits so that Provident can begin construction. *See Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), *aff'g Groome Resources, Ltd., L.L.C. v. Parish of Jefferson*, 52 F. Supp. 2d 721 (E.D. La. 1999). In *Groome*, the Plaintiff, a housing provider, Groome Resources, sought to open a group home for Alzheimer's patients in Jefferson Parish, but needed a zoning variance to operate the property as a group home. *Groome*, 52 F. Supp. at 722. The purchase of the property for the group home was contingent on obtaining the zoning variance. *Id.* Groome applied for a variance as required by Jefferson Parish's zoning ordinance, and the Parish's Department of Inspection and Code Enforcement and the Parish's Attorney's Office reviewed the applications. *Id.* at 723. Both entities recommended approval of the application, but despite those recommendations, Jefferson Parish refused to act on the application after public opposition to the application was voiced. *Id.* at 723-724, n. 2; 234 F.3d at 196-197. While the Parish refused to take action, Groome had to delay closing on the property several times, and was unlikely to receive further extensions. 52 F. Supp. 2d at 722. Jefferson Parish's continued delay thus threatened to completely block Groome's ability to open the proposed group home.

The Court found the Parish to have violated the Fair Housing Act by failing to grant the application for a variance and ordered that the Parish allow Groome to open the group home.

The Court entered the following order: "IT IS ORDERED that the Parish of Jefferson is hereby permanently ENJOINED from interfering with or withholding approval of a reasonable accommodation for Groome Resources, Ltd., L.L.C., to operate a group home for Alzheimer's patients … Specifically, Groome is to be permitted to open and operate the home with five Alzheimer's patients as residents." *Id.* at 725.

On appeal, the Fifth Circuit did not address the scope of the injunction, but held that "the district court was correct in resolving the legal question of whether the Parish had failed to approve Groome Resources' reasonable accommodations application for its group home, and that the hardship to Groome Resources constituted an immediate injury requiring judicial relief." *Groome*, 234 F.3d at 199. Plaintiffs here request that this Court issue essentially the same Order issued by the Court in *Groome*. The Court has the inherent power to enjoin St. Bernard Parish from interfering with or withholding approval of the re-subdivision applications and directing the Parish to issue building permits so that Provident can proceed with construction.

The *Groome* decision is consistent with Supreme Court and Fifth Circuit precedent holding that a court's authority to craft injunctive relief to remedy discrimination is broad and flexible. *See, e.g.*, *Gore v. Turner*, 563 F.2d 159, 165 (5th Cir. 1978) ("a trial court must be permitted sufficient flexibility to fashion effective and equitable remedies in civil rights cases. The twin goals in housing discrimination cases are to insure that no future violations occur and to remove any lingering effects of past discrimination."); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 448-449 (5th Cir. 1973) (holding in the Title VII context that "the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974) (noting that courts have broad and flexible power to order equitable remedies). *See also Young v. Pierce*, 685 F.

Supp. 975, 979 (E.D. Tex. 1988) ("In order to fulfill responsibilities pressed upon it by the Constitution and federal civil rights laws, the court necessarily must have a free hand to devise broad and flexible remedies, and these remedies must be tailored to the peculiar factors of the case …. [T]he propriety and form of injunctive relief in housing discrimination cases is committed to the discretion of the district court, which is most familiar with the facts.") Indeed, courts have not only the power, but the duty to fashion sufficient relief to remedy proven discrimination. *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 414 (5th Cir. 1974) (noting the court's "duty to carry out within practicable limits the purpose of Title VII, which is to make the discriminatee whole and to remedy the effects of past discrimination" and stating that courts "are not 'limited to simply parroting the Act's [Title VII] prohibitions …' [but] should order 'such affirmative action as may be appropriate.'") (quoting *Local 53 of Int'l Ass'n of Hear & Frost Insulators & Asbestos Workers v. Vogler*, 497 F.2d 1047, 1052 (5th Cir. 1969)), *rev'd in part on other grounds by* 424 U.S. 747 (1976) (reversing denial of further relief). *See also Gates*, 501 F.2d at 1320; *Berry v. Cooper*, 577 F.2d 322, 324 (5th Cir. 1978) (court has the power and the duty to provide a remedy "which will so far as possible eliminate the discriminatory effects of the past.")

St. Bernard Parish should not be permitted to act in brazen defiance of this Court's authority and in continued violation of one of the nation's most important civil rights laws without consequence. After two evidentiary hearings, two findings of contempt and racial discrimination, and the expenditure of hundreds of thousands of dollars in legal expenses, the time has come for severe sanctions and direct Court intervention to protect GNOFHAC and Provident's rights. Without these steps, it is clear that the Parish will succeed in "ping-pong[ing]

[Plaintiffs] back and forth between the Planning Commission and the Parish Council" such that Defendants will achieve their illegally motivated goal. (Docket #300 at 14.)

CONCLUSION

For the foregoing reasons, GNOFHAC and Provident respectfully request that the Court hold the Parish and the Council in contempt of court, order that Provident's re-subdivision applications are approved, and order the Parish's Director of the Department of Community Development to issue Provident's building permit applications by October 1. Plaintiffs further request that the Court order the imposition of coercive sanctions until such time as Defendants comply with the Court's Order. In addition, Plaintiffs respectfully request that the Court order Defendants to compensate Plaintiffs for the damages, costs, and fees incurred as a result of Defendants' contemptuous conduct and sanction Defendants for their conduct.

Dated: August 28, 2009

Respectfully submitted,

__/s/ Katherine A. Gillespie

John P. Relman
Katherine A. Gillespie
RELMAN & DANE PLLC
1225 19th Street NW, Suite 600
Washington, DC 20036
(202) 728-1888

Counsel for GNOFHAC and Provident Realty Advisors, Inc.

Dennis L. Roossien, Jr.
Robert Voelker
Munsch Hardt Kopf & Harr P.C.
3800 Lincoln Plaza
500 North Akard
Dallas, TX 75201
(214) 855-7535

Counsel for Provident Realty Advisors, Inc.

Joseph D. Rich
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
(202) 662-8600

Counsel for GNOFHAC

/s/ Morgan Williams

Morgan Williams (LA Bar No. 31564)
GREATER NEW ORLEANS FAIR
HOUSING ACTION CENTER, INC.
228 St. Charles Avenue, Suite 1035
New Orleans, LA 70130
(504) 208-5070