STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

DECLARATORY RULING ON THE PETITION OF NICHOLAS RABIECKI

I. INTRODUCTION

On July 10, 2006, the Commission on Human Rights and Opportunities (hereinafter "CHRO" or "the Commission") received a properly filed petition for a declaratory ruling from Nicholas Rabiecki (hereinafter "Rabiecki" or "Petitioner"). Under the authority of Connecticut General Statutes § 4-176 and Connecticut Agencies Regulations § 46a-54-122, the Petitioner seeks a ruling from CHRO on the interpretation and application of the state's fair housing laws regarding disability discrimination.

On July 14, 2006, the Commission, through its Managing Director and Commission Attorney, sent Heritage Village Master Association, Inc. (hereinafter "Heritage Village" or "the Association") a letter informing it of Rabiecki's petition and inviting it to submit a request to intervene or to become a party to this petition. On July 20, 2006 Heritage Village sent a letter to the Commission stating that it wished to intervene in this matter.

At its regularly scheduled meeting on August 10, 2006, the CHRO Commissioners voted to issue a declaratory ruling on the issues presented. By letter dated August 14, 2006, CHRO notified the Petitioner of the Commission's decision to issue a declaratory ruling and invited submission of further arguments, documents or other supplemental supporting materials. On the same date CHRO sent a letter to Heritage Village and invited Heritage Village to submit any written arguments and/or supporting documents.

On August 16, 2006 the Petitioner submitted written comments in response to the Commission's invitation. On September 11, 2006 Heritage Village submitted written comments and other materials for the CHRO's consideration.

On October 3, 2006 CHRO published a notice in the Connecticut Law Journal inviting any interested parties to apply for intervenor status and/or to submit any written arguments and/or supporting documents in regards to the declaratory ruling. To date, only the Petitioner and Heritage Village have submitted any materials or arguments relevant to this declaratory ruling. On December 14, 2006, the Commission will make a determination regarding Heritage Village's request to intervene in this matter.

II. FACTS PRESENTED

For the purpose of this ruling, we will limit our review of the facts to those reported by the Petitioner and/or Heritage Village that are directly relevant to the issues to be decided.

The Petitioner is a resident at Heritage Village, a "55 and over" condominium community.[1] Heritage Village provides various recreational, maintenance, security and convenience services to its residents. For a number of years Heritage Village's security personnel have provided on-demand, non-emergency wheelchair assistance (hereinafter "wheelchair assists") to residents who need assistance getting from their condominium units into vehicles. This service was provided at no cost to the residents who used the service. Heritage Village asserts that the wheelchair assist service has

[1] The Fair Housing Act provides an exemption against familial status discrimination (i.e., discrimination against households with children under the age of 18) to certain types of "housing for older persons." This exemption includes housing that has at least 80% of its units occupied by at least one person who is 55 years old. Additionally, the housing must meet certain other requirements that show that it is "intended and operated for occupancy by persons 55 years of age or older." See, 42 U.S. C. § 3607(b)(2)(C). For the purposes of this ruling we will assume that Heritage Village has met the necessary qualifications under federal law to qualify as a "55 and over" community.

evolved from the security personnel's desire to assist residents. In his petition for a declaratory ruling the Petitioner claims that Heritage Village is attempting to totally discontinue this service.

In its written submission, Heritage Village states that over the years it has experienced pressure to provide the same level of services to residents without increasing costs to unit owners. As a result, budget cuts have been implemented. Heritage Village explains that in the Fall of 2005 Heritage Village's Board of Trustees examined services that could be reduced and/or charged for, and as a result passed a resolution calling for a per occurrence charge for various services such as lockout assistance, false fire alarms, garage door assists and wheelchair assists. Heritage Village provided the CHRO with a copy of this resolution dated September 15, 2005. In that resolution the Board of Trustees proposes to provide residents with twelve free wheelchair assists per year and charge $20.00 per occurrence thereafter.[2] The Petitioner submitted a copy of a December 8, 2005, draft resolution that states that the concern about the wheelchair assist issue was identified in 1993 and still remains a problem in 2005. That resolution proposes totally discontinuing the wheelchair assist service. In its comments to the Commission Heritage Village states that it has "officially considered suspending the wheelchair assist service," but at this point has not done so.

The Petitioner states that he uses the wheelchair assists to gain access to a van that takes him to his physical therapy appointments twice each week. We do not know the reasons other residents use the wheelchair assists; however, we assume that

[2] According to the documentation Heritage Village provided, the September 15, 2005 resolution delineates the following fee schedule for other services: (1) Lockout assistances two free in a 12 month period and $10 per occurrence thereafter, (2) Fire false alarms in 4-plex units 2 free in a 12 month period and $20 per occurrence thereafter, and; (3) Garage door assist 2 free in a 12 month period and $10 per occurrence thereafter.

handicapped residents use the service for a variety of medical and non-medical excursions.

III. PARTIES

The party to this declaratory proceeding is:

Nicholas Rabiecki
1000A Heritage Village
Southbury, Connecticut 06488

On December 14, 2006 the Commission will decide on Heritage Village's request to intervene on this matter.

Heritage Village Master Association, Inc.
One Heritage Way
P.O. Box 2102
Southbury, Connecticut 06488

IV. ANALYSIS OF THE ISSUES PRESENTED BY RABIECKI'S PETITION FOR A DECLARATORY RULING

A. Introduction

This declaratory ruling addresses the following issues:

1. Whether it is a violation of the state's fair housing laws to discontinue Heritage Village's on demand, non-emergency wheelchair assists to residents with disabilities?

2. Whether it is a violation of the state's fair housing laws to charge residents with disabilities for Heritage Village's on demand, non-emergency wheelchair assists?

B. Applicable Law

Connecticut General Statutes § 4-176 provides that an agency may issue a declaratory ruling regarding the "the applicability to specified circumstances of a provision of the general statutes." Therefore, it is first necessary to review the statutory

provisions that may apply to the questions presented by this request for a declaratory ruling.

Connecticut General Statutes § 46a-64c(a)(6)(B) states that it is a discriminatory practice

> [t]o discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a learning disability or physical or mental disability of: (i) Such person; or (ii) a person residing in or intending to reside in such dwelling after it is so sold, rented, or made available; or (iii) any person associated with such person.

A person with a physical disability is defined by Connecticut General Statutes § 46a-51(15) as

> . . . any individual who has a chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device.

Connecticut General Statutes § 46a-64c(a)(6)(C)(ii) states that discrimination includes ". . . a refusal to make reasonable accommodations in rules, policies or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."

C. Application of the State's Fair Housing Laws to the Facts Presented

It is illegal to discriminate against any person "in the provision of services or facilities in connection with such dwelling," based on a person's physical disability. Connecticut General Statutes § 46a-64c(a)(6)(B). Connecticut's Fair Housing statutes not only protect prospective tenants and homeowners from discrimination in efforts to obtain and maintain housing, but also provide the right to equal treatment while living in

the individual housing. Gomes v. Casagmo Condominium Ass'n, Inc., 1999 WL 566862, Conn. Super. (July 23, 1999); CHRO ex rel. Ronald Little, Complainant v. Clark and Bauer CHRO No. 9810387 (August 2, 2000). It would certainly be illegal to exclude an individual from a service provided to other residents due to the individual's protected class. See, Fayyumi v. City of Hickory Hills**,** 18 F.Supp.2d 909, N.D.Ill.,1998, (Landlord cannot refuse to provide service and maintenance based on tenant's race); North Dakota Fair Housing Council, Inc. v. Allen, 319 F. Supp. 2d 972, 974 (D.N.D. 2004)(Landlord cannot single out a certain minority group of tenants for rent increases or special fees.)

Courts in Connecticut have looked to the Federal Fair Housing Act and related case law for assistance when interpreting Connecticut's fair housing statutes. Miko v. Commission on Human Rights, 200 Conn. 192, 202 (1991). The Federal Fair Housing Act's equivalent provision to Connecticut General Statutes § 46a-64c, 24 United States Code § 3604(b), was intended to "guarantee, for example, that an individual could not be discriminatorily barred from access to recreation facilities, parking privileges, cleaning and janitorial services and other facilities, uses of premises, benefits and privileges made available to other tenants, residents, and owners." See, U.S. House of Representatives, Committee on the Judiciary, Report 100-711: the Fair Housing Amendments Act of 1988, reprinted in 1988 U.S. Code Cong. & Admin. News 2173, 2184, 100th Cong., 2nd Sess. (1988).

To establish discrimination under the fair housing laws one must show: (1) intentional discrimination (disparate treatment); (2) disparate impact; and/or (3) failure to

make a reasonable accommodation. Tsombanidis v. West Haven Fire Dept., 352 F.3d 565, (2d Cir. 2003). Unfortunately, we do not have an adequate record before us to determine whether there is any viable discrimination in this case because the facts provided by the Petitioner are not sufficiently complete for us to make a finding on the basis of his petition. See, CHRO Declaratory Ruling on the Petition for Declaratory Ruling of Hunter's Ambulance, Inc., et al (December 8, 1997); CHRO Declaratory Ruling on the Petition for Declaratory Ruling of the Town of Avon (November 14, 1996); Connecticut Regulations § 46a-54-122(b)(3) (petitions for declaratory rulings shall "provide an appropriate factual background of the circumstances giving rise to the request"). For example, in a disparate treatment case, when a housing provider provides a legitimate, nondiscriminatory reason for an action it has taken, the burden shifts to the complaining party to prove that the given reason was pretextual. AvalonBay Communities Inc. v. Town of Orange, 256 Conn. 557, 591-597 (2001). In the Petitioner's August 16, 2006 comments for this declaratory ruling, he suggests that the Board of Trustees took this action regarding the wheelchair assists at that specific time based on his individual usage of the services and/or his outspokenness in the media regarding these events. However, there is no factual evidence of the Heritage Village's discriminatory animus against the Petitioner other than his conclusory assertions.

There is also not enough information for us to determine whether there is a viable disparate impact claim under the facts provided. This case presents an unusual set of circumstances. Here, the disabled residents' terms, conditions or privileges of residency would not differ from other residents. Instead, the argument would logically

be that disabled residents would be discriminated against by the termination of and/or charging for the wheelchair assists because it would create a particular hardship for those individuals. Here, we do not know whether there is actually a discriminatory effect on the disabled residents if Heritage Village takes its proposed actions. For example, if most disabled residents do not use the service more than twelve times a year then this change might only affect disabled residents who are frequent users of the service. Again, the factual record before us is inadequate to make a determination as to whether the Petitioner or any other disabled individual would have a viable disparate impact claim.

Typically when a disabled individual files a case regarding a requested service, it is in the context of a reasonable accommodation request for a service to be provided, rather than a complaint regarding the termination or change of a service that has already been in place. "The state and federal fair housing laws create a statutory right to a reasonable accommodation once the Complainant has proven that he [or she] has a disability and has made the request for an accommodation." CHRO ex rel. Filshtein v. West Hartford Housing Authority, CHRO No. 0050061 (Oct. 4, 2001) citing U.S. v. California Mobile Home Park Management Co., 29 F. 3d 1413 (9th Cir. 1994). In Filshtein, the hearing referee adopted the five-part test used in HUD v. Riverbay Corporation, HUDALJ 02-93-0320-1 (1994) to establish a prima facie case of failure to reasonably accommodate under state and federal law:

1. Complainant suffers from a handicap as defined in the Act;
2. Respondent knows of the Complainant's disability or should reasonably be expected to know of it.

3. Accommodation of the handicap may be necessary to afford the Complainant an equal opportunity to use and enjoy the dwelling;
4. The accommodation is reasonable;
5. Respondent refused to make such accommodation.

Once a Complainant has established a prima facie case for failure to reasonably accommodate, the Respondent can justify its refusal to accommodate by proving that the proposed accommodation would subject it to an excessive financial or administrative burden, or that the requested accommodation would be a fundamental alteration in the nature of the services it provides. Id.

It is almost impossible to give general guidance in this declaratory ruling as to whether a requested accommodation is reasonable because the analysis of such accommodation requests are "highly fact specific" and made on a "case-by-case" basis. Dadian v. Vill. of Wilmetter, 269 F.3d 831, 838 (7th Cir. 2001); Sporn v. Ocean Colony Condominium Ass'n, 173 F.Supp.2d 244 (D. N.J. 2001) citing Hovsons Inv. v. Town of Brick, 89 F.3d 1096, 1104 (3rd Cir. 1996). A reasonable accommodation analysis would require us to review an individual's medical information that substantiates the need for the accommodation. That information is not before us.[3] Furthermore, additional information is needed to determine whether an individual can present adequate evidence to prove a prima facie case of failure to reasonably accommodate and whether Heritage Village can legally justify a refusal to accommodate. Such analysis is based on the individual facts of the case and therefore is much better suited to the Commission's investigative process.

[3] We do not have any specific medical information about the Petitioner's need for a reasonable accommodation.

If Heritage Village does take either of its proposed actions regarding the wheelchair assist service, any resident who feels the service as it stands now is necessary to accommodate a disability may elect to make a reasonable accommodation request for such service. At that point the interactive process of determining whether it is feasible for Heritage Village to grant the reasonable accommodation request would begin. (See, Jankowski Lee & Associates v. HUD, 91 F.3d 891, 895 (7th Cir. 1996) for a discussion of the interactive process). If the requested accommodation is denied, the resident may file a complaint with the CHRO within 180 days of the alleged discriminatory action. See, Connecticut General Statutes § 46a-82(e).[4] At that point the Commission will then investigate whether Heritage Village has violated the law under the particular set of circumstances.

Although we will not make a determination here as to whether the Petitioner or any other handicapped resident would have a viable claim under a reasonable accommodation theory, we do want to note several factors that would certainly go into such analysis. A proposed accommodation is not reasonable if it would impose an "undue burden" on the housing provider, or result in a "fundamental alteration" of the housing provider's services. Shapiro v. Cadman Towners, Inc., 51 F.3d 328, 335; Lyons v. Legal Aid Society, 68 F.3d 1512, 1517 (2d Cir. 1995). "The requirement of reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person." Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995).

[4] In addition to filing a complainant at the CHRO individuals in Connecticut who have a housing discrimination claim may file directly with HUD or file a state or federal court action.

If Heritage Village claims the proposed accommodation creates an undue burden on it, we would look at the cost of that accommodation to the Association and the fact that the service has been provided for free for many years. We note generally that a housing provider does have to "shoulder certain costs involved so long as they are not unduly burdensome." U.S. v. California Mobile Home Park, 29 F.3d 1413, 1416 (9th Cir. 1994). Again, this analysis must be made on a case-by-case basis. In terms of charging a fee for an accommodation, in California Mobile Home Park, the court discussed factors a fact-finder could consider to determine whether a housing provider could charge a fee for the accommodation. The court looked at the amount of the fee charged, the total housing cost, the proportion of other residents paying the fee, the importance of the fee to the housing provider's total income and the significance of a proposed fee waiver to the handicapped resident. Id., 1418. A similar analysis could be made pursuant to a reasonable accommodation request under the Association's proposed changes to the wheelchair assist service.

Should Heritage Village assert that a requested accommodation alters the fundamental services it provides, it would certainly be logical to consider the fact that Heritage Village is a "55 and over" community that markets to an aging population that is likely to experience some form of handicap while living at Heritage Village.[5] We are cognizant that Heritage Village is not a medical facility and is not required to offer an

[5] In fact prior to 1995 communities that were specifically designated as "55 and older", such as Heritage Village, were required to provide "significant facilities and services specifically designed to meet the physical and social needs of older persons." 42 U.S.C. § 3607(b)(2)(C)(i)(1994). The 1995 version of the Fair Housing Act eliminated the "significant facilities and services" requirement because of litigation arising over the definition of "significant facilities and services". See, U.S. Senate Committee on the Judiciary, S. Rep. No. 104-172, 104th Cong., 2nd Sess. 3 (1995). However, we believe that the fact that there was contemplation that 55 and older communities would provide some services to its residents other than the basic housing itself, leads to a reasonable inference that 55 and older communities are in the business of providing services that cater to an aging population.

unlimited array of new medical services in an attempt to reasonably accommodate a resident's accommodation request. "[T]he law does not require housing providers to offer new supportive services – such as counseling and medical care – that would not otherwise be available [in an effort to reasonably accommodate its residents]." Schwemm, Housing Discrimination Law & Litigation (2005), § 11D:8 citing Preamble II, 24 C.F.R. ch. 1, subch. A, app. I, 54 Fed. Reg. 3249. This case, however, is somewhat unusual because the request would be for a supportive service that is already in place. We would also want to look at all of the services that Heritage Village provides or has provided to its residents in order to determine what its fundamental services are.[6]

The set of facts that exist at Heritage Village will make for a unique challenge should a reasonable accommodation request regarding the wheelchair assist service arise. Although individual residents may have become dependent on this service, there is no general requirement that a condominium association provide specific services to the community at large. On the other hand, the law does require housing providers to affirmatively take steps to assist handicapped residents to have equal access to the housing provided should a reasonable accommodation request occur.[7]

[6] Although Heritage Village has provided us with a copy of an advertisement that lists some services it provides to residents we do not know whether that encompasses all of the services.

[7] We also note that we are unfamiliar with the layout of the condominiums at Heritage Village. Therefore, we point out that if the reason that residents need the wheelchair assists is that stairs or other barriers make it difficult to access individual units the law also allows residents to request permission to make reasonable modifications to the exterior of units, such as the installation of a ramp or a wheelchair lift, at the individual resident's expense. See, Connecticut General Statutes § 46a-64c(a)(b)(C)(ii); CHRO ex rel. Westphal v. Brookstone Court, LLC, 2006 WL 463262, Conn. Super., 2006 *appeal pending on other grounds A.C*. 28221). This information is given purely for informational purposes and we are not suggesting that this is a viable alternative to reasonably accommodating a resident should the Association be legally responsible to do so.

V. CONCLUSION

We do not want this ruling to discourage housing providers from voluntarily providing services that assist disabled residents. In fact, we applaud Heritage Village for the services it has provided disabled residents thus far, and commend Heritage Village for its commitment to continue such service to the residents at large to whatever extent feasible. The only conclusion that can be reached from this declaratory ruling is that if an individual resident requests that Heritage Village provide some form of wheelchair assist service as a reasonable accommodation, a specific case-by-case analysis as to whether such accommodation would be mandatory under the state's fair housing laws must be carried out.

ADOPTED BY A MAJORITY VOTE OF THE COMMISSIONERS PRESENT AND VOTING AT A COMMISSION MEETING HELD ON _____, 2006 IN HARTFORD, CONNECTICUT.

Attest:_____
Andrew M. Norton, Chairman
Or duly authorized Commissioner

Date:_____