

**NORTH CAROLINA HUMAN RELATIONS COMMISSION
Office of Administrative Hearings
1711 New Hope Church Rd.
Raleigh, North Carolina 27603**

SARAH COX, AND JAMES COX)
)
)
Complainant,)
)
v.)
)
SOVEREIGN OAKS HOMEOWNERS)
ASSOCIATION)
)
Respondents.)

DETERMINATION

NCHRC Case No.: 20HO2468
HUD Case No.: 04-22-2597-8

Pursuant to N.C. Gen. Stat. 41A-7, the North Carolina Human Relations Commission (NCHRC) makes the following Determination that **no reasonable grounds** exist to believe that an unlawful discriminatory housing practice has occurred in the above-entitled matter:

JURISDICTION

The Commission has jurisdiction over the parties and subject matter as follows:

Complainants Sarah Cox and her husband James Cox have a minor child who belongs to a class of persons whom the Fair Housing Act (the "Act"), as amended protects against unlawful discrimination because of his disability.

The subject property is located at 88 Wandering Oaks Way, Asheville (Buncombe County) NC, owned by Complainants, and subject to the covenants and bylaws of Respondent Sovereign Oaks HOA (the "HOA"). At all relevant times, the individual Respondents were members and officers of Respondent HOA and/or officers or members of the HOA Board. The alleged discriminatory act occurred on June 13, 2022. The complaint was filed timely on August 2, 2022.

ALLEGATIONS OF THE COMPLAINT

Complainants allege that on March 1, 2021, they submitted a Reasonable Accommodation request to the HOA's Design Review Committee (DRC), via email, requesting approval to build a fence in their backyard to avoid their 6-year-old son, who has a mental disability, from straying, which

he has done in the past. Complainant Sara Cox alleges that on March 15, 2022, she personally gave medical documentation of her son's condition to Respondent HOA's attorney, Zephyr Sullivan. Complainants allege that by June 13, 2022, they still did not have approval for the fence from the HOA's DRC and seemed to have reached an impasse with the HOA DRC. Complainant alleged that, using approved materials and heights, they began building the fence on the subject property in fear for their son's safety, for wanting their son to have full enjoyment of their home, and to prevent their son from eloping. Complainants assert that on June 14, 2022, they received a notification of violation letter from the HOA informing them that--- as of June 13, 2022--- they are being fined \$100.00 per day for construction of a fence that has not been approved by the HOA.

Complainants believes the Respondents have discriminated against them by unreasonably delaying approval of their request for a Reasonable Accommodation.

RESPONDENT'S DEFENSES

The Respondents have **asserted** non-discriminatory defenses to the complaint as follows:

Respondents assert that on March 1, 2022, Complainants submitted an application to the HOA with plans and specification for a "reasonable accommodation" fenced area for their disabled 6 - year-old son.

Respondents assert that on April 5, 2022, the Design Review Committee (hereafter "DRC") on behalf of the HOA , held a special meeting on-site on Complainants' lot to consider the location of a fence as a reasonable accommodation.

Respondents assert that on April 8, 2022, the DRC agreed to the request the Complainants made for an expanded fenced in area for their son, provided that the fence be moved five feet, so as not to encroach on the set back requirements between neighboring lots. Furthermore, the DRC agreed to offer Complainants to expand the fenced in area in other portions of the lot to make up for that loss.

Respondent Mike Newton asserts that on April 8, 2022, he sent an email to Complainants stating, "*rather than delay their approval for reasonable accommodation, the DRC in a special meeting had measured out a concept in Complaints yard which he believes would expedite the process.*" The DRC proposed the following reasonable accommodation as followed:

Starting at the middle of Complainants frontage on Towering Oaks, there is a large oak tree approximately 35 feet from the road edge. If the fence ran across Complainants property on the house side (approximately 38 feet from the road), the fence would be approximately 84 feet in length. This would allow for the fifteen-foot setback on the Eggen's side and keep the visibility of the fence at its minimum from view. On the other side, the fence would run approximately eighty-four feet toward the house, then cross the yard again at approximately eighty-four feet and end near the arborvitae that Complainant Sara Cox has already planted along the Wandering Oaks Way frontage. The fence would then go downhill and meet the existing fence line at Towering Oaks.

The setback on this frontage behind the existing landscaping is approximately fifty feet. According to Respondents this would enclose 7000+ square foot area, mostly shaded and wooded with the fence naturally landscaped on three sides. Respondents assert that would include some grassy area with a heavily shaded section nearest the trees.

Respondent Mike Newton asserts that he sent an email to Complainants on April 9, 2022, to mark out the area before deciding on this concept considering all the variables that come with seasonal changes, and lawn maintenance considerations. Respondent Newton further asserts that he would forward a note to Respondent Jerry Snow with his line drawings, and his suggestion for landscaping around the fence.

Respondent Mike Newton asserts that on April 16, 2022, he emailed Complainants asking a good time to meet about finalizing the fence plans. Respondents stated that on April 22, 2022, they received a letter from Complainant Sara Cox stating, *"the alternative layout does not meet their needs and is unacceptable"*.

Respondents contend that Complainants have asserted that the accommodation offered by the HOA is not feasible (due initially to purported concerns about their foundation, and later based upon the location of their septic). However, the HOA specifically received confirmation from various sources that the accommodation offered is in fact feasible-in that the fence can be installed as suggested by the HOA without interfering with Complainants' foundation or septic.

Respondents contend that throughout May 2022 and the first week of June 2022, the parties, through counsel, discussed the accommodation requested and offered over the phone, in person, and through email and letter. Respondents assert that on May 17, 2022, counsel for the HOA expressed to counsel for Complainants' son that the HOA was willing to grant the accommodation requested by Complainants, if they (Complainants) agreed to move the fence slightly, so as not to encroach on the setback line on the side of their property that borders the Eggen and Bauman lots which the HOA estimated that the fence proposed by the Complainants encroached by five feet.

Respondents assert that instead of Complainants engaging with the HOA in good faith, as required by HUD Guidance, they unilaterally opted on June 10, 2022, to commence construction on the fence without approval or parties reaching any agreement as to the footprint of the fence.

Respondents contend that despite the contention of the Complainants in their complaint that they are being fined, the Notice of Decision issued by the HOA opted to hold open the question and decision on whether a fine should be assessed for the Complainants violation of the Declaration. Further, the HOA offered the Complainants the opportunity *"to cure the violation, by moving the fence to the location proposed by the DRC, thereby accommodating the 15-foot setback, and agreeing to remove the fence once there is no longer a need for the accommodation, and agreeing to remove the fence if they transfer the home, by sale or otherwise to new owners"*.

Respondents assert that the discussion between the Complainants and the HOA related to a fence has been ongoing since 2019, when Complainants--- for the first time--- submitted plans to

the DRC for a perimeter fence to be located on the front building setback line boarding Wandering Oaks Way and Towering Oaks Lane.

Respondents stated that since 2019, the HOA has consistently sought to work with Complainants to meet their needs. Respondents deny discriminating against Complainants--- but instead--- always attempted to work with Complainant to find a reasonable solution to the dispute in question. Respondents assert that the Arbitrator Award supports this decision.

FINDINGS

The investigation revealed the following:

Refusal to provide reasonable accommodation

NCHRC has jurisdiction over the parties and the subject matter as provided in the Acts. There is no direct evidence of discrimination. Therefore, to establish a reasonable accommodation violation the evidence must satisfy the following prima facie elements:

1. The Complainant is a person with a disability.
2. The Respondent knew or reasonably should have known that the Complainant is a person with a disability.
3. The Complainant requested a reasonable accommodation in the rules, policies, practices, or services of the Respondent.
4. The requested accommodation may be necessary to afford the Complainant an equal opportunity to use and enjoy the dwelling.
5. The Respondent refused the Complainant's request to make such accommodation or failed to respond or delayed responding to the request such that it amounted to a denial.

The evidence shows that Complainants have not satisfied element 5 above. Complainants allege that on March 1, 2022, they requested a reasonable accommodation for their disabled son from Respondents. Complainants provided as supportive evidence a copy the letter presented to Respondents on March 1, 2022, and a letter from their son's medical provider recommending that a fence be installed around the backyard of the Complainants' home that provides safe containment, along with shaded, soft spaces.

According to Respondents, on April 5, 2022, the DRC, on behalf of the HOA, held a special meeting on-site on Complainants' lot to consider the location of the fence as a reasonable accommodation. Further, Respondents stated that on April 8, 2022, the DRC agreed to the request the Complainants made for an expanded fenced in area for their son, provided that the fence be moved five feet, so as not to encroach on the set back requirements between neighboring lots. Respondents stated that the DRC also agreed to offer Complainants to expand the fenced-in area in other portions of the lot to make up for that loss. Respondents provided emails sent to Complainants as supportive evidence.

Respondent Mike Newton stated that on April 8, 2022, he sent an email to Complainants stating, *"rather than delay their approval for reasonable accommodation, the DRC in a special meeting*

had measured out a concept in Complaints yard which he believes would expedite the process.”
The DRC proposed the following reasonable accommodation as followed:

Starting at the middle of Complainants frontage on Towering Oaks, there is a large oak tree approximately 35 feet from the road edge. If the fence ran across Complainants property on the house side (approximately 38 feet from the road), the fence would be approximately 84 feet in length. This would allow for the fifteen-foot setback on the Eggen’s side and keep the visibility of the fence at its minimum from view. On the other side, the fence would run approximately eighty-four feet toward the house, then cross the yard again at approximately eighty-four feet and end near the arborvitae that Complainant Sara Cox has already planted along the Wandering Oaks Way frontage. The fence would then go downhill and meet the existing fence line at Towering Oaks. The setback on this frontage behind the existing landscaping is approximately fifty feet. According to Respondents this would enclose 7000+ square foot area, mostly shaded and wooded with the fence naturally landscaped on three sides. Respondents assert that would include some grassy area with a heavily shaded section nearest the trees.

Respondent Mike Newton asserts that on April 16, 2022, he emailed Complainants asking a good time to meet about finalizing the fence plans. Respondents stated that on April 22, 2022, they received a letter from Complainant Sara Cox stating “the alternative layout does not meet their needs and is unacceptable”. Respondents provided an email from Complainant as supportive evidence.

Respondents contend that Complainants have asserted that the accommodation offered by the HOA is not feasible (due initially to purported concerns, about their foundation, and later based upon the location of their septic). However, the HOA specifically received confirmation from various sources the accommodation offered is in fact feasible-in that the fence can be installed as suggested by the Association without interfering with Complainants’ foundation or septic. Respondents provided supportive evidence. According to Respondents, throughout May 2022 and the first week of June 2022, the parties, through counsel, discussed the accommodation requested and offered over the phone, in person, and through email and letter. In particular, on May 17, 2022, counsel for the HOA expressed to counsel for Complainant’s son that the HOA was willing to grant the accommodation requested by Complainants, if they agreed to move the fence slightly, so as not to encroach on the setback line on the side of their property that borders the Eggen and Bauman lots which the HOA estimated that the fence proposed by the Complainants encroached by five feet.

Respondents contended that in connection with this dispute the HOA Board spoke with the neighbor adjacent from Complainants who is directly impacted by the installation of the fence, and learned that Complainants approached the neighbor in February of 2022, to seek her assent to an as-yet-to-be submitted proposal where the fence would impinge on the 15’ setback. According to the neighbor she told Complainant Sara Cox she would have no objection to a fence bordering her property “as long as it met the legal setback requirements”.

Respondents assert that instead of Complainants engaging with the HOA --- in good faith ---as required by HUD Guidance, they unilaterally opted on June 10, 2022, to commence construction on the fence without approval or the parties reaching any agreement as to the footprint of the fence.

Complainants stated that on June 14, 2022, they received a notification of violation letter from the HOA informing them that as of June 13, 2022, they are being fined \$100.00 per day for construction of a fence that has not been approved. Respondents contended that despite the contention of the Complainants in their complaint that they are being fined, they agree that they did issue the Notice of Decision to fine Complainants, however, they opted to hold open the question and decision on whether a fine should be assessed. Respondents also contended that they offered the Complainants the opportunity *"to cure the violation by moving the fence to the location proposed by the DRC, thereby accommodating the 15-foot setback."* Respondents also provided as supportive evidence an email between Respondents' legal counsel and Complainants' son's legal counsel. Respondent Mike Newton provided the investigator with a signed Affidavit stating that the fenced in area proposed by the DRC was at least 4,000 square feet, larger than the fence ultimately installed by the Complainants. Respondents also provided as supportive evidence some photos depicting the fence constructed by the Complainants.

Based on the lack of any evidence that Respondents refused the request without negotiation or unreasonably delayed any of their responses to Complainants' requests, there are no reasonable grounds to believe that Respondents refused to grant the Complainant a reasonable accommodation in violation of N.C.G.S. §41A-4(f)(2) and Section 804(f)(3)(B) [42 U.S.C. §3604(f)(3)(B)].

Terms and Conditions

In order to establish a prima facie case against Respondents of violation of the Acts for imposing discriminatory terms and conditions on Complainants because they are disabled, the evidence must satisfy the following elements:

1. The Complainant is a member of a protected class;
2. The Complainant was subject to Respondents' rules, covenants and bylaws;
3. The Respondents imposed unfavorable or less favorable terms or conditions on the complainant's tenancy; and
4. The Respondents did not impose such a term or condition on similarly situated tenants not of the complainant's protected class.

Complainant has failed to satisfy elements 3 and 4 above. The investigation revealed that there is no evidence that Respondents imposed unfavorable or less favorable terms or conditions on Complainants that were different from those imposed on similarly situated tenants not of the complainant's protected class.

According to Respondents there were no other request for reasonable accommodation presented to the HOA board since the inception of the community. Respondents provided a written statement as supportive evidence. In addition, the HOA was recently named in a lawsuit by another resident who asserted that the HOA was not enforcing the Design Guidelines pertaining

to a structure on an adjacent property. Respondents stated that allegation was ultimately dismissed. Respondents deny discriminating against Complainants, but instead, always attempted to work with them to find a reasonable solution to the dispute in question. Respondents assert that the Arbitrator Award supports this decision and provided evidence of the Arbitrator's decision. Complainants never had to actually pay any fine threatened or imposed because of the fence. The NCHRC notes that the Fair Housing Acts do not allow Respondents to require the Complainants to remove the fence if they move or no longer need it; restoration of reasonable modifications on move-out or lack of necessity applies only to interior modifications of rental properties.

Therefore, the Commission finds that there are no reasonable grounds to believe that any of the Respondents acted in violation of N.C.G.S. §41A-4(a)(2) and Section 804(f)(2) [42 U.S.C. §3604(f)(2)].


CONCLUSION

After a thorough review of the allegations presented in the charge and during the investigation, and consideration of the evidence provided in light of the required prima facie elements of proof, the Commission has concluded that Complainant's allegations were not substantiated and that there are **no reasonable grounds** to believe that Respondents have violated the State and Federal Fair Housing Acts.

This the 15th day of December 2022.

Ronya Bynum

Ronya Bynum, Fair Housing Investigator
North Carolina Human Relations Commission
Civil Rights Division
Office of Administrative Hearings



Lanfong Goins, Executive Director
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Office of Administrative Hearings