No. 19-3621

In the United States Court of Appeals
for the Third Circuit

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431 E Palisade Avenue Real Estate, LLC; 7 North Woodland Street, LLC; John and Jane Does 1-10,

Appellees,

v.

City of Englewood; City Council of Englewood,

Appellants.

On Appeal From An Order of the United States District Court For The District Of New Jersey In Case No. 2:19-CV-14515, Brian R. Martinotti, U.S. District Judge

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Brief of Appellees

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and 3d Cir. LAR 26.1.1, Appellees certify that each appellee is either (i) a limited liability company, meaning it is not a "nongovernmental corporate party" within the meaning of those rules; or (ii) an individual. No publicly owned corporation not a party to this appeal has a financial interest in the outcome of this proceeding.

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Statement of the Issues

Whether the district court abused its discretion in granting a preliminary injunction. JA1-45.

Counterstatement of the Case

431 E Palisade Avenue Real Estate, LLC, and 7 North Woodland Street, LLC (collectively, "Care One"), two of the plaintiffs in this case, seek to establish an assisted living and memory care home (the "Facility ") on residential land in the City of Englewood, NJ (the "City").[1] JA56, 58-59. Through the "Municipal Land Use Ordinance of the City of Englewood" (the "Ordinance"), the City, like many municipalities, regulates land use.[2] New Jersey law authorizes the City Council of Englewood (the "Council") to pass generally applicable zoning ordinances like the Ordinance. JA59.

The Ordinance zones the land on which the Facility is planned "R-AAA"—that is, it is zoned for single-family residential use. JA62, 334. But the Ordinance does not permit development of the Facility in an R-AAA Zone. The only permitted uses are "[a] one-family dwelling"; "[a]ccessory uses, accessory buildings and accessory structures"; "[m]unicipal purposes"; "[p]arks and playgrounds"; "[n]ature preserve and nature study area"; "[p]ublic schools and private nonprofit day schools"; and "[p]laces of worship." JA360-61. A "one-family dwelling" is defined as a "building designed for, or occupied exclusively by, one family and not designed or used as . . . a group home or congregate living facility in which a person's

[1] We also use "the City" as a synecdoche for the Defendants in this matter as a whole.

[2] Relevant excerpts of the Ordinance can be found at JA296-544.

continued occupancy is dependent upon the payment of a fixed rent or room charge." JA352.

In 2014, the City adopted a master development plan (the "Master Plan"). JA135-295. The Master Plan acknowledges that the City's elderly population is large and growing, and calls for more senior housing as one of its objectives. JA170-71, 215. Nevertheless, the Ordinance lists "[a]ssisted living facilit[ies]" as a permitted use *only* in one district zoned Research, Industry and Medical ("RIM District"). JA434, 436. The RIM District is located in the far southwestern portion of the City. JA546.

The City's decision to relegate assisted-care homes like the Facility to the RIM District provides particular obstacles to the City's Orthodox Jewish community. JA63-65. All Orthodox Jewish synagogues in the City are located in districts zoned for primarily residential uses. JA64. Orthodox Jews' faith requires them to refrain from driving on Shabbat, which is the period from sundown on Fridays to sundown on Saturdays; because the RIM District is not within walking distance of any residential district, then, Orthodox Jews living in a home like the Facility in the RIM District would be unable to join their families for worship during Shabbat. JA64.

Orthodox Jews are also banned from carrying things outside their homes during Shabbat unless they walk within a designated area called an *eruv*. JA64. *See*

generally Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (extensively discussing the design, operation, and significance of an *eruv*). The *eruv* in the City does not include the RIM District, meaning that elderly Orthodox Jewish residents living within a home like the Facility in the RIM District—the *only* area where the City allows such facilities to be constructed—would be unable to carry anything with them if they left the facility on the Sabbath. JA64-65. The Facility, by contrast, will be within the *eruv*. JA69.

Care One is not the only plaintiff in this case. John and Jane Does 1-10 (the "Doe Plaintiffs") are residents of the City who practice Orthodox Judaism and intend to reside in the Facility when it is built. JA59. The Facility is the only planned facility that would fulfill the Doe Plaintiffs' religious, physical, and medical needs. JA68.

The land on which the Facility will sit consists of abutting properties at 431 East Palisade Avenue, 405 East Palisade Avenue, and 7 North Woodland Street. JA67. Care One acquired full title to the 431 East Palisade Avenue land on or about May 10, 2017. JA548-51. Its predecessor-in-interest entered into a contingent agreement for the acquisition of the land at 7 North Woodland Street and 405 East Palisade Avenue on April 20 of the same year. JA560. However, that agreement contains a termination provision; it originally provided that Care One needed to terminate the agreement by August 9, 2019, JA68, or instead finalize its purchase of the land even if it lacked the necessary governmental approvals to construct the

Facility, JA563. In November 2019, Care One secured an extension; now Care One must make its decision by November 4, 2020. JA1132.

Thus, if Care One cannot secure the necessary approvals by that date, it will either have to give up the 7 North Woodland Street and 405 East Palisade Avenue properties, meaning it will not be able to build the Facility, or lock itself into a purchase of land that may be undevelopable. Unless this Court affirms the district court's preliminary injunction, it is unlikely that the Facility will ever be built. *See* Certification of Thomas Herten in Opposition to Defendants-Appellants' Emergency Motion for a Stay Pending Appeal ("Herten Certification") ¶¶ 8-12, *431 E. Palisade Ave. Real Estate, LLC v. City of Englewood*, Case No. 19-3621 (3d Cir. Dec. 20, 2019).

Beginning in 2017, Care One and its legal counsel met extensively with the City to try to secure approval of the Facility. JA70. In January 2018, the Council asked that Care One formally present the Facility to it, but Care One was then yanked from the Council's agenda at the last minute. JA70. The Council also raised concerns (which the City has not repeated in court) that rezoning to permit the construction of the Facility would represent illegal "spot" zoning, but Care One's counsel responded with a letter explaining why it would not. JA587-91. Finally, in January 2019, Care One formally requested that the Council rezone the relevant property so that it could build the Facility. JA583-85.

After years of discussions, the Council finally heard Care One's rezoning petition on May 7, 2019; it allotted only 30 minutes to the petition, JA73, despite the extensive materials Care One prepared for the Council before the meeting, *see* JA593-685. To date, the Council has not acted on Care One's application.

With limited other options, Care One and the Doe Plaintiffs filed their complaint in this case on June 28, 2019. JA55. In the complaint, they asserted that the zoning code's relegation of assisted living and memory care facilities to the RIM District violates multiple federal and state laws, including the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq*. Care One simultaneously sought a preliminary injunction enjoining the City from enforcing the Ordinance. JA108-09.

Plaintiffs made three main arguments regarding their likelihood of success on the merits: (i) the Ordinance discriminates against elderly and handicapped citizens on its face (a disparate-treatment claim); (ii) the City's enforcement of the Ordinance has a disparate impact on elderly and handicapped citizens; and (iii) the City has failed to offer a reasonable accommodation. *See* Memorandum of Law in Support of Preliminary Injunction at 6-16, *431 E Palisade Ave. Real Estate, LLC et al. v. City of Englewood*, No. 2:19-cv-14515-BRM-JAD (June 28, 2019), ECF No. 2-16.

In a thorough 28-page opinion, the district court concluded that a preliminary injunction should issue. JA1-28. The district court did not reach Care One's disparate-impact and reasonable-accommodation claims (JA11 n.12), but it

determined that the "'segregation' of assisted-living and memory-care facilities from 'all residential districts in the City,'" JA14 (quoting Pls.' Br. in Support of Appl. at 1), rendered the Ordinance facially discriminatory, JA20-23, and that the City had provided no legitimate justification for the discrimination, JA23-26. Therefore, Care One was likely to succeed on its disparate-treatment claim. JA26. The district court similarly concluded that Care One would suffer irreparable harm if an injunction did not issue, JA27, that an injunction would be in the public interest, JA27, and that the balance of equities favored Care One, JA28.

The injunction prevented the City "from enforcing any provisions contained in the [Ordinance] . . . related to allowed land uses or dimensions, in any review of Plaintiffs' request for approvals to develop, construct, and operate [the Facility] . . . subject to review and approval by the Planning Board and any other State/County/Local Governments that have jurisdiction pursuant to the Municipal Land Use Law." JA30. As the district court recognized, and Appellants' counsel conceded, even with the injunction "[i]t is still a long road before a shovel gets put in the ground," as Care One still needs to obtain other approvals before it can begin constructing the Facility. JA1069.

The City appealed. JA46. This Court stayed the preliminary injunction on December 23, 2019. *See* Order Granting Stay, *431 E. Palisade Ave. Real Estate, LLC v. City of Englewood*, Case No. 19-3621 (3d Cir. Dec. 23, 2019).

Summary Of Argument

I. A familiar four-factor test governs preliminary injunctions. Care One was required to show likelihood of success on the merits and irreparable harm. In its discretion, the district court was also required to balance harm to the defendant and the public interest. The City errs in arguing that all four factors must favor Care One.

II. A. Care One is likely to prevail on its disparate-treatment claim, the only claim before this Court. The Fair Housing Amendments Act of 1988 ("FHAA"), as this Court has recognized, is intended to prohibit the exclusion of congregate-living arrangements for persons with handicaps. On its face, the Ordinance discriminates against such arrangements by excluding them from all of the City's primarily residential zones. The Ordinance both prohibits all but specified uses—which do not include congregate care—in the R-AAA Zone and assigns "[a]ssisted living facilit[ies]" to the RIM District, all in accordance with the Master Plan. It is precisely those persons defined as handicapped by 42 U.S.C. § 3602(h) who need "assisted living," which New Jersey law defines as "a coordinated array of supportive personal and health services, available 24 hours per day, to residents who have been assessed to need these services." N.J. Admin. Code § 8:36-1.3.

Given the Ordinance's express discrimination, discriminatory motive is irrelevant. But the record shows discriminatory motive—a desire to treat the handicapped differently—anyway. The Ordinance itself conveys an intent to

segregate congregate-care housing in the RIM District as part of the creation of a healthcare village for seniors needing medical services. To be discriminatory, a motive need not be malicious or invidious. Even "benign" differentiation can be discriminatory.

The district court correctly concluded that the discrimination here operates "on the basis" of handicap. This Court's *Wind Gap* decision, upholding a regulation that governed fees (not housing segregation) and grouped undefined "personal care homes" with other "multi-adult rooming facilities" such as hotels, is not remotely to the contrary.

The City's reliance on this Court's *Lapid-Laurel* decision is likewise misplaced. That case involved no assertion of disparate treatment and provides scant discussion of what a disparate-treatment claim might have looked like. Questions that merely lurk in the record are not considered to have been decided in a way that constitutes precedent.

B. The City has not provided a justification that overcomes Care One's prima facie case of discrimination. Mostly, the City simply relies on inapposite case law. The one actual justification the City offers—the need to preserve a historic or residential area—is just the kind of interest the FHAA was intended to overcome. And the district court's conclusion in this respect is reviewed for abuse of discretion, which does not exist here.

III. The district court did not abuse its discretion in determining that Care One would suffer irreparable injury without a preliminary injunction. Both the legal presumption that discrimination is irreparable injury and the record evidence that the Facility is unlikely to be built without injunctive relief support the district court's conclusion.

IV. The district court did not abuse its discretion in balancing the other stay factors. Appellants barely try to show otherwise, instead mainly just repeating their merits assertions and insisting that the City has the prerogative to zone as it sees fit despite contrary federal legislation.

The preliminary injunction should be affirmed.

Argument

I. The City Misstates The Preliminary Injunction Standard

The City recites the familiar four-factor test to determine whether a preliminary injunction is warranted: "(1) the likelihood that the plaintiff will prevail on the merits; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest." Br. 10 (citing *Gerardi v. Pelullo,* 16 F.3d 1363, 1373 (3d Cir. 1994), and *Opticians Ass'n v. Indep. Opticians of Am.*, 920 F.2d 187, 191-92 (3d Cir. 1990)). With regard to the "likelihood" factor, "[a] 'likelihood' does not mean more likely than not." *Singer*

Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011) (*en banc*); *accord, e.g.*, *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) ("likelihood" means "significantly better than negligible but not necessarily more likely than not").

After reciting the correct test, the City states incorrectly that Care One must "establish[] all four factors in its favor"; supposedly, "[t]he burden lies with the plaintiff to establish **every element** in its favor, or the grant of a preliminary injunction is inappropriate." Br. 10; *see also id.* at 15 (same).

But a plaintiff is not required to satisfy *all four* factors. Instead, as this Court has "repeated[ly]" stated, "a district court—in its sound discretion—should balance those four factors so long as the party seeking the injunction meets the threshold on the first two." *Reilly*, 858 F.3d at 176; *see also Tenafly Eruv Ass'n*, 309 F.3d at 157. The district court cited *Reilly* extensively. JA9, 26, 27, 28.

The City relies on a line of cases the *Reilly* court dismissed as "inconsistent" with prevailing circuit precedent. 858 F.3d at 177. A plaintiff must satisfy the two "gateway factors"; if it does, then the court can "consider[] the remaining two factors and determine[] *in its sound discretion* if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.* at 179 (emphasis added).

This Court reviews the issuance of a preliminary injunction under a "three-part standard: findings of fact are reviewed for clear error, conclusions of law are

evaluated under a plenary standard, and the ultimate decision to grant the preliminary injunction is reviewed for abuse of discretion." *N.J. Primary Care Ass'n Inc. v. N.J. Dep't of Human Servs.*, 722 F.3d 527, 535 (3d Cir. 2013). "Any determination that is a prerequisite to the issuance of an injunction . . . is reviewed according to the standard applicable to that particular determination." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).[3] Therefore, though this Court exercises "plenary review over the district court's conclusions of law and its application of the law to the facts," it reviews "findings of fact for clear error, which occurs when [it is] left with a definite and firm conviction that a mistake has been committed." *Duraco Prods., Inc. v. Joy Plastic Enters., Ltd.*, 40 F.3d 1431, 1438 (3d Cir. 1994).

II. The District Court Correctly Ruled That Care One Is Likely To Prevail On Its Disparate-Treatment Claim

A. The District Court Correctly Determined That The Ordinance Is Facially Discriminatory

The FHAA prohibits housing discrimination against persons with handicaps. It reflects Congress's "'clear pronouncement of a national commitment to *end the unnecessary exclusion of persons with handicaps* from the American mainstream.'" *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1105 (3d Cir. 1996) (emphasis in original) (quoting H.R. Rep. No. 100-711, at 18 (1988)). Recognizing that

[3] All internal quotation marks and citations are omitted unless otherwise noted.

discrimination against the handicapped has been effectuated through "land-use requirements on congregate living arrangements among non-related persons with disabilities," Congress understood that the FHAA must apply to "zoning decisions and practices." H.R. Rep. No. 100-711, at 24. This Court has recognized that "'the Act is intended to prohibit the imposition of terms or conditions which have the effect of excluding congregate living arrangements for persons with handicaps,'" *Hovsons*, 89 F.3d at 1106 (quoting H.R. Rep. No. 100-711 at 24), and to safeguard "the ability of [handicapped] individuals to live in the residence of their choice in the community." *Id*. at 1105.

The Ordinance discriminates against the elderly handicapped citizens of Englewood in the manner that the FHAA was intended to prevent. The express terms of the Ordinance "exclud[e] congregate living arrangements for persons with handicaps" from 26 of the City's 27 zoning districts, and from *all* the City's primarily residential neighborhoods, thereby preventing handicapped persons from living in the neighborhood of their choice. *Id.* at 1106. Therefore, the district court correctly determined that Appellees are likely to prevail on their disparate-treatment claim because the Ordinance discriminates on its face against person with handicaps. JA26.

1. The Ordinance discriminates on its face against handicapped persons.

In general, as already noted, plaintiffs alleging that a housing practice violates the FHAA can bring three types of claims: (1) claims of intentional discrimination (also called disparate-treatment claims); (2) disparate-impact claims; or (3) claims that a defendant refused to make "reasonable accommodations" to the plaintiff's disability. *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005). "[F]acially discriminatory actions are just a type of intentional discrimination or disparate treatment, and should be treated as such." *Larkin v. State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996); *see Wind Gap*, 421 F.3d at 177 (addressing claims of "disparate treatment through explicit facial discrimination").

Appellees' complaint asserts all three forms of discrimination. The district court based its ruling on Appellees' likelihood of success, however, only on their facial disparate-treatment claim. JA26-27. As Appellants concede, only that claim is before this Court. Br. 18.

To make out a prima facie case of facial discrimination, a plaintiff must show only that "a regulation or policy facially discriminates on the basis of a protected trait." *Wind Gap*, 421 F.3d at 177. In other words, "the focus is on the 'explicit terms of the discrimination'" and not the motive or intent behind it. *Id.*

"Disparate treatment" involves the "differential treatment of similarly situated persons or groups." *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d

926, 933 (2d Cir.), *aff'd in part*, 488 U.S. 15 (1988). That "the defendant expressly treats someone protected by the FHAA in a different manner than others" is enough to establish a prima facie case of intentional discrimination. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995).

Appellants argue that "facial challenges are disfavored," and that zoning ordinances are "insulated from attack." Br. 18-19. But no case Appellants cite for this point involved facial challenges under the FHAA to discriminatory housing practices.[4] In this area of the law, by contrast to Appellants' cases, "[r]ecognizing the purpose and breadth of provisions of the FHAA, courts have consistently invalidated a wide range of municipal licensing, zoning and other regulatory practices affecting persons with disabilities." *Potomac Grp. Home Corp. v. Montgomery Cty., Md.*, 823 F. Supp. 1285, 1294 (D. Md. 1993) (collecting cases). Indeed, in *Wind Gap*, 421 F.3d at 180, this Court listed five cases striking down regulations that facially discriminated based on handicapped status.

Appellants likewise err in arguing that a party cannot prevail on a facial discrimination claim where, as here, the parties disagree concerning the "interpretation" of the Ordinance. Br. 21. Parties disagree all the time about what

[4] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (First Amendment challenge to voting law); *Rumson Estates, Inc. v. Mayor & Council of Borough of Fair Haven*, 828 A.2d 317 (N.J. 2003) (as-applied challenge to zoning ordinance as *ultra vires* under state law); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (as-applied constitutional challenges to village zoning ordinance).

enactments mean, but such disagreement does not stop courts from finding enactments facially discriminatory. *See, e.g.*, *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 304 (3d Cir. 2007) (addressing competing interpretations of statute and concluding that it "facially singles out methadone clinics, and thereby methadone patients, for different treatment"); *Erie Cty. Retirees Ass'n v. Cty. of Erie, Pa.*, 220 F.3d 193, 215 (3d Cir. 2000) (interpreting county retirement policy and concluding that Medicare status was a "proxy" for age, thereby rendering policy facially discriminatory); *Mont. Fair Hous., Inc. v. City of Bozeman*, 854 F. Supp. 2d 832, 837 (D. Mont. 2012) (rejecting city's interpretation of zoning ordinance and holding that it clearly "discriminates against the handicapped"); *Nev. Fair Hous. Ctr., Inc. v. Clark Cty.*, 565 F. Supp. 2d 1178, 1183-84 (D. Nev. 2008) (disagreeing with defendant's interpretation of Nevada's group-home statute and concluding that it facially discriminates against the handicapped).

This is a clear-cut case of facial discrimination in violation of the FHAA. For each of the City's residential districts, the Ordinance provides a comprehensive list of "[p]ermitted uses" and prohibits all other uses. *E.g.*, Zoning Ordinance § 250-59(B), JA361 (listing "[p]ermitted uses" for "one-family residence districts"); *id.* § 250-61(B), JA380 (listing "[p]ermitted uses" for "Multiple Residence (RMB) District"); *id.* § 250-60, JA372-73; *id.* § 250-65, JA409-10. In one-family residence districts, including the R-AAA, "[p]ermitted uses" include "one-family

dwelling[s],” “[p]ublic schools and private nonprofit day schools,” and “[p]laces of worship.” JA360-62. The ordinance states: “Within a one-family residence district**,** no land or building shall be used, nor shall any building be constructed, altered or designed to be used, *for any purposes other than* the following [specifically identified uses].” § 250-59(B), JA361 (emphasis added).

Assisted-living facilities are not on the list of permitted uses for the R-AAA or any other districts zoned primarily for residential use. Instead, assisted-living facilities are expressly identified as permitted uses in only one of the City’s zones, which is not predominantly residential: the Research, Industry and Medical (RIM) District. § 250-72, JA434-35.

The express terms of the Ordinance accordingly prohibit assisted-living facilities in all zones outside of the RIM District. That prohibition was not an oversight. As is made explicit on the face of the Ordinance itself, it was the City’s intent to segregate assisted-living facilities and similar uses from the rest of the City to create “a health care village that offers care and living opportunities for older persons” and to zone senior housing into that village. *Id.*

Consequently, the elderly handicapped citizens of Englewood requiring congregate care are excluded from the City’s single-family and multi-family residential areas, whereas citizens who are not disabled can choose to live in any of the City’s 24 residential districts. JA26. This express segregation to the RIM District

of disabled senior citizens in need of congregate care constitutes facial discrimination "on the basis of the protected trait," in violation of the FHAA. *Wind Gap*, 421 F.3d at 177.

Appellants barely acknowledge the express terms of the Ordinance that confine assisted-living facilities to the RIM District. Instead, their main argument on appeal, repeated throughout the brief, is that the Ordinance is not discriminatory because *one portion of it*—the portion defining the permitted uses in the R-AAA Zone—does not mention or expressly preclude assisted-living facilities. *E.g.*, Br. 16 (describing the ordinance at issue as only the R-AAA Zone); *id.* at 30 ("no suspect classification even mentioned in the R-AAA Zone"); *id.* at 40 ("the R-AAA Zone is completely devoid of any language explicitly referring to the protected class"). But the question is *not* whether a single, isolated *portion* of the Ordinance expressly discriminates, but whether the terms of the Ordinance as a whole subject a member of a protected class to unequal treatment. *See Wind Gap*, 421 F.3d at 177.

Like statutes, ordinances "must be read in their entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole." *In re Petition for Referendum on City of Trenton Ordinance 09-02*, 990 A.2d 1109, 1115 (N.J. 2010) (*per curiam*); *AMN, Inc. of N.J. v. S. Brunswick Twp. Rent Leveling Bd.*, 461 A.2d 1138, 1141 (N.J. 1983) ("[I]t is well established that courts apply the same rules of judicial construction [to the language of an

ordinance] as they apply when construing statutes."); *State v. Quality Mgmt. Assocs. of N.J., Inc.*, No. A-6286-08T4, 2011 WL 9827, at *5 (N.J. Super. Ct. App. Div. July 14, 2010) (same for ordinances); *accord* 4 Am. Law. Zoning § 41:11 (5th ed. 2019) (When construing a zoning ordinance, "[s]pecific language must be construed in the context of the entire ordinance so that all parts thereof may be given their intended effect, that the relations between terms may be understood, and that the ordinance may be construed as a harmonious whole.").

For example, the defendant in *Grancagnola v. Planning Board of Township of Borough of Verona* sought to build a mixed-used building that included retail space in a zone designated as "Residential-Office." 533 A.2d 982, 983-85 (N.J. Super. Ct. App. Div. 1987). The zoning code permitted one-family residences as of right in that zone, and conditionally allowed "mixed uses," defining that term as "mixed residential and commercial uses," but did not define "commercial uses." *Id.* at 985. The plaintiffs challenging the defendant's proposed development argued that "commercial uses," as defined by the code, did not include retail uses. *Id.*

The court agreed. Rather than reviewing the "Residential-Office" provision in isolation, the court examined the entire zoning code to determine whether retail stores would be permitted in defendant's desired zone. *Id.* Although the court had "no doubt that an authorization for 'commercial uses' could be properly construed in many contexts to include retails stores," it was clear that the city's zoning code

"treat[ed] retail stores as a separate category of use from other commercial uses, because it provides separate, specific authorization for retail stores in several zones." *Id.* In other words, although "retail" was not mentioned in the "Residential-Office" district, that absence combined with how other parts of the code treated retail made it clear that retail uses were not authorized in the "Residential-Office" district. *Id.* at 985-86; *see also Dumont Lowden, Inc. v. Hansen*, 183 A.2d 16 (N.J. 1962) (reading zoning map and text of zoning code together to determine whether a specific parcel was zoned residential or was merely unzoned).

The Ordinance, read as a "harmonious whole," makes it pellucid that assisted-living facilities are prohibited in all zones but the RIM District. The provision of the Ordinance applicable to the R-AAA states that "no land or building shall be used, nor shall any building be constructed, altered or designed to be used, for any purposes other than" an exhaustive list of uses. § 250-59, JA360-62. Assisted-living facilities are not on the exhaustive list of "[p]ermitted uses" in the R-AAA Zone, and the Ordinance expressly *prohibits* all other uses. § 250-59, JA360-62; *see* 1 Rathkopf's The Law of Zoning and Planning § 5:18 (4th ed. 2019) [hereinafter Rathkopf] ("Where [an] ordinance states that no land or building may be used except for those uses specified, the listing of permissive uses necessarily implies the exclusion of others.").

That would be enough, but the clear import of that express prohibition is reinforced by the "separate, specific authorization for" assisted-living facilities in the RIM District. *See Grancagnola*, 533 A.2d at 985-86. As in *Grancagnola*, any question whether a specific use is prohibited in one zone can be answered here by reference to how that use is treated in another zone. *See id.*; Rathkopf § 5:18 ("[T]he legislative intent to exclude a use in one district is emphasized by the inclusion of the use as a specifically permitted use under another classification.").

Contrary to Appellants' suggestion, Br. 20-24 & Heading C.1, the district court did not accept their argument that the Ordinance contains "no Express Discriminatory Language." The court noted that the *portion* of the ordinance defining the R-AAA Zone contains no express discriminatory language, *see* JA14 ("There is no express language . . . prohibiting or discriminating against either the elderly or the handicapped *in any of these [residential] district*s." (emphasis added)). But the court then considered the Ordinance in its entirety, as the case law required it to do, and concluded that it "*expressly prohibit[s]* congregate-living facilities" from the districts in which single-family homes and multifamily residences are permitted uses. JA22 (emphasis added).

Nearly all of Appellants' arguments on appeal are based on the flawed premise that this case relates to only one portion of the Ordinance—the R-AAA Zone definition—and not the Ordinance as a whole. Appellants argue, for example, that,

"[s]ince there is no explicit discriminatory language, . . . a land use application and a request for variance relief was required to determine whether the use would in fact be permitted." Br. 23. But there *is* explicit discriminatory language.

Moreover, the presence of explicit discriminatory language shows why Appellants have no serious ripeness or exhaustion arguments to raise.[5] This Court can (and should) evaluate the merits of Appellees' facial challenge by analyzing the express terms of the challenged ordinance. This Court does not need the benefit of a variance request or a land use application.[6]

Again focusing on the R-AAA Zone definition rather than the Ordinance as a whole, Appellants argue that the Ordinance must be upheld because of an "absence of language" that discriminates against handicapped individuals requiring congregate care. Br. 36-38. But there is no "absence of language"; the Ordinance *expressly* classifies "assisted-living facilities" as permitted in the RIM District and only the RIM District and *expressly* prohibits congregate-living facilities in all other zones. Because "the Act 'is intended to prohibit the imposition of terms or conditions

[5] Appellants concede (as they did at the preliminary injunction hearing before the district court, *see* JA1038-39) that, under well-established law, exhaustion is not required for a disparate-treatment claim based on a facial challence to an ordinance, which becomes ripe at the time the challenged ordinance was enacted. Br. 18; *see Cty. Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) (finality rule "does not apply . . . to *facial* attacks on a zoning ordinance").

[6] Because this appeal relates to Appellees' facial disparate-treatment challenge to the Ordinance only, this Court need not reach Appellants' argument that, if the "prohibitive language" in the Ordinance could give rise to "a disparate impact claim (or even a reasonable accommodation claim), exhaustion would first be required." Br. 22. But in any event, Plaintiffs satisfied any applicable exhaustion requirements before bringing those claims. *See* Dist. Ct. Dkt. 23 at pp. 9-15.

which have the effect of excluding congregate living arrangements for persons with handicaps,'" *Hovsons*, 89 F.3d at 1106 (quoting H.R. Rep. No. 100-711 at 24), an exclusion of congregate-living facilities is a recognized form of discrimination against the handicapped. Thus, unlike the policy at issue in *Marriott Senior Living Services, Inc. v. Springfield Township*, the Ordinance "specifically address[es] the treatment of handicapped or disabled persons." 78 F. Supp 2d 376, 388 (E.D. Pa. 1999).

Appellants argue that it defies "common sense" and "logic" to find facial discrimination based on the City's amendment of the Ordinance to include "assisted living facilities" as a permitted use as of right in the RIM Zone, thereby giving the handicapped "preferential" treatment in that zone. Br. 38. But the City's decision to give handicapped persons "preferential" treatment in their own isolated and predominantly non-residential neighborhood only underscores that this is a case of intentional differential treatment on the basis of a protected trait. However benign the City may think its motive for doing so, such express differential treatment constitutes discrimination under the FHAA.

Appellants also argue—again resting on their narrow reading of the Ordinance as including only the R-AAA Zone definition—that, because the Zoning Ordinance "simply has no discriminatory language to be removed," the district court "usurped the local government's authority" by finding the statute facially discriminatory.

Br. 38-39. Where there is a violation of the FHAA, however, the court has express statutory authority to "grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)." 42 U.S.C. § 3613(c). This Court has accordingly enjoined "the enforcement of [a] zoning ordinance that purported to bar construction of a nursing home at the specific location in question." *Hovson*, 89 F.3d at 1106 & n.5. The district court had (and has) ample remedial authority.

Appellants attempt to distinguish *Bozeman*, 854 F. Supp. 2d at 837—in which the court struck down an analogous zoning ordinance as facially discriminatory—based again on their piecemeal approach to construing the Ordinance. They argue that, unlike the zoning ordinance in that case, here "the R-AAA Zone is completely devoid of any language explicitly referring to the protect class." Br. 40. But, for the reasons already discussed, that is not so, and *Bozeman* is directly on point.

Bozeman involved a zoning ordinance that, like the Ordinance at issue here, exhaustively listed the "Authorized Uses" in each zone, using a table that designated permitted uses with a "P," conditional uses with a "C," and prohibited uses with a "—". 854 F. Supp. 2d at 837. Assisted-living facilities were "permitted in one zoning district, allowed on a conditional basis in two districts, and not permitted in four districts." *Id.* at 834, 837. "Single-household dwellings," in contrast, were permitted

in all seven residential zones. *Id.* at 837. The court in *Bozeman* concluded that "[o]n its face . . . the Authorized Uses Section applies less favorably to a protected group, i.e., individuals who require assisted living care due to disabilities." *Id.*

Here too, the "plain language" of the City's Zoning Ordinance prohibits assisted-living facilities in all but the RIM District. As in *Bozeman*, the City's Zoning Ordinance allows assisted-living facilities only in the RIM District and allows a variety of single- and multi-family housing in all other zones. Indeed, the discrimination on the face of the Ordinance here is even broader than in *Bozeman*, where the city allowed assisted-living facilities as conditional uses in two additional zones.

2. Because the Ordinance discriminates on its face, discriminatory motive is irrelevant, but in any event was present here.

Because the ordinance explicitly discriminates against the City's elderly citizens who require congregate care, this Court need not look beyond the plain text of the ordinance to affirm the district court's determination that Appellees are likely to prevail on their facial discrimination claim. As this Court has directly held, "where a plaintiff demonstrates that the challenged action involves disparate treatment through explicit facial discrimination, or a facially discriminatory classification, 'a plaintiff need not prove the malice or discriminatory animus of a defendant.'" *Wind Gap*, 421 F.3d at 177 (quoting *Bangerter*, 46 F.3d at 1501).

"Rather, the focus is on the 'explicit terms of the discrimination.'" *Id.* (quoting *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)); s*ee also DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 726 (3d Cir. 1995) ("[I]n a facial disparate treatment case, the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis," and thus plaintiff "is relieved from independently proving intent.").

Indeed, Appellants *concede* this point more than once in their opening brief. Br. 24, Heading C.2 ("discriminatory motive was irrelevant"); Br. 25 (conceding that, where an ordinance discriminates on its face, "it would be irrelevant what the intent behind the ordinance was since the language explicitly discriminates"). Appellants nevertheless argue that "no discriminatory purpose . . . was a 'motivating factor' behind the challenged action." Br. 26.

Appellants cite *Eastampton Center, LLC v. Township of Eastampton*, 155 F. Supp. 2d 102, 111 (D.N.J. 2001), to suggest that "a plaintiff must make a showing that discriminatory intent . . . was a motivating factor." Br. 26. In that non-binding district court case, however, the district court merely explained that a plaintiff "*can establish* a prima facie case of intentional discrimination by showing that discriminatory intent . . . was a motivating factor[.]" *Eastampton*, 155 F. Supp. 2d at 111 (emphasis added) & n.7. The court did not address whether courts are *required*

to evaluate intent in cases of express facial discrimination, whereas this Court has held expressly that they are not. *DiBiase*, 48 F.3d at 726; *Wind Gap*, 421 F.3d at 177.

Though the point is irrelevant, the record is clear that a discriminatory purpose *did* motivate the City's Ordinance. To show a discriminatory purpose, "[a] plaintiff is only required to show that a protected characteristic played a role in the defendant's decision to treat her differently." *Wind Gap*, 421 F.3d at 177. The Ordinance on its face shows that the City made a deliberate choice to segregate living facilities for persons in need of congregate care from its single-family residential districts. A stated purpose of the Ordinance is the creation of a "health care village" in the RIM District "that offers care and living opportunities for older persons" near "existing medical and health care services," JA435, leaving no doubt that the City intended to "treat . . . differently" elderly handicapped persons. *Wind Gap*, 421 F.3d at 177. Appellants embraced this rationale in their emergency stay papers, arguing that keeping "seniors and/or those needing assistance" close to useful services and business was a legitimate justification for placing "assisted living facilities" in the RIM District. Stay Mot. 19.

Critically, a "discriminatory purpose need not be malicious or invidious," or "'evil or hostile.'" *Wind Gap*, 421 F.3d at 177 (quoting *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 696 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993)). "It is a violation of the

FHAA to discriminate even if the motive was benign or paternalistic." *Id.* For example, in *Larkin v. State of Michigan Department of Social Services*—a case cited by this Court in *Wind Gap* as involving "obvious" facial discrimination based on handicapped status, 421 F.3d at 180—the Sixth Circuit invalidated as facially discriminatory a Michigan statute that imposed spacing requirements on group homes "based on the paternalistic idea that [the State] knows best where the disabled should choose to live." 89 F. 3d 285, 291 (6th Cir. 1996).

The City's decision to place handicapped elderly citizens in the RIM Zone to facilitate their access to medical services in a "health care village" may have been grounded in the best intentions. But that does not make the restrictions the City has placed on where its handicapped citizens can live any less discriminatory under the FHAA. And, though admirable, the fact that the City generally is an "inclusive" and "progressive community" that cares about fair housing and long-term care, *see* Br. 27-28, has no bearing on whether it intended through the challenged zoning ordinance to treat its handicapped citizens differently.

Nor is there merit to Appellants' argument that the City cannot be found to have acted with "discriminatory purpose" because "there simply was no action taken." Br. 27. The City acted when it passed the Ordinance—the express terms of which convey an intent to treat handicapped persons differently. *See, e.g., Cmty. Servs., Inc. v. Heidelberg Twp.*, 439 F. Supp. 2d 380, 397 (M.D. Pa. 2006) (township

acted with a discriminatory purpose when it passed a facially discriminatory ordinance). Appellants repeat their mantra that there was no variance applied for or specific action taken in response to a zoning application, Br. 27, but they cite no authority for the suggestion that this Court cannot discern discriminatory intent from the face of the Ordinance itself, without the need for further administrative proceedings. Indeed, the ability to discern discriminatory treatment from the face of the statute is precisely why, on a facial challenge, no independent inquiry into intent is needed. *Horizon House*, 804 F. Supp. at 694 ("motives of drafters of a facially discriminating ordinance" are "irrelevant" because "court must focus on the explicit terms of the ordinance").

3. The Ordinance discriminates "on the basis" of handicap.

Appellants argue that the district court failed to analyze whether the Ordinance discriminated "because of a handicap." Br. 29-32. That is incorrect. The district court concluded that Appellants were likely to prevail on their claim that the Ordinance "treat[s] the handicapped needing congrega[te] care differently from other individuals *because of* their handicap." JA23 (emphasis added). Although the district court did not separately discuss this element of Appellees' facial discrimination claim, Third Circuit precedent does not require courts to do so. To the contrary, this Court noted in *Wind Gap* that this element of an FHAA claim "is very often glossed over or, perhaps, so obvious as not worthy of discussion." 421 F.3d at 178.

The Court in *Wind Gap* extensively discussed whether the alleged discrimination there was "because of" a handicap because *Wind Gap* was a "proxy" case, in which the Court had to address whether a "technically neutral classification" was being used as a proxy for discrimination based on handicapped status. *Id.* at 177-79. Not surprisingly, in such cases assessing "whether 'handicapped' or 'disabled' status . . . [is] the *basis* for different treatment," may not be "so obvious" and may require a more focused inquiry. *Id.*

The local regulation at issue in *Wind Gap*, for example, classified "personal care homes" as "commercial" rather than "residential" facilities for the purpose of assessing sewer services management fees. *Id.* at 181. But the regulation did not define "personal care home," and thus the Court had to determine whether the term was a "proxy for handicapped status." *Id.* at 171. The Court ultimately concluded for two reasons that the case did not "lend[] itself to a facially discriminatory classification theory." *Id.* at 179. Neither reason applies here.

First, the Court held that "[a] plain reading of the relevant regulation does not support the . . . conclusion that 'personal care home' is facially discriminatory . . . because of the residents' disabilities." *Id.* at 184. "On its face," said the Court, "the term 'personal care home' has nothing to do with handicapped or disabled status," but rather could include any number of facilities providing services to residents that do not fall within the FHAA's definition of handicapped—including "the elderly;

juveniles (including juvenile delinquents, abused or neglected children, or orphans); the homeless; battered women; or ex-criminal offenders." *Id.* at 179.

Here, by contrast, the Court is not faced with a "technically neutral" classification. In New Jersey, "assisted living" means "a coordinated array of supportive personal and health services, available 24 hours per day, to residents who have been assessed to need these services." N.J. Admin. Code § 8:36-1.3. The term "assisted-living facilities" thus necessarily refers to residential facilities providing services to persons that fall within the FHAA's definition of handicapped, *i.e.*, persons with a "physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h); *see Assisted Living Assocs. of Moorestown, L.L.C. v. Moorestown Twp.*, 996 F. Supp. 409, 416 (D.N.J. 1998) ("A typical resident of an assisted living facility needs assistance with two or more basic daily activities, such as, toileting, bathing, or dressing[.]").[7] This is not a proxy case that requires a focused inquiry into whether an undefined term implicitly makes disability the basis of the discrimination. The text of the Ordinance uses terminology that makes the discrimination plain.

[7] According to a report published by the New Jersey Department of Health, 90% of assisted living facility residents in New Jersey require assistance with one or more "activities of daily living," and more than 60% require assistance with four or more of these activities. State of New Jersey Department of Health, Division of Certificate of Need and Licensing, Assisted Living: 2016 Resident Profile Survey Results, at 12 (July 2017), https://www.nj.gov/health/healthfacilities/documents/2016_alrps_survey_results.pdf

Second, the *Wind Gap* Court determined that it was appropriate in proxy cases to look beyond the face of the statute "to ferret out any indicia that the disparate treatment was *covertly* 'because of' a handicap." 421 F.3d at 179 (emphasis added). It then articulated four reasons why the "fact pattern" of that case was distinguishable from "true 'proxy' cases where courts have had little difficulty leaping from the term 'personal care home' – or something substantially equivalent – to discrimination based on handicapped status." *Id.* at 180. Appellants suggest that this Court must evaluate those same four elements here, *see* Br. 26-27, but the *Wind Gap* Court did not establish a new standard for determining whether a regulation discriminates "on the basis" of a handicap. It merely explained the factors that justified its conclusion that use of the undefined term "personal care home" in a fee-setting regulation, without more, did not constitute facial discrimination against the handicapped.

For example, the regulation in *Wind Gap* did not "single out" facilities for the disabled to pay higher sewer fees, but instead grouped "personal care homes"— "the alleged proxy for disabled status"—with a number of different "multi-adult rooming facilities" (hotels, motels, nursing homes, boarding houses) that typically charge a fee. 421 F.3d at 181. The fact of housing multiple adults, not the need for personal care itself, determined the applicable fees.

The same cannot be said here. "Assisted-living facility" is grouped in the RIM District with "Medical and Health Care" land uses, reflecting that these facilities are

being singled out for segregation into a single zone—not merely for different fees—because of the medical needs of the residents, which of course is what makes them handicapped and in need of assisted living. The stated "purpose" of the RIM District to develop a single zone where seniors can live near medical services only serves to reinforce the ineluctable conclusion that the need for such services is what drives the classification. JA435. And the very impairments that make individuals handicapped within the meaning of the FHAA are what drive the need for such services in assisted-living facilities.

As the Court observed in *Wind Gap*, in most proxy cases in which challenged regulations are found facially invalid, "defendant's purported reason for treating plaintiff's facility differently [i]s predicated on some [unsupported or invalid] justification for treating *disabled persons* differently." 421 F.3d at 182 (emphasis in original). There, the treatment of numerous multi-adult facilities alike for sewer management fees, by contrast, suggested that the rationale for the different treatment was related to the facilities' commercial status, rather than the disabled status of the residents: "'[C]ommercial' facilities have a greater proportionate use of the municipality's sewer service as compared to 'residential' units and, therefore, should bear a greater proportionate share of the cost." *Id.* at 183. And, to repeat, here the City is not just charging different fees to a wide swath of entities including assisted living facilities. Instead, it is segregating such facilities into the far southwestern

portion of the City and expressly advances as one rationale the desire to keep assisted-living facilities "close to services and businesses useful to senior and/or those needing assistance" and to "creat[e] . . . a health-care village," Br. 44-45.

Appellants attempt to analogize this case to *Wind Gap* by again inviting the Court to analyze only a portion of the statute—the portion addressing the R-AAA Zone—which, Appellants say, does not even mention "assisted-living facilities" and does not use a "proxy" to "single out" the handicapped. Br. 30. But the Ordinance as a whole singles out facilities for the handicapped not for their "commercial, for-profit" status, as Appellants suggest (Br. 31), but because they provide medical and health services to disabled individuals requiring congregate care. The City's view that such facilities belong in the RIM District with other medical and health facilities, and not among the City's residential neighborhoods, is the very discrimination at issue.

Appellants also insist that the Ordinance does not discriminate "on the basis" of handicap because the City's elderly handicapped residents—including those in need of congregate care—are free under the plain terms of the ordinance to live in the R-AAA Zone, so long as they don't need to pay for that care. Br. 30-31 (citing ordinance's definition of "dwelling, one-family" and "family"). Thus, the argument goes, any differential treatment against assisted-living facilities must, like the

differential fees in *Wind Gap*, exist "because of" the "'for-profit' commercial" nature of the entities providing such care.

That argument falters on two grounds. First, it lacks a textual basis. The definition of one-family dwellings expressly excludes congregate-living facilities that are "dependent upon the payment of a fixed rent or room charge," JA352, and would apply on its face to bar from the R-AAA Zone non-profit and for-profit congregate-care facilities alike. Thus, there is no evidence in the text (or otherwise) of an attempt to discriminate based on for-profit status. And, although the ordinance would arguably allow congregate-care facilities in the R-AAA Zone that require no payment for services, no assisted-living facility could provide "a coordinated array of supportive personal and health services, available 24 hours per day," N.J. Admin. Code § 8:16-1.3, completely free of charge to anyone.

Second, Appellants' insistence that handicapped individuals can live freely in single-family residences in the R-AAA district provides cold comfort indeed. As this Court recognized in *Lapid-Laurel, L.L.C. v. Zoning Board of Adjustments of the Township of Scotch Plains*, 284 F.3d 442, 460 (3d Cir. 2002), "the elderly handicapped" often "must live in some sort of institutional setting in order to receive the assistance or health care that they need." Moreover, "[t]hat a law may not burden all members of the protected class does not remove its facially discriminatory character." *Children's All. v. City of Bellevue*, 950 F. Supp. 1491, 1496 n.8 (W.D.

Wash. 1997). The Ordinance prohibits those requiring congregate care from assisted-living facilities from living in all but the RIM District. Although some handicapped individuals may be able to live in the R-AAA Zone in a one-family dwelling, those requiring congregate care may not, and the exclusion of those handicapped persons from the City's single-family residential zones is what violates the FHAA. Furthermore, Orthodox Jews requiring congregate care and wishing to live in an *eruv* must live in the R-AAA district in which the Facility is planned, but the Ordinance prevents them from doing so.

Finally, Appellants contend that "[t]he mere fact that it may have been 'intentional' to render assisted-living facilities as permitted uses in only [one] zone"—the industrial RIM District—"does not equate to an improper basis but rather is a fundamental principle of the City's zoning powers." Br. 32. That statement is completely at odds with the FHAA. The City's zoning power certainly may give it the power to relegate countless commercial or residential facilities to the RIM Zone—hotels, multi-family residences, apartment buildings, and the like. But unlike handicapped persons, the residents of those facilities are not a specifically protected class under the FHAA (or any other statute). *See Wind Gap*, 421 F.3d at 183 n.11.

An intentional decision to permit handicapped individuals requiring assisted living to reside in only one zone in all of Englewood—and one that is not even residential in nature—is differential treatment "based on" a handicap and is precisely

of the type the FHAA was meant to proscribe: one with "the effect of excluding . . . congregate living arrangements for persons with handicaps" from select neighborhoods. *Hovsons*, 89 F.3d at 1106; *see Lapid-Laurel*, 284 F.3d at 460 (agreeing with numerous other courts that "'equal opportunity' . . . to live in a single-family residential neighborhood" is protected by the FHAA).

4. This Court's decision in *Lapid-Laurel* did not involve a disparate-treatment claim.

Appellants argue that, in finding Appellees likely to prevail on their facial discrimination claim, the district court ignored this Court's decision in *Lapid-Laurel*. Br. 32-36. Not so. The district court cited *Lapid-Laurel*, JA16-17, but had no reason to discuss it at length because *it did not involve a facial discrimination claim*.

The plaintiffs in that case argued that the Township of Scotch Plains' zoning ordinances violated the FHAA because they had "a disparate impact on the elderly handicapped," and that the Township's Zoning Board of Adjustments had "failed to make reasonable accommodations in order to facilitate housing for the elderly handicapped." *Lapid-Laurel*, 284 F.3d at 446. This Court affirmed the district court's decision granting summary judgment to the Township and Zoning Board on both the disparate-impact and reasonable-accommodation claims. As Appellants concede (Br. 34), however, the plaintiffs did not mount—and the Court thus had no opportunity to address—a disparate-treatment claim. *Id.*at 448 n.3.

Appellants nevertheless ask this Court to conclude that the *Lapid-Laurel* Court would never have upheld a facially discriminatory ordinance and thus, because it rejected the plaintiffs' disparate-impact and reasonable-accommodation claims, it must have first decided that the ordinance was not discriminatory on its face. Br. 34. And so, say Appellants, because this Court in *Lapid-Laurel* "construed" and upheld an "almost identical" ordinance, that case "establish[es]" that the City's ordinance is not facially discriminatory. Br. 36.

This argument suffers from several logical missteps, not least of which is that it is universally accepted that "'questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Grant v. Shalala*, 989 F.2d 1332, 1341 (3d Cir. 1993) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). *Lapid-Laurel* cannot be read as rejecting a disparate-treatment claim that was never brought. And Appellants cited no authority for the assertion (Br. 25) that *any* ordinance that is upheld against a disparate-impact claim *must* be facially valid. *Cf. Bangerter*, 46 F.3d at 1501 (highlighting that the "legal framework for . . . disparate impact[] claims remains inappropriate for [disparate-treatment] case").

Moreover, the issues on appeal in *Lapid-Laurel* turned almost entirely on the proceedings before the Township's Zoning Board. Because the Court was not faced with a facial challenge, the opinion contains virtually no discussion of the text of the

challenged ordinance, except to note generally that it designates only one location in the Township for senior housing—a light industrial area. 284 F.3d at 467. This Court's brief discussion of the ordinance provides slim basis for concluding that the Court "construed" an ordinance "almost identical" to the one at issue here.

Appellants' lengthy discussion of this Court's analysis in *Lapid-Laurel* of the plaintiff's disparate-impact and reasonable-accommodation claims (Br. 33-35) is a distraction. Those claims, though in the complaint, were not the basis of the preliminary injunction here and are not before this Court.

For example, New Jersey's treatment of group homes for the handicapped as "inherently beneficial uses" for zoning purposes, *see* Br. 33, may have been relevant to the disparate-impact claims asserted in *Lapid-Laurel*, where the plaintiffs were tasked with presenting evidence of a "discriminatory pattern" resulting from the challenged ordinance. *Lapid-Laurel*, 284 F.3d at 467-468 & n.10.[8] But Appellants cite no authority suggesting that the possibility that a developer *might overcome*

[8] In *Lapid-Laurel*, the plaintiff failed to show a prima facie case of disparate impact because it presented *no evidence or statistics* at summary judgment that the ordinance resulted in a discriminatory pattern disadvantaging the handicapped. 284 F.3d at 467-68. Appellees, by contrast, even on a limited record at the preliminary injunction stage, offered evidence of a discriminatory impact. Dist. Ct. Dkt. 23 at p. 20-22. The district court made no findings concerning that evidence, however, having granted the preliminary injunction on the basis of Appellees' facial claim. If this Court concludes it must look beyond the facial discrimination claim it should remand for further proceedings below, including proceedings on Appellees' disparate-impact claim, rather than evaluate this evidence in the first instance. Nor should this Court in the first instance address Appellees' reasonable-accommodation claim, which this Court has "cautioned" involves a "highly fact-specific" inquiry, "requiring a case-by-case determination." *Lapid-Laurel*, 284 F.3d at 462.

through a use variance the disparate treatment that exists on the face of a zoning ordinance somehow nullifies the facial discrimination. If that were the case, no zoning ordinance would ever be deemed discriminatory on its face, which is certainly not the law. *See Wind Gap*, 421 F.3d at 180 (collecting cases).

B. The District Court Did Not Abuse Its Discretion In Determining That The City Has No Legitimate Justification For Relegating All Assisted-Living Facilities To The RIM District

"If a[n] [FHAA] plaintiff establishes that a statute or ordinance is facially discriminatory, the burden shifts to the governmental defendant to justify the disparate treatment." *Arc of N.J., Inc. v. New Jersey*, 950 F. Supp. 637, 643 (D.N.J. 1996). A district court is entitled to "discretion . . . in determining whether the defendant has carried its burden of establishing justification for acts resulting in discriminatory effects." *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977). "[A] justification must serve, in theory and practice, a legitimate, bona fide interest of the [FHAA] defendant, *and* the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Id*. (emphasis added).

The district court did not abuse its discretion in concluding that the City has not carried that burden. With regard to the second part of the test—essentially asking whether the chosen acts represent the least restrictive means of effectuating the chosen purpose, *id.*—the City does not even offer an argument. It *never* contends

that the only way it could achieve its chosen purposes is through confining assisted-living facilities to the RIM District.

Instead, it begins its argument on justification with a page-and-a-half-long discussion of *Eastampton* and the finding of the court there that "plaintiffs did not provide credible evidence of a facially neutral ordinance that applied more heavily on one group or another." Br. 41-43. Left unexplained is why the *Eastampton* court's finding that plaintiffs there failed to prove disparate treatment (the first step of the inquiry) has any relevance to the question whether the City has provided legitimate justifications for its facially discriminatory Ordinance (the second step).

After that digression, the City's brief moves into a discussion of the City's supposed purposes in enacting the Ordinance. *Id.* at 43-46. But the City never mentions its burden to show that the Ordinance was the least restrictive means of achieving its purposes, let alone makes such a showing. That failure is fatal. *See, e.g.*, *Rizzo*, 564 F.2d at 149.

The inquiry into legitimate purpose could end there (especially in light of the deferential standard of review), but the flaws in the City's argument do not end with that omission. The City cites two cases to support its purported justifications for its facially discriminatory Ordinance, but both citations are far off point. It cites *Lapid-Laurel* for the proposition that "traffic safety concerns" and "emergency vehicle access" could serve as legitimate justifications for a facially discriminatory statute.

Br. 45 (citing *Lapid-Laurel*, 284 F.3d at 467). But *Lapid-Laurel* dealt only with disparate-impact and reasonable-accommodation claims; it did not address facial challenges at all. *Id.* at 449. And the discussion of traffic concerns and emergency vehicle access came in the *Lapid-Laurel* court's discussion of whether a requested accommodation was reasonable. *Id.* at 462-66.

Even if ameliorating traffic concerns could somehow *require* discriminating against the elderly (instead of, as in *Lapid-Laurel*, bearing on whether a suggested accommodation was reasonable), there is no evidence in the record linking traffic concerns to where assisted-living facilities are located. *See Bangerter*, 46 F.3d at 1503 ("Restrictions [on housing for the handicapped] predicated on public safety . . . must be tailored to particularized concerns about individual residents."). The City's brief vaguely mentions "other evidence of record indicating … safety for all modes of transportation" and cites a statewide law's purpose section but provides no further explanation. Br. 45.

The City's other citation is even less helpful. It cites *Eastampton*, 155 F. Supp. 2d at 108, as "finding legitimate justification when proposed land use amendments were intended to create [a] 'green belt' around the municipality's center to preserve 'the historic open space and environmentally-sensitive areas of the community.'" Br. 45-46. The *Eastampton* court held no such thing. It *never reached* the question of legitimate justification, instead holding that the defendant "Planning Board and

Council were responding to the public sentiment for open space and attempting to engage in sound land use planning" and that such a motive undercut a claim that the defendants discriminated intentionally. *Eastampton*, 155 F. Supp. 2d at 121-22.

What is more, the statements the City cites are taken not from the *Eastampton* court's legal analysis but from its recitation of the facts of the case. *See id.* at 108. In any event, the citation to *Eastampton* shares the same flaw as the *Lapid-Laurel* citation discussed above; the City vaguely alludes to evidence that may be similar to some evidence at issue in *Eastampton*, but it never cites anything specific.

The other justifications the City advances fare no better. The City contends that a "central focus" of its zoning "has always been to preserve the historic 'East Hill area," to keep assisted-living facilities "close to services and businesses useful to senior and/or those needing assistance," and to "creat[e] . . . a health-care village." Br. 44-45. But discrimination against the elderly cannot be justified by a claimed need to preserve a historic or residential area. As this Court said in *Hovsons*, the FHAA "'is intended to prohibit . . . [the imposition of] terms or conditions . . . which have the effect of excluding . . . congregate living arrangements for persons with handicaps." *Hovsons*, 89 F.3d at 1105. As another court correctly observed, "the preservation of a neighborhood's residential character neither benefits the disabled nor responds to a legitimate, non-stereotypical safety concern." *Bozeman*, 854 F. Supp. 2d at 839.

As for creating a health-care village or keeping assisted-living facilities close to services or business useful to seniors, "[w]e should be chary about accepting the justification that a particular restriction upon the handicapped really advances their housing opportunities rather than discriminates against them in housing." *Bangerter*, 46 F.3d at 1504. Restrictions based on "generalizations" about all handicapped persons do "not pass muster." *Id.*; *see Larkin*, 89 F.3d at 291 (rejecting justification for group home spacing requirement that "simply assume[d] that the disabled must be integrated, and d[id] not recognize that the disabled may choose to live near other disabled individuals"). Moreover, even if those goals are legitimate, there simply is no evidence in the record that there is "no alternative course of action . . . that would enable that interest to be served with less discriminatory impact." *Rizzo*, 564 F.2d at 149. A district court does not abuse its discretion by failing to credit an assertion for which the proponent has provided no factual support.

To justify granting the preliminary injunction, the district court had to find that Care One has a likelihood of success on the merits. *Reilly*, 858 F.3d at 177. But "likelihood" does not mean certainty, or even "more likely than not"; instead, it means "a reasonable chance, or probability, of winning." *Singer Mgmt.*, 650 F.3d at 229.

Here, the City has not come close to meeting its burden to demonstrate that "no alternative course of action could be adopted that would enable [the purportedly

legitimate] interest to be served with less discriminatory impact," *Rizzo*, 564 F.2d at 149; indeed, it has not even made an argument on that ground. The interests it has identified receive no support in case law addressing facial challenges, and its "evidence" for their existence consists of nothing but vague and unsupported references to the record. In those circumstances, the district court acted well within its discretion by concluding that Care One has "a reasonable chance" of prevailing on this issue. *Singer Mgmt.*, 650 F.3d at 229.

III. Care One Would Suffer Irreparable Harm Without An Injunction

Because Care One has "demonstrate[d] that it can win on the merits," the district court was authorized in its discretion to assess whether Care One "is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Reilly*, 858 F.3d at 179. The district court did not abuse its discretion by answering that question in the affirmative.

Irreparable harm is *presumed* when an FHAA violation is proved for several different reasons, each applicable to this case. First, the FHAA itself grants courts the right to issue injunctions. *See* 42 U.S.C. § 3613(c)(1). "Some courts have construed such an express Congressional grant of injunctive power to mean that the court can presume irreparable harm based on a showing that an FHAA violation has or is likely to occur." *ReMed Recovery Care Ctrs. v. Twp. of Willistown, Chester Cty., Pa.*, 36 F. Supp. 2d 676, 687 (E.D. Pa. 1999); *accord, e.g., Rogers v. Windmill*

Pointe Vill. Club Ass'n, Inc., 967 F.2d 525, 528 (11th Cir. 1992); *Moorestown*, 996 F. Supp. at 438-39; *901 Ernston Road, LLC v. Borough of Sayreville Zoning Bd. of Adjustment*, Civ. No. 18-2442, 2018 WL 2176175, at *4-5 (D.N.J. May 11, 2018).

This Court has not explicitly adopted that presumption, though (as stated above) many district courts in this Circuit have. In other statutory contexts, however, this Circuit has presumed irreparable harm based on a statute's allowance of injunctive relief. *See, e.g., Gov't of Virgin Islands, Dept. of Conservation and Cultural Affairs v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir. 1983) ("[W]hen a statute contains, either explicitly or implicitly, a finding that violations will harm the public, the courts may grant preliminary equitable relief on a showing of a statutory violation without requiring any additional showing of irreparable harm."), *superseded by statute on other grounds as recognized by Edwards v. HOVENSA, LLC*, 497 F.3d 355, 359 (3d Cir. 2007); *U.S. Postal Serv. v. Beamish*, 466 F.2d 804, 806 (3d Cir. 1972).

Other courts have concluded that the harms the FHAA seeks to prevent render a violation inherently irreparable. For example, some courts have held that discrimination itself always causes an irreparable harm. *See, e.g., Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982) ("Victims of discrimination suffer irreparable injury, regardless of pecuniary damage."). Others, specifically addressing housing, have concluded that FHAA

violations result in irreparable harm because someone "who is discriminated against in the search for housing cannot remain in limbo while a court resolves the matter. He or she must find housing elsewhere, and once that housing is found, . . . it becomes difficult to disrupt new friendships and other community ties by uprooting oneself again." *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984); *accord, e.g., ReMed*, 36 F. Supp. 2d at 687 ("[A] person cannot remain 'in limbo' while a court resolves the matter but must somehow find alternative, temporary housing that will result in disruption of community ties."). And still others have concluded that "there is irreparable harm where the defendant's conduct delays treatment for prospective members of a community residence." *901 Ernston Road*, 2018 WL 2176175, at *4; *accord, e.g., Step by Step, Inc. v. City of Ogdensburg*, 176 F. Supp. 3d 112, 135 (N.D.N.Y. 2016) ("The City's actions have deprived [plaintiff] of its ability to pursue its mission and to provide housing and services to its mentally ill clients and this denial constitutes irreparable harm."); *Easter Seal Soc. of N.J., Inc. v. Twp. of North Bergen*, 798 F. Supp. 228, 236 (D.N.J. 1992) ("[T]he prospective tenants of the community residence currently suffer and will imminently suffer irreparable harm given the delay of their treatment as a result of defendants' actions.").

The reasons laid out in those cases all apply here. First, of course, there is a likelihood of success of proving a violation of the FHAA, so this Court could apply

the *ReMed*/*Virgin* presumption and simply conclude that a violation of the FHAA leads to irreparable harm. Alternatively, the harm of discrimination, *Vietnamese Fishermen's Assoc.*, 543 F. Supp. at 218, and the fact that those seeking to live in the Facility have to live *somewhere* and cannot just remain in limbo, *see, e.g.*, *ReMed*, 36 F. Supp. 2d at 687, both independently constitute irreparable harms that Care One and the Doe Plaintiffs have suffered.

Even aside from any legal presumptions, the factual record shows irreparable harm. There is a delay in treatment here, as in *901 Ernston Road* and *Step-by-Step*; the City's discriminatory Ordinance has caused Care One to be unable to provide services to the Doe Plaintiffs. Indeed, there is not just a delay but a likelihood of no treatment at all if Care One does not prevail; if the injunction is not maintained, then it is unlikely the Facility will ever be built, meaning the Doe Plaintiffs will have difficulty in receiving the care they need. *See* Herten Certification ¶¶ 8-12.

The City addresses little of this. It cites *Lapid Ventures, LLC v. Twp. of Piscataway*, Civ. No. 10-6219 (WJM), 2011 WL 2429314 (D.N.J. June 13, 2011), for "denying preliminary injunction as no irreparable harm where only harm imposed would be delay in building facility if successful at trial and no current danger to hypothetical residents." Br. 47. A different decision by a judge of the same court, reviewing a different record, is scant basis for arguing that the district court here abused its discretion. In any event, the case is very different.

The *Lapid Ventures* court found that the plaintiffs were unable to make out a prima facie case of disparate treatment under the FHAA—not the case here. 2011 WL 2429314 at *8. What is more, the only harm imposed on the plaintiff "should they later [have won] at trial [was] delay in building [its] [f]acility," *id.* at *9; here, by contrast, and as discussed above, removal of the injunction would likely result in the Facility's never being constructed.

There were no plaintiffs in *Lapid Ventures* except the builder, *id.*; here the Doe Plaintiffs are present, and they will be irreparably harmed if the Facility is never built because they will not receive the treatment Care One offers and will lack housing capable of meeting their religious, physical, and medical needs. JA68; *Moorestown*, 996 F. Supp. at 425 (D.N.J. 1996) ("Preventing a developer from providing housing to the elderly and handicapped . . . is [an] injury under the FHA."). Finally, *Lapid Ventures* does not address the point from case law that housing harms are likely to prove irreparable because people have to live somewhere and if one option is removed another has to be chosen.

The remainder of the City's arguments are nothing but warmed-over ripeness complaints. It again asserts that "[Care One] did not submit a land use application," "desired to circumvent . . . land use procedures," and "creat[ed] its own crisis and then ran to Court in the eleventh hour claiming irreparable harm." Br. 48. The apparent thesis is that, if only Care One had applied for a variance, all its problems

would have been solved, and litigation could have been avoided; therefore Care One's harm was of its own making as opposed to irreparable. The City's argument takes as its premise that any application for a variance from the City's own Ordinance would have succeeded, but there is no evidence in the record one way or another on that point.

That point aside, the City's argument again reflects a misunderstanding of the fundamental premises of a facial challenge. This Court has made clear that facial challenges to statutes and ordinances are not subject to the requirement to seek a variance. *See Cty. Concrete*, 442 F.3d at 164. With this argument, the City attempts to smuggle such a requirement in through the irreparable-harm test. That recasting of an argument this Court has rejected is no basis to conclude that the district court abused its discretion.

IV. The Public Interest And Balance Of Equities Favor Care One

Because the Ordinance is facially discriminatory and because the record amply supports the district court's finding that Care One will suffer irreparable harm without an injunction, that court then evaluated the last two preliminary injunction factors: "the possibility of harm to other interested persons from the grant or denial of the injunction, and . . . the public interest." *Reilly*, 858 F.3d at 176; *see also id.* at 179 ("[A] movant for preliminary equitable relief must meet the threshold for the first two 'most critical' factors . . . . If these gateway factors are met, a court then

considers the remaining two factors."). A district court's balancing of the equities and the public interest against the likelihood of success and the irreparable harm suffered by the plaintiff is reviewed for abuse of discretion. *See N.J. Primary Care*, 722 F.3d at 535.

This Court's decision on these factors should be straightforward. To reach this point, the district court had already concluded, with more than sufficient basis to withstand appellate review, that (i) portions of the Ordinance are facially discriminatory and (ii) Care One and the other plaintiffs will suffer irreparable harm if the Ordinance is not enjoined. *Reilly*, 858 F.3d at 179. It is difficult to imagine a case where a court would decline to issue an injunction even after a finding of facial discrimination and irreparable harm.

Unsurprisingly, then, we are aware of, and the City cites, no case where a court concluded that a statute or ordinance was facially discriminatory and caused irreparable harm but nonetheless refused to grant an injunction. Instead, the usual course for courts that make findings of facial discrimination and irreparable harm is to issue an injunction. *See, e.g.*, *Heidelberg*, 439 F. Supp. 2d at 399-401; *Milan v. Pyros*, Civil Action No. 08-320, 2008 WL 1994863, at *24-*27 (W.D. Pa. May 5, 2008). So too here.

The City's main argument on these factors is that the district court was wrong on the merits. Br. 49. But a determination that a plaintiff is likely to succeed is a prerequisite to even begin evaluating the other factors. *Reilly*, 858 F.3d at 179.

Many of the City's other arguments simply ignore that prerequisite. The City argues that denying the injunction "would have permitted the local government to enforce the ordinances it enacted" and "would promote public confidence in local government and the application of localized expertise that zoning boards utilize in determining whether to grant use variances." Br. 50. Given the prerequisite finding of facial discrimination, however, those concerns are irrelevant; as the district court correctly observed, "the enforcement of a discriminatory law vindicates no public interest." JA27 (citing *Moorestown*, 996 F. Supp. at 440).

The City's argument regarding "[Care One]'s self-created emergent application" is similarly flawed. Br. 51. Under the City's view, the public interest would not be vindicated by an injunction because Care One sued to invalidate portions of the Ordinance as facially discriminatory instead of going before the City's zoning personnel. *Id.* This is, again, the City's ripeness argument in another guise. It cannot be against the public interest for Care One not to go before the City's zoning board when this Circuit's precedent permits it to bring a facial challenge without doing so. *See Cty. Concrete*, 442 F.3d at 164.

The City's other citations are faulty as well. It cites two cases for the proposition that "courts typically will not order completed or near completed buildings to be demolished or substantially modified." Br. 50. Perhaps, but it is difficult to see why it matters to the question whether parts of the Ordinance are facially discriminatory and should be enjoined. Nor is it clear why the supposed fact that zoning is the "'process whereby a community defines its essential character,'" Br. 50-51 (quoting *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J., plurality opinion in one case and concurring in judgment in two others)), should be enough to overcome the facially discriminatory nature of the Ordinance.

The City argues that the "injunction forced the enjoined party to take action – in this case to essentially approve [Care One]'s application without consideration of the R-AAA zoning scheme." Br. 51-52. But, as the City conceded below, invalidation of the discriminatory parts of the Ordinance is not tantamount to approval of the Facility. Instead, "'[Care One] would be obligated to proceed before the [City of Englewood] Planning Board.'" JA10 n.9 (quoting JA1060). So the only immediate effect of upholding the decision would be that Care One could attempt to secure the Planning Board's approval, through a process in which concerned citizens and the City itself could be heard.

The district court did not abuse its discretion in balancing the four stay factors and concluding that they favor a preliminary injunction.

Conclusion

The district court's grant of a preliminary injunction should be affirmed.

Dated: February 12, 2020

Respectfully submitted,

By: s/ Roy T. Englert, Jr.

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Counsel certifies as follows:

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3. Pursuant to 3d Cir. LAR 28.3(d), I am a member of the bar of this Court.

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Dated: February 12, 2020

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Certificate of Service

I hereby certify that, on February 12, 2020, I caused a true and correct copy of the foregoing Brief for Appellees to be filed with the Court by CM/ECF. All parties that have appeared are Filing Users and are served electronically by the Notice of Docket Activity generated by CM/ECF.

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