



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Hawai‘i

November 1, 2018

VIA U.S. MAIL AND EMAIL

Wendy Wong
Executive Director
Kahala Nui
4389 Malia Street
Honolulu, Hawai‘i 96821
wwong@kahalanui.com

Re: Memorandum to All Residents on May 11, 2018, Concerning HB 2739

Dear Ms. Wong:

The ACLU Foundation and the ACLU of Hawai‘i Foundation write to express concern about a memorandum addressed to all Kahala Nui residents dated May 11, 2018, with the subject “HB 2739- ‘Our Choice, Our Care Act’ (Death with Dignity).” The memorandum informed residents that “exercising the provisions of this act is not an option” because it would violate Kahala Nui’s Residency Agreement, which purports to prohibit activities in Kahala Nui that are “inconsistent with the doctrines and teaching of the [Catholic] Church.” This is, simply put, illegal.¹ As a housing provider, Kahala Nui and its affiliates may not impose religious dictates on its residents or otherwise discriminate on the basis of religion.

Fifty years ago, Congress enacted the Fair Housing Act (“FHA”), 42 U.S.C. § 3601, to promote “truly integrated and balanced living patterns.” *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). To that end, the FHA prohibits discrimination in housing based on race, religion, sex, national origin, familial status, and disability. 42 U.S.C. §§ 3601 et seq. Similarly, Chapter 515 of the HRS prohibits discrimination in real estate transactions on the basis of race, sex, gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection, and it bars the inclusion of discriminatory

¹ The memorandum also contradicts Kahala Nui’s unconditional obligation to provide services to the general public—a condition of accepting the \$142,000,000 in special purpose, tax-exempt revenue bonds for the planning, design, construction, and operation of the senior housing community. *See, e.g.*, Hawai‘i Revised Statutes (“HRS”) § 39A-31 (defining “project party” as “a not-for-profit corporation that provides health care facilities to the general public.”).

provisions in written instruments relating to real property. HRS §§ 515-3, 515-6.² Clause 7.23(c) of the Residency Agreement, and your related directive prohibiting residents from exercising their rights under HB 2739, cannot be reconciled with the FHA or HRS Chapter 515. Clause 7.23(c) states that Kahala Nui “will not permit any use or activity . . . morally repugnant to the Roman Catholic Bishop of Honolulu or inconsistent with the doctrines and teaching of the Church.” The provision violates the plain terms of the FHA and Hawai‘i law because it establishes and promotes a preference for Catholic residents, while discouraging residency by those who do not accept and live by Catholic beliefs and practices, as defined by the Honolulu Bishop.

Specifically, under Section 3604(b) of the FHA, it is unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . religion.” 42 U.S.C. § 3604(b). *See also* HRS § 515-3(2) (setting forth similar protections for “real estate transactions”). Thus, Kahala Nui may not base rental decisions on a prospective resident’s religious beliefs and practices or refusal to comply with certain religious beliefs and practices. *See, e.g., Chapp v. Bowman*, 750 F. Supp. 274, 277 (W.D. Mich. 1990) (holding that plaintiffs were likely to prevail in their FHA claim when they “were denied purchase of the property because [the sellers] were concerned that [the plaintiffs] did not share their religious beliefs.”); *Snyder v. Bazargani*, 241 Fed. App’x. 20 (3d Cir. 2007) (upholding jury verdict under the FHA against landlords who first inquired about plaintiffs’ religion and then treated them differently because they were Jewish); *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677-78 (D. Vt. 2005) (upholding tenant’s FHA claim alleging that her lease was terminated in part because she refused to listen to defendant-landlord’s attempt to discuss religion with her). By requiring all prospective residents to agree to Kahala’s Nui’s restrictions based on Catholic belief and practice, however, the Residency Agreement effectively does just that.

Moreover, section 3604(c) of the FHA states that housing providers may not “make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . religion.”³ A

² It also violates Hawaii’s public-accommodations law. *See* HRS §§ 489-1 et seq. (banning discrimination on the basis of religion in places offering “goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public,” including, a “comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm” or a “professional office of a health care provider, . . . , or other similar service establishment.”).

³ Section 3604(c) creates an independent cause of action, but discriminatory messages barred by this section also constitute compelling evidence that a housing provider violated the FHA’s broader anti-discrimination provisions, including section 3604(b). *See* Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 230 (2001).

written or oral communication violates this provision whenever it would suggest a discriminatory preference or limitation to an “ordinary reader or listener.” *See Pack v. Fort Washington II*, 689 F. Supp. 2d 1237, 1245 (E.D. Cal. 2009) (quoting *Fair Housing Congress v. Weber*, 993 F. Supp. 1286, 1290 (C.D. Cal. 1997)); *see also United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999-1000 (2d Cir. 1991). “Significantly, no showing of a subjective intent to discriminate is . . . necessary to establish a violation of th[is] section.” *Jancik v. Dep’t of Hous. & Urban Dev.*, 44 F.3d 553, 556 (7th Cir. 1995). *Accord Corey v. Sec’y, U.S. Dep’t of Hous. & Urban Dev. ex rel. Walker*, 719 F.3d 322, 326 (4th Cir. 2013). Because an ordinary reader would easily perceive Clause 7.23(c) as indicating a preference for Catholics, the Residency Agreement—presented to prospective residents at the time of rental and enforceable by Kahala Nui for the duration of the residency—also runs afoul of section 3604(c) of the FHA both at the time it is offered for signature and on an ongoing basis thereafter.⁴

For the same reason, the May 11 memorandum informing residents that they may not exercise their rights under the “Our Choice, Our Care Act” because it would be “morally repugnant to the Roman Catholic Bishop of Honolulu or inconsistent with the doctrines and teaching of the Church” also violates Section 3604(c). An ordinary reader would understand the notice to convey a preference for Catholics and Catholic beliefs and practices. *Cf. Morris v. West Hayden Estates First Addition Homeowners Ass’n, Inc.*, 2017 WL 3666286, *3-4 (D. Idaho 2017) (upholding at the complaint stage a claim by Christian residents that their homeowner association’s letter indicating a preference against Christians violated the FHA’s prohibition of discriminatory notices and statements).

Indeed, under Hawai‘i law “[e]very provision in an oral agreement or a written instrument relating to real property that purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals because of . . . religion . . . is void.” HRS § 515-6(a). Clause 7.23(c) is thus invalid, because it effectively restricts the occupancy of Kahala Nui to people willing to conform to Catholic beliefs and practices. And, in turn, sending the May 11, 2018, memorandum constitutes a “discriminatory practice” because it “attempt[s] to honor” and enforce a legally void, discriminatory provision. *See* HRS § 515-6(c).

Kahala Nui must cease its discriminatory housing practices. Housing discrimination on the basis of religion is an affront to a “fundamental of human dignity.” *See* Lyndon B. Johnson, *Letter to the Speaker of the House Urging Enactment of the Fair Housing Bill* (Apr. 5, 1968), <http://www.presidency.ucsb.edu/ws/?pid=28785S>. It violates not only the FHA, but also Hawai‘i law, which provides for “compensatory and punitive damages, legal and equitable relief, and

⁴ While violations of section 3604 frequently concern efforts to steer prospective buyers or renters away from housing opportunities, they can also occur in post-acquisition communications and treatment. *See, e.g., Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (landlord’s agent’s racist statement to white tenant, overheard by black tenant, was covered by section 3604(c)); *see also Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc) (noting that section 3604 may reach post-acquisition discriminatory conduct that makes a dwelling unavailable to the owner or tenant).

November 1, 2018

Kahala Nui

Page 4 of 4

reasonable attorney's fees and costs" to remedy violations of Chapter 515 in a civil action. *See* HRS § 515-9. Accordingly, we ask that Kahala Nui immediately (1) send a memorandum to all residents rescinding the May 11, 2018, memorandum, and (2) stop propagating and enforcing clause 7.23(c) of the Residency Agreement.

Please confirm no later than November 16, 2018, that you have completed these steps to bring Kahala Nui into compliance with the law.⁵ In the meantime, if you have any questions or concerns, please do not hesitate to contact us.

Sincerely,



Mateo Caballero
ACLU of Hawai'i Foundation
P.O. Box 3410
Honolulu, HI 96801
(808) 522-5908
mcaballero@acluhawaii.org

Daniel Mach
Heather L. Weaver
ACLU Program on Freedom of
Religion and Belief
915 15th St. NW, Suite 600
Washington, D.C. 20005
(202) 675-2330
dmach@aclu.org
hweaver@aclu.org

cc: Patrick Duarte, President and CEO, Kahala Nui (pduarte@kahalanui.com)
Board of Directors, Kahala Nui
William D. Hoshijo, Executive Director, Hawai'i Civil Rights Commission

⁵ Because HB 2739 goes into effect in two months, January 1, 2019, and there may be residents in Kahala Nui and elsewhere considering medical aid in dying, we intend to make this letter public before the expiration of the November 16, 2018, deadline.