IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE EQUAL RIGHTS CENTER, Plaintiff, v. EQUITY RESIDENTIAL, et al., Defendants.	)	Case No. 1:06-cv-01060-CCB

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517 to address questions of law concerning Plaintiff Equal Rights Center's Motion for Partial Summary Judgment (ECF No. 228) that eight multifamily residential properties violate the design and construction provisions of the Fair Housing Act ("Act").[1] See 42 U.S.C. §§ 3604(f)(3)(C).

I. INTEREST OF THE UNITED STATES

In 1988, Congress amended the Fair Housing Act to, inter alia, make it unlawful to discriminate in housing on the basis of disability and defined "discrimination" to include the failure to design and construct certain multi-family dwellings so that they would be accessible to and usable by persons with disabilities. See 42 U.S.C. § 3604(f)(3)(C). The United States has important enforcement responsibilities under the Act. For example, the Attorney General may initiate civil proceedings on behalf of the United States in cases alleging a "pattern or practice"

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

of housing discrimination. 42 U.S.C. § 3614(a). Additionally, the Attorney General "shall commence and maintain a civil action" on behalf of an aggrieved person who has filed a complaint of housing discrimination with the Department of Housing and Urban Development ("HUD"), where HUD has made a determination of reasonable cause and the complainant or respondent has elected to proceed in federal court. See 42 U.S.C. § 3612(o). Furthermore, private litigation under the Act is an important supplement to government enforcement. See Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972); 42 U.S.C. § 3616a (authorizing the Secretary of HUD to contract with private, non-profit fair housing organizations to conduct testing, investigation, and litigation under the FHA).

II. BACKGROUND

Plaintiffs' motion concerns eight multifamily residential properties located in California, Maryland, Massachusetts and Washington, D.C. Pl.'s Mem. in Supp. Mot. Partial Summ. J. 22, ECF No. 228-1. There is no dispute that these eight properties are covered by and are subject to the Fair Housing Act's accessibility requirements: each has four or more units and was designed and constructed for first occupancy after March 13, 1991. 42 U.S.C. §§ 3604(f)(3)(C), 3604(f)(7).

Plaintiff's inspections of these properties revealed violations of each of the Act's design and requirements, including the lack of an accessible building entrance, inaccessible common and public use areas, the lack of an accessible route into and through units, doors that were not usable by persons in wheelchairs, inaccessible environmental controls, inaccessible kitchens and bathrooms, and the lack of reinforced bathroom walls that would support installation of grab bars. Expert Report of Phill Zook 6-7, ECF No. 228-14. Defendants' experts do not dispute that most of the accessibility barriers identified by Plaintiff do not comply with HUD-recognized

accessibility standards for multifamily housing. Rather, they found that most violations were, in their judgment, "minor deviations," that the housing was "usable" by people with disabilities notwithstanding the violations, or that the violations could be modified. See, e.g., Expert Report of David Kessler, ECF Nos. 235-7, 235-8, 235-9; Expert Report of Mariesha Blazik, ECF No. 235-10.[2]

III. ARGUMENT

A. The Fair Housing Act Requires Compliance with Objective Design and Construction Standards

1. The Act's Design and Construction Requirements

The Fair Housing Act defines "discrimination" as including the failure to "design and construct" covered multifamily dwellings[3] built for first occupancy after March 13, 1991 without basic accessibility and usability features for persons with disabilities. 42 U.S.C. § 3604(f)(3)(C). The Act's requirements for accessible design and construction are as follows:

> (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
>
> (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
>
> (iii) all premises within such dwellings contain the following features of adaptive design:
>
> (I) an accessible route into and through the dwelling;

[2] Mr. Kessler and Ms. Blazik disputed a small number of the violations found by Plaintiff and alleged that they were, in fact, in compliance. Such isolated factual disputes would not defeat Defendants' liability, but instead would go to the scope of injunctive relief the Court would order.

[3] "Covered multifamily dwellings" are units in "buildings consisting of 4 or more units if such buildings have one or more elevators" or "ground floor units in other buildings consisting of 4 or more units." 42 U.S.C. § 3604(f)(7).

> (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
>
> (III) reinforcements in bathroom walls to allow later installation of grab bars; and
>
> (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Id. Designers and builders may demonstrate compliance with these provisions by following the appropriate requirements of the American National Standards Institute ("ANSI") A117.1 (1986). 42 U.S.C. § 3604(f)(4).

These provisions reflect "a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream . . ." H.R. Rep. No. 100-711 at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2186. They also reflect Congress' recognition that unintended barriers may be just as exclusionary as intentional discrimination: "A person using a wheelchair is just as excluded from the opportunity to live in a particular dwelling by the lack of access into the unit and too narrow doorways as by a sign posted saying 'No Handicapped People Allowed.'" Id. at 25.[4] As one court has observed:

> The purpose of the accessibility requirements in the FHAA was to prevent discrimination against persons with disabilities. Unlike some other forms of discrimination, the built environment itself creates a barrier to equal access for persons with mobility impairments, which may be difficult or costly to fix down the road. The only way to prevent such discrimination, therefore, is through careful consideration – during the early stages of design – of accessibility concerns.

[4] Throughout this brief, the United States uses the term "disability" instead of "handicap." For purposes of the Act, the terms have the same meaning. See Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (definition of "disability" under Americans with Disabilities Act taken almost verbatim from definition of "handicap" under Fair Housing Act); Helen L. v. DiDario, 46 F.3d 325, 330 n. 8 (3d Cir.) ("The change in nomenclature from 'handicap' to 'disability' reflects Congress' awareness that individuals with disabilities find the term 'handicapped' objectionable."), cert. denied sub nom., Pa. Sec'y of Pub. Welf. v. Idell S., 516 U.S. 813 (1995).

United States v. Shanrie Co., No. 05-CV-306-DRH, 2007 U.S. Dist. LEXIS 23587, *20 (S.D. Ill. Mar. 30, 2007).

2. The HUD Fair Housing Amendments Act Guidelines

The Act delegates to the Secretary of HUD "[t]he authority and responsibility for administering" the Act. 42 U.S.C. § 3608(a). The Act further delegates rulemaking authority to HUD, 42 U.S.C. § 3614a, and states that HUD "shall provide technical assistance" to implement the Act's accessibility requirements. 42 U.S.C. § 3604(f)(5)(C).

Pursuant to this authority, HUD, after notice and comment, issued the Fair Housing Amendments Act Guidelines ("Guidelines"). 56 Fed. Reg. 9472-9515 (Mar. 6, 1991), codified at 24 C.F.R. Ch. I, Subch. A, App. II (Apr. 1, 1995). The Guidelines "provide technical guidance on designing dwelling units as required by the Fair Housing Amendments Act of 1988." 56 Fed. Reg. 9499. The Guidelines set out the "minimum standards of compliance with the specific accessibility requirements of the [Act]." Id. at 9476. They include, among other specifications, maximum heights for thresholds, maximum running slopes and cross-slopes along accessible routes and ramps, minimum door widths to allow a person in a wheelchair to pass, the amount of clear floor space necessary for a person in a wheelchair to use a kitchen or bathroom, and maximum and minimum heights for switches, outlets and other environmental controls. Id. at 9503-9515. In developing the Guidelines, "HUD solicited and considered comments by 'several national, State and local organizations and agencies, private firms, and individuals that have been involved in the development of State and local accessibility codes,' as well as 'a

number of disability organizations.'"[5] United States v. Tanski, No. 1:04-CV-714, 2007 U.S. Dist. LEXIS 23606, *42-43 (N.D.N.Y. Mar. 30, 2007) (quoting 56 Fed. Reg. 9475).

HUD has also stated that compliance with a "comparable standard," i.e., one that "affords handicapped persons access essentially equivalent to or greater than that required by ANSI A117.1," would also satisfy the Act's requirements. 54 Fed. Reg. 3243 (Jan. 23, 1989). Accordingly, since 1991 HUD has recognized nine other "safe harbors" for compliance: HUD's Fair Housing Act Design Manual (1998); the 1986, 1992, 1998 and 2003 versions of ANSI A117.1; the International Code Council's 2000 Code Requirements for Housing Accessibility; the International Building Code as supplemented in July 2001 and March 2003; and the 2006 International Building Code. See 73 Fed. Reg. 63,613-14 (Oct. 24, 2008) (to be codified at 24 C.F.R. pt. 100). The other safe harbors are generally more stringent than the Fair Housing Accessibility Guidelines and 1986 ANSI A117.1.

3. The Failure to Comply With the Guidelines or "Safe Harbors" Establishes a Prima Facie Case Under the Fair Housing Act, Which May Be Overcome Only By Showing Compliance with a Comparable, Objective Accessibility Standard

As HUD has determined, a plaintiff "may establish a prima facie case by proving a violation of the Guidelines," which Defendants may overcome only by demonstrating compliance with "some comparable objective accessibility standard." HUD v. Nelson, HUD ALJ 05-068FH, 2006 WL 4540542, *5, 7 (Sept. 21, 2006) (Order on Secretarial Review)

[5] These organizations included the Disability Rights Education and Defense Fund, the Association for Education and Rehabilitation of the Blind and Visually Impaired, the National Head Injury Association, United Cerebral Palsy Associations, International Association of Psychological Rehabilitation Facilities, the National Mental Health Association, the American Paralysis Association, the Association for Retarded Citizens, the National Alliance for the Mentally Ill, Paralyzed Veterans of America, and the National Organization on Disability. See 56 Fed. Reg. 9475.

(emphasis in original), aff'd, 320 F. App'x 635 (9th Cir. 2009); see also 73 Fed. Reg. 63,614 ("In enforcing the design and construction requirements of the Fair Housing Act, a prima facie case may be established by proving a violation of HUD's Fair Housing Accessibility Guidelines . . . [and] may be rebutted by demonstrating compliance with a recognized, comparable, objective measure of accessibility.").

Because HUD promulgated the Guidelines pursuant to express Congressional regulatory authority, see supra Section III.A.2, HUD's determination is entitled to deference. Meyer v. Holley, 537 U.S. 280, 287 (2003) (HUD is "the federal agency primarily charged with the implementation and administration of the [Fair Housing Act]" and the Court "ordinarily defer[s] to an administrating agency's reasonable interpretation of a statute."); Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984); see also United States v. Edward Rose & Sons, 246 F. Supp. 2d 744, 750-51 (E.D. Mich. 2003) (deferring to Guidelines in interpreting Fair Housing Act), aff'd, 384 F.3d 258, 263 n. 4 (6th Cir. 2004) (affording Chevron deference to HUD regulatory definitions). HUD's interpretation of the Act must therefore be followed unless it is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844.

There is no inconsistency between using violations of the Guidelines to presume non-compliance with the Act and HUD's statement that the Guidelines are not mandatory. "The purpose of the Guidelines is to describe minimum standards of compliance with the specific accessibility requirements of the Act." 56 Fed. Reg. 9476. Although a defendant may attempt to demonstrate compliance with another equivalent accessibility standard, "a plain reading of section 3604(f)(3)(C) demonstrates that it requires compliance with an objective accessibility standard broadly applicable to handicapped people." Tanski, 2007 U.S. Dist. LEXIS 23606, at *41 (emphasis added). Thus, "designers and builders that choose to depart from the provisions

of a specific safe harbor bear the burden of demonstrating that their actions result in compliance with the Act's design and construction requirements." 73 Fed. Reg. 63,614; see also id. at 63,612 ("[D]esigners and builders may continue to use alternative methods of complying, with the following caveat . . . If a designer or builder does not rely on one of the HUD-recognized safe harbors, that designer or builder has the burden of demonstrating how its efforts comply with the accessibility requirements of the Fair Housing Act.").

Courts are in accord and have granted summary judgment to plaintiffs when "a covered dwelling does not comply with the ANSI standards or the HUD Guidelines, and defendants fail to submit evidence that the property complies with any other accessibility standard." Tanski, 2007 U.S. Dist. LEXIS 23606, at *32; United States v. Taigen & Sons, 303 F. Supp. 2d 1129, 1154 (D. Idaho 2003) (summary judgment granted where units did not conform with Guidelines and defendants "failed to submit evidence in the record that [the subject housing] complies with any other accessibility standard."); United States v. Quality Built Constr., 309 F. Supp. 2d 756, 763 (E.D.N.C. 2003) (summary judgment granted where defendants did not "come forward with alternative measurements or any other evidence to show that a triable issue of fact exists."); Baltimore Neighborhoods, Inc. v. Rommel Builders, 40 F. Supp. 2d 700, 713-14 (D. Md. 1999); Shanrie Co., 2007 U.S. Dist. LEXIS 23587 at *37 n. 3 & *39-41; Memphis Ctr. for Indep. Living v. Richard and Milton Grant Co., No. 2:01-CV-2069, slip op. at 8 (W.D. Tenn. Apr. 27, 2004) ("If a construction feature does not comply with the Guidelines, then the housing provider defending an FHA violation has the burden of showing that the feature is nonetheless accessible … by meeting a 'comparable standard' – i.e., one that provides 'access essentially equivalent to or greater than required by ANSI A117.1.'") (citation omitted) (attached as Exhibit 1).

4. Defendants May Not Defeat Liability by Showing That Certain Individuals Are Able to Access the Properties or By Claiming That the Violations Are Minor

Notwithstanding numerous undisputed violations of the Guidelines, Defendants claim that they complied with the Act because some persons with disabilities are able to access Defendants' properties or because, in their opinion, the violations are minor and do not inhibit access for persons with disabilities. For example, Defendants' designated expert, Alison Vredenbergh, has opined that "specific property features that do not directly fall within a safe harbor, other code provisions or reasonable tolerance are nonetheless accessible, usable or easily adaptable in a tailored way for persons with disabilities." Defs.' Mem. in Opp'n Partial Summ. J. ("Defs.' Mem.") 22, ECF No. 235. Defendants also cite Paul Sheriff, "a paraplegic himself," who conducted a "roll-through survey" to determine whether a unit is accessible and in compliance with the FHAA. Id.[6] Such claims misstate the law and do not overcome the prima facie case that arises from Defendants' failure to adhere to the Guidelines.

Mr. Sheriff stated that he was able to access certain units and, on that basis, concluded that Defendants had complied with the Act. Mr. Sheriff did not rely upon any accessibility

[6] Mr. Sheriff's report makes certain representations concerning the U.S. Department of Justice that warrant correction or clarification. First, Mr. Sheriff states that "I am recognized by the Civil Rights Section [sic] of the Department of Justice . . . as a qualified expert and consultant." Expert Report of Paul Sheriff 3, ECF No. 235-10. The Civil Rights Division has not retained Mr. Sheriff as an expert or as a consultant. Second, Mr. Sheriff asserts that the Department has accepted a device called "Wing Its" in lieu of "reinforcements in bathroom walls to allow later installation of grab bars." Id. at 9. While the Department has, under certain circumstances, accepted this device as a substitute remedy as part of a negotiated settlement, this does not absolve any defendant of liability for failing to install reinforcements during construction, as the Act explicitly requires. See 42 U.S.C. § 3604(f)(3)(C)(iii)(III). More generally, agreements concerning retrofits in specific circumstances that are negotiated by the United States in consent decrees do not constitute recognized "tolerances" that impact liability or the scope of a defendant's obligations under the Act.

standards or take any measurements. See Expert Report of Paul Sheriff 9, ECF No. 235-10 ("I do not rely on a tape measure for my assessment . . . I believe this is a much more effective means of gauging actual accessibility than simply comparing measurements with the prescriptive criteria of the safe harbors."). This is the very type of individualized, subjective evidence that courts have repeatedly rejected in determining whether a unit is accessible to persons with a broad range of disabilities and physical limitations, as the Act requires. In Quality Built Constr., the court rejected an affidavit by a person with a disability who stated he could navigate a unit, despite violations of the Guidelines:

> [T]he Court believes that his testimony would have little bearing on the ultimate issue in this case. Whether one disabled person may be able to maneuver through the complex and units does not indicate compliance with the Act. This is particularly true with respect to Mr. Curll [the disabled affiant]. As Plaintiff notes, Mr. Curll is a wheelchair athlete and a former paralympian which seriously undermines the position that his ability to maneuver through the units is representative of the accessibility to disabled persons in general.

309 F. Supp. 2d at 772 n. 1.

Likewise, in Tanski, defendants submitted declarations from disabled residents who claimed to be able to access the units. In rejecting these "wholly subjective declarations" as "not probative on the question of whether the apartments are designed and constructed such that they comply with [the Act]," the court held:

> Neither the Fair Housing Act nor the HUD Guidelines support the view that compliance may properly be evaluated by considering whether a particular dwelling meets the needs of a particular handicapped tenant. Thus, the anecdotal experiences of individual handicapped people residing in McGregor Village Apartments do not raise a material question of fact regarding whether the apartments were designed and constructed in compliance with the Fair Housing Act. Moreover, none of the declarants has any expertise relevant to whether the dwellings comply with objective accessibility requirements recognized by an individual or organization with expertise in the field, and their submissions cannot amount to an alternative way of demonstrating compliance with the requirements of the Fair Housing Act.

2007 U.S. Dist. LEXIS 23606, at *43-44. See also Nelson, 2006 WL 4540542, at *7 ("[T]he issue is not whether a specific person with a disability could access the property, but rather, whether most persons with wheelchairs or other disabilities can utilize the property.") (emphasis in original).

Finally, the fact that Defendants characterize certain violations as "de minimis" (see Defs.' Mem. at 35) does not excuse Defendants' liability or defeat partial summary judgment. In United States v. Shanrie Co., defendants conceded that the slope of a part of a ramp did not comply with the HUD Guidelines, but "brush[ed] it off as a 'minor discrepancy'…" The court noted that "[w]hile [defendant] Shiels may feel as though the violation is minor, it is a violation nonetheless." 2007 U.S. Dist. LEXIS 23587, at *39 n. 17.

5. Under the Act, Defendants Must Build Accessible Housing at the Time of Design and Construction, and May Not Achieve Compliance by Making Modifications Post-Occupancy

Defendants also claim that their non-compliance with the Guidelines or any other safe harbor should be excused when an inaccessible feature may be corrected through what Defendants describe as "quick, simple and inexpensive modifications." Defs.' Mem. at 16. However, it is well-settled that builders may not satisfy the Act's design and construction requirements by agreeing to modify or correct otherwise non-accessible features upon request. United States v. Shanrie Co., No. 05-CV-306-DRH, 2007 U.S. Dist. LEXIS 96763, *11 (S.D. Ill. Apr. 10, 2007) ("[T]his Court, like other courts, rejects Defendants' proposal that certain repairs be made only if requested."); Baltimore Neighborhoods, Inc., 40 F. Supp. 2d at 707 (rejecting argument that "adaptive design," as used in the Act, means that "defendants are required only to provide accessible features upon request."); Mont. Fair Hous. v. Am. Capital Dev., 81 F. Supp.

2d 1057, 1065 (D. Mont. 1999) ("adaptable design" is a "term of art, meaning design appropriate for use by persons of all abilities without modification").

A rule that allowed a builder effectively to ignore the Act's affirmative accessibility requirements, as long as the builder promised to make modifications on request, would contravene the Act and its goal of expanding the availability of housing for persons with disabilities. Nowhere does the Act provide that builders may disregard any or all of the Act's affirmative accessibility requirements because modifications may be made after completion of construction. The Act's accessibility requirements are intended to create "[t]ruly adaptable units," meaning units that "can be adjusted or adapted without renovation or structural change because the basic accessible features like door widths and ground level entrance are already part of the unit." Phillips v. Downtown Affordables LLC, No. CV 06-00402, 2007 U.S. Dist. LEXIS 65603, *18 (D. Haw. Sept. 5, 2007) (emphasis in original) (quoting Barrier Free Environments, Inc., HUD Office of Policy Dev. and Research, Adaptable Housing 8 (1987) & H.R. Rep. 100-711, at 27). Thus, contrary to Defendants' allegations, the term "adaptable design," as used in the Act, does not excuse Defendants from failing to incorporate the Act's design and construction requirements into the initial design and construction of the housing. See Defs.' Mem. at 14. Indeed, HUD considered and rejected a proposal that would require provision of accessible features "to people with handicaps on a case-by-case basis." See 56 Fed. Reg. 9474-76.

Furthermore, the Act already contains provisions requiring, upon request, reasonable accommodations and modifications, which are separate and distinct from the Act's affirmative design and construction provisions. Compare 42 U.S.C. §§ 3604(f)(3)(A) & (B) with § 3604(f)(3)(C). Because this provision requires that disabled residents bear the expense of any

modifications, 42 U.S.C. § 3604(f)(3)(A), the Act's design and construction requirements are intended to reduce the need for extensive modifications in new multifamily housing, such as widening doors, removing thresholds or moving environmental controls.[7] Furthermore, a rule that allowed developers to make modifications after the completion of construction would typically be of little to no assistance to aftermarket buyers or renters with disabilities, who may not be able even to enter the premises, much less occupy them, if the original occupant did not ask for modifications. This hardly comports with the Act's goal to "eliminate the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities." H.R. Rep. 100-711, at 27-28.

B. An Organizational Plaintiff Need Not Show that an Individual Buyer or Renter Suffered Discrimination to State a Claim under the Act's Design and Construction Requirements

Defendants argue that Plaintiff cannot prove a violation of 42 U.S.C. §3604(f)(3)(C) unless it can show that an individual was denied housing at the eight properties due to disability. Defs.' Mem. at 8-9. The Court previously rejected this argument by holding that Plaintiff has shown an injury-in-fact establishing its standing to pursue its claims against Defendants, notwithstanding the lack of an individual discrimination victim. Equal Rights Ctr. v. Equity Residential, 798 F. Supp. 2d 707, 723-24 (D. Md. 2011) (citing Havens, 455 U.S. at 379). In any event, "a 'failure to design and construct' under § 3604(f)(3) is 'a discrete instance of discrimination' independent of §§ 3604(f)(1) and 3604(f)(2)." HUD v. Nelson, 320 F. App'x at 367 (quoting Garcia v. Brockway, 526 F.3d 456, 461-62 (9th Cir. 2008)); see also Nat'l Fair Hous. Alliance v. A.G. Spanos Constr., 542 F. Supp. 2d 1054, 1061 (N.D. Cal. 2008) ("[T]he

[7] Of course, when such features are incorporated into a unit's original design and construction, the costs are minimal. See H.R. Rep. 100-711, at 27 (requirements are "easy to incorporate in housing design and construction.").

construction of each complex constitutes an actionable violation of the FHA."). Even if it were not, this standard is easily met because violations of the Act's design and construction requirements unquestionably "otherwise make unavailable or deny" housing based on disability and impose discriminatory "terms, conditions and privileges" based on disability. 42 U.S.C. §§ 3604(f)(1)(A), (f)(2).[8]

[8] All but one of the cases cited by Defendants is either a Ninth Circuit decision or a decision of a district court within the Ninth Circuit. Defs.' Mem. Opp'n Partial Summ. J. at 8-9. Each pre-dates the Ninth Circuit's decision in Nelson. Furthermore, all of the cases cited by Defendants involve whether a particular individual has standing to seek relief. None holds that an organizational plaintiff may not proceed with a design and construction claim in the absence of an individual discrimination victim. To the contrary, the court in Housing Investors, Inc. v. City of Clanton, 68 F. Supp. 2d 1287 (M.D. Ala. 1999), found that while the individual plaintiff lacked standing, the organizational plaintiff did have standing and could proceed with its claim. Id. at 1294.

IV. CONCLUSION

For the reasons stated above, the United States respectfully submits that: 1) a showing that Defendants violated the HUD Fair Housing Guidelines constitutes a prima facie case of discrimination under the Act's design and construction requirements, which may be overcome only through compliance with a comparable, objective accessibility standard; and 2) Plaintiff need not show that an individual buyer or renter was denied housing to state a claim under the Act's design and construction requirements.

Dated: November 13, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2014, I filed the foregoing document and all attachments entitled **Statement of Interest of the United States of America** via the Court's CM/ECF system, which shall send notice to all counsel of record via electronic mail.

s/ Max Lapertosa

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MEMPHIS CENTER FOR INDEPENDENT LIVING,

Plaintiff,

vs.

Case No. 01-2069 D/A

RICHARD AND MILTON GRANT CO., et al.,

Defendants,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

RICHARD AND MILTON GRANT CO., et al.,

Defendants.
Defendant/Counter-Plaintiff.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR THE UNITED STATES

This matter is before the Court on Plaintiff-Intervenor United States' motion for summary judgment. In this housing discrimination case, the United States alleges that Richard and Milton Grant Company, J. Richard Grant, Milton Grant, John Gillentine, Parker Estes & Associates, and Henry Hart Engineering violated the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-19, and Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-89, by failing to design and construct two apartment complexes so as to be accessible to persons with disabilities.

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I. Factual and Procedural Background

Plaintiff Memphis Center for Independent Living ("MCIL") initiated the instant action on January 25, 2001, alleging that Defendants failed to design and construct the apartment complexes in compliance with the FHA. In October 2001, the United States of America joined as a Plaintiff-Intervenor in the action.

The apartment complexes at issue in the instant motion are the Wyndham Apartments ("Wyndham"), in which the United States alleges 2643 FHA violations and 23 ADA violations, and the Camden Grove Apartments ("Camden"), in which the United States alleges 4372 FHA violations and 18 ADA violations.

Richard and Milton Grant Company, J. Richard Grant, and Milton Grant ("Grant Defendants") designed, built, and own both apartment complexes. John Gellentine was the architect for both projects. Henry Hart Engineering Company ("Hart Engineering") performed the civil engineering work at Wyndham, and Parker Estes & Associates ("Parker Estes") performed the civil engineering work at Camden.

Both apartment complexes are composed of two-story, non-elevator buildings of eight and twelve units that are joined by garages at the corners. Each apartment unit has its own private entrance, driveway, and attached garage. Each one bedroom unit has a single car garage with a twelve foot wide interior space. Each two bedroom unit has a nineteen foot wide garage. Residents of each complex share a variety of on-site amenities.[1] Neither complex has sidewalks parallel to the

[1]Wyndham has mail box kiosks, tennis/basketball courts, a swimming pool, tenant refuse facilities, a gazebo, and a clubhouse containing a leasing office, restrooms, exercise room, and meeting space. Camden has mail box kiosks, a swimming pool, two tennis courts, tenant refuse facilities, and a clubhouse containing a leasing office, restrooms, exercise room, meeting space, and a theater.

road or sidewalks leading from the roads to ground floor unit entrances. The only paved, pedestrian routes at both complexes are short approach walks from unit driveways to unit entrances and from the roads or parking areas to the entrances of some adjacent site amenities. Wyndham, which consists of 166 ground floor apartments within its fifty-one buildings, was completed in 1998, seven years after the FHA's accessibility requirements became effective. Construction of Camden began in 2001 and is still underway. Sixty-four buildings are planned, with 276 ground floor apartments.

The government's expert, architect William Hecker, conducted extensive onsite surveys of Wyndham and Camden to assess their compliance with the accessibility requirements of the FHA and ADA. He reviewed site and architectural plans and measured features that were constructed at the time of his visits to determine whether the complexes conformed with the FHA's requirements.[2] Defendants do not dispute the vast majority of his measurements.

At Wyndham, Defendants operated on the supposition that only seventeen of the ground floor units had to be accessible to disabled individuals. Therefore, the remaining 149 of the 166 ground floor units at Wyndham have a step at the unit entrance that prevents a person using a wheelchair from gaining access to those units. Of those, ninety-nine Wyndham units have an additional step at the porch or breezeway leading to the entrance door. Many of the doors to bathrooms, bedrooms, and/or walk-in closets in all of the ground floor units are narrower than the Guidelines requirement. One hundred and forty-nine of the 166 units have thermostats mounted too high for a person in a

[2]The United States summarizes a variety of features at the apartment complexes that do not meet the Fair Housing Accessibility Guidelines ("Guidelines") promulgated by the Department of Housing and Urban Development ("HUD"). It does not, however, seek summary judgment regarding "minor deviations from the HUD Guidelines" to eliminate any arguments Defendants may make about small discrepancies in measurement. (Pl. U.S.' Mem. in Supp. of its Mot. for Summ. J. at 4.)

wheelchair to reach them and lack reinforcement in the bathroom walls to support grab bars near the toilet and bathtub.

Camden had similar features in more than 90% of the sixty-two units that had been constructed in August 2002, when the United States conducted its survey. Twelve of those units have steps in front of the unit door, and forty-five have L-shaped walkways from the driveways to the unit entrances. Camden does not have the entrance steps that Wyndham has, though it has a number of driveways and walkways at slopes above 8.33%, the maximum FHA-compliant grade in many situations. Few if any Guidelines-compliant pedestrian routes exist at Camden for people using wheelchairs to travel from any ground floor unit to parking, on-site amenities, or the public street. Defendants designed Camden for vehicular access, even to the on-site amenities.

The United States requested a preliminary injunction to halt further construction at Camden, but the Court denied this motion on September 30, 2003. (Order Den. U.S.' Mot. for Prelim. Inj.) After balancing the likelihood of the United States' success on the merits, irreparable harm, the degree of harm to others, and the public interest, the Court denied preliminary injunctive relief, deferring any appropriate relief pending final disposition on the merits.

On July 31, 2003, the United States filed a motion for summary judgment. Parker Estes and the Grant Defendants responded individually on December 5, 2003. The Court granted the parties until March 26, 2004 to supplement the motion and response. The United States filed a surreply memorandum on March 24, 2004.

II. Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In other words, summary judgment is appropriately granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The party moving for summary judgment may satisfy its initial burden of proving the absence of a genuine issue of material fact by showing that there is a lack of evidence to support the nonmoving party's case. Id. at 325. This may be accomplished by submitting affirmative evidence negating an essential element of the nonmoving party's claim, or by attacking the opponent's evidence to show why it does not support a judgment for the nonmoving party. 10a Charles A. Wright et al., Fed. Prac. & Proc. § 2727, at 35 (2d ed. 1998).

Facts must be presented to the court for evaluation. Kalamazoo River Study Group v. Rockwell Int'l Corp., 171 F.3d 1065, 1068 (6th Cir. 1999). The court may consider any material that would be admissible or usable at trial. 10a Charles A. Wright et al., Fed. Prac. & Proc. § 2721, at 40 (2d ed. 1998). Although hearsay evidence may not be considered on a motion for summary judgment, Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. Celotex, 477 U.S. at 324; Thaddeus-X v. Blatter, 175 F.3d 378, 400 (6th Cir. 1999).

In evaluating a motion for summary judgment, all the evidence and facts must be viewed in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Wade v. Knoxville Util. Bd., 259 F.3d 452, 460 (6th Cir. 2001).

Justifiable inferences based on facts are also to be drawn in favor of the non-movant. Kalamazoo River, 171 F.3d at 1068.

Once a properly supported motion for summary judgment has been made, the "adverse party may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

III. Analysis

The FHA embodies "a national commitment to end the unnecessary exclusion of persons with [disabilities] from the American mainstream" by increasing the stock of accessible housing in furtherance of Congress' "goal of independent living." H.R. Rep. No. 100-711, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2179. The Act includes a broad prohibition of discrimination on the basis of disability in the sale or rental of a dwelling, 42 U.S.C. §§ 3604(f)(1)-(2). It also defines "discrimination" as the failure to design and construct covered multifamily dwellings, designed for first occupancy after March 13, 1991, in such a manner that:

> (i) the public and common use portions of the dwellings are readily accessible to and usable by persons with disabilities;
> (ii) all the doors designed to allow passage into and within all premises within the dwellings are sufficiently wide to allow passage by persons using wheelchairs; and
> (iii) all premises within the dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual using a wheelchair can maneuver about the space.

Id. at § 3604(f)(3)(C).

Congress authorized the Secretary of HUD to promulgate regulations to implement the FHA and provide technical assistance to help achieve the Act's accessibility requirements. Id. at §§ 3601, 3604(f)(5)(C). Pursuant to this authority, HUD issued implementing regulations in 1989 that expounded on the FHA's design and construction requirements. 24 C.F.R. § 100.200 et seq. HUD issued the Guidelines two years later. 56 Fed. Reg. 9473-9515 (Mar. 6, 1991).

The HUD Guidelines guide builders to compliance, but they are merely examples of compliance and therefore not mandatory. Id. at 9472. "The purpose of the Guidelines is to describe minimum standards of compliance with the specific accessibility requirements of the Act." Id. at 9476. A failure to meet the requirements as interpreted in the Guidelines does not constitute unlawful discrimination. Id. The Guidelines are "intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Amendments Act. . . . Builders and developers may choose to depart from the Guidelines, and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act." Id. at 9473. The FHA and the Guidelines also provide that another acceptable way to make these areas and features accessible is through

compliance with American National Standards Institute[3] ("ANSI") 117.7-1986, American National Standard for Buildings and Facilities - Providing Accessibility and Usability for Physically Handicapped People. Thus, the Guidelines, though relevant and highly significant, are not decisive. The real question is whether the units and common areas are reasonably accessible and usable for most physically disabled people.

If a construction feature does not comply with the Guidelines, then the housing provider defending an FHA violation has the burden of showing that the feature is nonetheless accessible. See id. ("Builders and developers may choose to depart from the Guidelines, and *seek alternate ways to demonstrate* that they have met the requirements of the Fair Housing Act.") (emphasis added); United States v. Hallmark Homes, Inc., No. CV01-432, 2003 WL 23219807, at *8 (D.Idaho Sept. 29, 2003). The Guidelines provide that compliance may be achieved by meeting a "comparable standard" - i.e., one that provides "access essentially equivalent to or greater than required by ANSI A117.1."[4] 54 Fed. Reg. 3243.

A. Public and Common Use Areas

1. Routes from Ground Floor Units to the On-Site Amenities and Public Streets

HUD's regulations and Guidelines require accessible pedestrian routes from covered units

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[3]ANSI is a private, national organization that publishes standards on a wide variety of subjects. See 54 Fed. Reg. 3243 (Jan. 23, 1989).

[4]Since 1991, HUD has recognized safe harbors, in addition to the Guidelines and ANSI A117.1-1986. These include HUD's Fair Housing Act Design Manual (1998), ANSI A117.1-1992, and ANSI A117.1-1998. See 65 Fed. Reg. 15740, 15755 (Mar. 23, 2000); 68 Fed. Reg. 30413-02 (May 27, 2003). The 2000 Code Requirements for Housing Accessibility and the International Building Code, both promulgated by the International Code Council are also safe harbors. See Code Requirements for Housing Accessibility at pp. iii-v. These safe harbors are not at issue in the instant case, as Plaintiffs argue that they require equal or greater accessibility than the Guidelines, and Defendants do not mention them.

to public and common use areas, with few exceptions. Defendants admit that accessible pedestrian routes do not exist from the public street to ground floor units. Instead, they argue that most units are exempted from any accessible route requirement due to site impracticalities, such as hills, and the remaining non-conforming units have accessible routes for vehicular access, rather than pedestrian access.

The Court first looks to whether there are impracticalities at the two apartment complex sites sufficient to exempt the buildings from the FHA. Defendants claim that the site impracticality exemption allows up to 104 of their 442 ground floor units (thirty-eight at Wyndham and up to sixty-six at Camden) to be inaccessible by persons with disabilities. HUD's implementing regulations require each covered dwelling to be served by at least one building entrance on an accessible route "unless it is impractical to do so because of the terrain or unusual characteristics of the site." 24 C.F.R. § 100.205(a). "The burden of establishing impracticality because of terrain or unusual site characteristics is on the person or persons who designed or constructed the housing facility." Id. Exemptions to the FHA must be "construed narrowly, in recognition of the important goal of preventing housing discrimination." Fair Hous. Advocates Ass'n, Inc. v. City of Richmond Heights, 209 F.3d 626, 634 (6th Cir. 2001), quoting Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1475 (11th Cir. 1993). Even in this area of little precedent, courts have shown that the burden for showing site impracticality is heavy. See Mont. Fair Hous., Inc. v. Amer. Capital Dev., Inc., 81 F. Supp. 2d 1057, 1066 (D.Mont. 1999); Baltimore Neighborhoods, Inc. v. Sterling Homes Corp., No. Civ. 96-915., 1999 WL 1068458, at *3 (D.Md. Mar. 25, 1999).

While the regulations do not set out how to meet the impracticality exemption, the Guidelines outline two tests to establish when normally covered dwelling units in non-elevator buildings may

be excluded from coverage due to site impracticality. 56 Fed. Reg. 9499, 9503-04. The two tests are the individual building test and the site analysis test. Id.; Sterling Homes, 1999 WL 1068458, at *3. Defendants rely upon the site analysis test. The Guidelines describe three steps to determine whether ground floor units in an apartment complex may be exempted from the FHA based on site terrain:

> (A) The percentage of the total buildable area of the undisturbed site with a natural grade less than 10% slope shall be calculated. The analysis of the existing slope (before grading) shall be done on a topographic survey with two foot (2') contour intervals with slope determination made between each successive interval. The accuracy of the slope analysis shall be certified by a professional licensed engineer, landscape architect, architect or surveyor.
>
> (B) To determine the practicality of providing accessibility to planned multifamily dwellings based on the topography of the existing natural terrain, the minimum percentage of ground floor units to be made accessible should equal the percentage of the total buildable area (not including flood plains, wetlands, or other restricted use areas) of the undisturbed site that has an existing natural grade of less than 10% slope.
>
> (C) In addition to the percentage established in paragraph (B), all ground floor units in a building, or ground floor units served by a particular entrance, shall be made accessible if the entrance to the units is on an accessible route, defined as a walkway with a slope between the planned entrance and a pedestrian or vehicular arrival point that is no greater than 8.33%.

56 Fed. Reg. 9503-04 (1991).

Defendants argue that thirty-eight units at Wyndham and up to sixty-six units at Camden should be exempted from the FHA for site impracticality. Defendants proffer post-construction measurements to support their position that an accessible route from the arrival point to the entry

door cannot be created with a slope of 8.33% or less at any of the units. To meet their burden under the site impracticality test, Defendants essentially argue that they cannot comply with the FHA because the units, as built, do not comply with FHA requirements. The United States, who would prefer that the Court look to pre-construction measurements, pointed out the circularity of Defendants' argument when it wrote, "the Grant defendants are asking the Court to assume based on the mere fact that accessible pedestrian routes were not constructed that such routes could not have been constructed." (U.S.' Post [Prelim. Inj.] Hr'g Br. at 54.) Moreover, Defendants make no attempt to explain why the Wyndham units were built with such steep slopes, when they admit that the complex is generally flat. Even if the Court were to accept valid post-construction evidence,[5] Defendants have failed to meet this heavy burden. Therefore, the Court finds that no ground floor units in either Camden or Wyndham are exempt from FHA requirements based on site impracticality.

Defendants rest much of their argument against liability on the assertion that accessible routes need not be designed for pedestrian use since the complexes are designed for vehicular traffic. This vehicular exemption, also narrowly construed, applies:

> if the slope of the finished grade between covered multifamily dwellings and a public

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[5]The Court notes that the Grant Defendants' pinpoint analysis is not such valid evidence. They argue that

> rather than applying the 4" per step rise over the entire length of the approximately 18' walkway, it is appropriate for Step C of the site analysis test to consider the slope of that portion of the route that has the steps. Using this "pinpoint" analysis – consistent with the United States' analysis on other slope issues – a 7" rise over a standard 11" tread creates a slope over 36%.

(Grant Defs.' Opp. at 24.) Their 36% incline measurement is conducted directly upon the steps in the approach walk, and therefore the incline will be the same at any set of standard stairs. Therefore, the Grant Defendants would like the Court to consider the fact that they have constructed an approach with two steps to prove that the walk could not have been created without the steps.

> or common use facility (including parking) exceeds 8.33%, or where other physical barriers (natural or manmade), or legal restrictions, all of which are outside the control of the owner, prevent the installation of an accessible pedestrian route, an acceptable alternative is to provide access via a vehicular route, so long as necessary site provisions such as parking spaces and curb ramps are provided at the public or common use facility.

56 Fed. Reg. 9504. The United States argues that "all of which are outside the control of the owner" modifies all the conditions in this Guideline, while Defendants argue that it modifies only the physical barriers and legal restrictions. Therefore, Defendants contend that the finished grade of the property need not be beyond their control, and the United States advocates the opposite reading. Under the Defendants' interpretation, "outside the control of the owner" would be rendered meaningless. Defendants argue that under the United States' interpretation, "the provision regarding the slope of the finished grade would be a vestigial circumstance that would never occur in the real world of construction." (Grant Defs.' Opp. to Pl.'s Mot. for Summ. J. ["Grant Defs.' Opp."] at 28.)

The cardinal principle of statutory construction is "to give effect, if possible, to every clause or word of a statute." Duncan v. Walker, 533 U.S. 167, 173 (2001) (citations omitted). The Court applies this canon of interpretation of to the Guidelines as well. Therefore, the Court will attempt a reading of the Guideline that gives effect to all phrases. As between the two readings, the United States' version is more convincing, since it supports an internally consistent reading of the Guideline. The "all of which" language refers to all of the preceding conditions. The physical barriers in the property are generally within a housing provider's control. A housing provider would need to show that the conditions were outsider of its control if it provided an inaccessible pedestrian route.[6]

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[6]There are surely areas so surrounded by heavily developed property as to prevent serious grading or so steep that it would be impracticable to create an 8.33% grade. The Guideline

Since the vehicular exemption is an exception to the FHA, Defendants bear the burden of showing that the property was so fraught with obstacles as to prevent the construction of accessible pedestrian routes. Defendants must produce more evidence than the mere fact that the paved routes, in their constructed state are, over 8.33%. As with the site impracticality exemption, proof of the exemption through the mere showing of the currently paved routes is insufficient because that would improperly shift the burden away from Defendants to Plaintiffs on a showing of an FHA violation. The burden of establishing impracticality and other exemptions is clearly on Defendants. 24 C.F.R. § 100.205(a). Moreover, Plaintiffs have produced expert testimony with supporting evidence showing that extensive regrading occurred at Camden, the site could have been graded to produce accessible pedestrian routes, and that no uncontrollable barriers or restrictions preclude the installation of accessible pedestrian routes. (U.S.' Post [Prelim. Inj.] Hr'g Br. at 7, 21, 43.) The United States has an even more striking case at Wyndham, where the terrain was undisputedly flat prior to construction.

Defendants argue in addition that the vehicular exemption applies because "[v]ehicular access is an integral part of the design of both Camden Grove and Wyndham." (Grant Defs.' Opp. at 25.) The Grant Defendants argue that they have attempted to create the atmosphere of single family home subdivisions in these two apartment complexes.[7] (Id.) While single family homes are

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elucidates that physical conditions are generally with the housing provider's control, and it would be the provider's burden to show impracticality.

[7]Parker Estes states that the United States "seeks to stymie the creation of non-traditional apartment complexes" and essentially decrees to apartment builders "No Vehicular Access Allowed." (Parker, Estes & Assocs., Inc's Mem. in Resp. to U.S.A's Mot. for Summ. J. at 8.) Parker Estes is mistaken, as the government advocates the inclusion of both pedestrian and vehicular access on public roads, and the Court agrees that the FHA attempts to create just such a choice for disabled individuals.

not subject to the FHA, apartment complexes are subject to the FHA. See 42 U.S.C. § 3604(f)(3)(C) (including "covered multifamily dwellings" within the FHA). The "unique" vehicular-oriented design of the apartment complexes does not exempt the complexes from the FHA, even if the complexes were designed in light of a substantial market preference for independent single family homes. Nor are the complexes exempt due to the lack of development around the complexes (notably at Camden), the assumption that all potential residents would own a car, or the lack of sidewalks along public roads. The FHA, regulations, and precedent make absolutely no mention of these factors, and the Court declines to consider them.[8]

The Court's finding is consistent with the intent of the Guidelines. As HUD emphasized in the Guidelines' Preamble, "the Department's expectation is that public and common use facilities generally will be on an accessible pedestrian route. The Department, however, recognizes that there may be situations in which an accessible pedestrian route simply is not practical, because of factors beyond the control of the owner." 56 Fed. Reg. 9485. In light of the statute, regulations, and precedent, Defendants' argument that the vehicular exemption is an alternative method of compliance with the FHA, rather than an exception to the rule, is not well-taken.

2. Clubhouses

Wyndham's clubhouse contains a leasing office, restrooms, an exercise room, and space for meetings. Camden's clubhouse contains a leasing office, an exercise room, space for meetings, and

[8]Defendants also argue that the United States bases its arguments against the vehicular exemption "on interpretations and assumptions by the Government about what is 'best' for people with disabilities, rather than an application of the actual statutory requirements of the Act to these properties." (Grant Defs.' Opp. at 13.) The United States argues that housing providers must create surroundings that welcome both the use of wheelchairs and cars. It seems that the Government is mandating the provision of choices to people who use mobility aids and cars, rather than limiting choices to only vehicles as the Grant Defendants claim.

a theater. These facilities are common use areas subject to the FHA. 56 Fed. Reg. 9485-86, 9505. The Grant Defendants admit to the interior violations at the clubhouses, but they argue that they have ameliorated the situation: "While many of these assertions are admittedly undisputed in the original state of the properties, in many instances, the Grant Defendants have made significant changes to Wyndham and Camden Grove that negate the Plaintiff's claim that these areas are not accessible." (Grant Defs.' Opp. at 30.) The instant case is in the liability phase of the proceedings, and any recent improvements, (see id. at 18-19, 30-31) do not reduce Defendants' responsibility for violating the law in the first instance. The FHA requires all ground floor units to be built accessible, not made accessible only when requested by tenants or after suit by the Government. Since the Grant Defendants admit violations, summary judgment on liability is granted to the United States. The Court will consider favorably any improvements and accommodations on the issue of damages at trial.

3. Mail Kiosks

Mailboxes are common use areas subject to the FHA. 56 Fed. Reg. 9485-86, 9505. The United States argues that the Wyndham mailboxes are located on excessively sloped ground and are stacked above the ANSI maximum side reach range of people using wheelchairs. Defendants reply that many of the mailboxes are within reach of a person in a wheelchair. The Guidelines require common use space to contain "sufficient accessible facilities of each type to assure equitable opportunity for use by persons with handicaps." 56 Fed. Reg. 9505. The Guidelines do not require that each and every mailbox be accessible to a person in a wheelchair. The Court agrees with Defendants' assertion that people with disabilities may be assigned the lower, in-reach boxes, which make up a majority of the mailboxes. The United States' motion for summary judgment is denied

as to the mailbox kiosks.

4. Parking

a. Parking Connected to Residential Units

The United States argues that neither Camden nor Wyndham offers parking to persons with disabilities on an equal basis with other residents. HUD has specifically stated that attached garages do not need to be accessible. See Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines, 24 CFR Ch. 1 at Question 10. Despite HUD's interpretation, the United States argues that the statutory prohibition on discrimination in "terms" and "conditions" in housing, 42 U.S.C. § 3604(f)(2), supports an equitable argument that Wyndham and Camden cannot provide covered parking spaces for its residents without providing the requisite number of covered parking spaces on accessible routes for its residents with disabilities.

Under a Chevron analysis, rules and regulations promulgated by an administrative agency "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron v. Nat'l Res. Def. Council, 467 U.S. 837, 844 (1984). As long as HUD's interpretation is not arbitrary, capricious, or manifestly contrary to the FHA, this Court is directed to defer to that interpretation, HUD being the agency with the authority and expertise to interpret the FHA. See U.S. v. Edward Rose, 246 F. Supp. 2d 744 (E.D.Mich. 2003). Upon review of the regulations dealing with attached garages, the Court finds that the interpretation is not arbitrary, capricious, or manifestly contrary to the statute. When Congress developed and passed the FHA, it clearly aimed to eliminate housing discrimination against people with disabilities, but not regardless of cost. Housing providers may be exempted from liability under the FHA for a limited number of cost-related reasons, including site impracticality. HUD could rationally have found that

accessible attached garages were too difficult or costly to justify requiring them. The United States' exhibit, "A Day in the Life," displays significant accessibility issues in the attached garages, and it leads to the conclusion that a private accessible parking garage would be quite expensive. The United States argues that 2% of the units should have accessible one-car garages with more parking available on request. (See Pl. U.S.' Mem. in Supp. of its Mot. for Summ. J. at 25.) This concession would be analogous to a requirement for accessible parking at public and common use areas, which is fully developed in the following subsection.

One of the most innovative aspects of the FHA was that it required full compliance of all ground units in apartment complexes, thereby eliminating the possibility that any of the units would be specifically labeled "disabled." All units must now be accessible to people who use wheelchairs and other mobility aids. By not requiring attached garages to be compliant with the FHA, housing providers may build all ground units in a similar, generally accessible fashion. To require 2% of the units to have special garages would again label some units better fit to disabled people than others. Without this 2% requirement, though people who use wheelchairs would not have accessible garages, they would be free to choose any ground unit that is available. These are the sorts of decisions that HUD, as an experienced interpreter of the FHA, is better able to make than is the Court. Since HUD's interpretation of the FHA is not arbitrary, capricious, or contrary to the FHA, the Court will defer to its determination that private attached garages need not be accessible.

b. Parking for Visitors

The United States next argues that the apartment complexes violate the FHA because the ground floor units do not have accessible visitor parking. The Guidelines require accessible visitor parking to the extent that visitor parking is provided. 56 Fed. Reg. 9505. First the United States

argues that garage parking cannot function as accessible visitor parking. The Court already decided that private garage parking need not comply with the FHA, as per the Guidelines, so the United States is correct that garages would not be intended to accommodate the cars of guests with disabilities. Next the United States argues that street and driveway parking is inaccessible to guests with disabilities "because the routes from those locations to the ground floor unit entrances - the driveways themselves - are not accessible due to lips and excessive slopes." (Id. at 26 (citation omitted).) The Court already decided that Defendants failed to establish a genuine issue of material fact on FHA compliance of the driveways, as Defendants were unable to rely on the site impracticality or vehicular exemptions to the FHA. Defendants are liable for failure to comply with the FHA, and the driveways of both Camden and Wyndham will be ordered into FHA compliance at the trial on remedies. Once the driveways are accessible to wheelchair users, there is no reason for the Court to believe that they would not be suitable for visitor parking. The United States' motion for summary judgment is denied as to liability for lack of visitor parking.

c. Parking for Complex Amenities

Where parking is provided at complex amenities, the Guidelines require accessible parking. 56 Fed. Reg. 9504-05. The Grant Defendants admitted that Wyndham's swimming pool complex and tennis/basketball courts lack such accessible parking facilities. The accessible parking space at the Wyndham clubhouse also lacks an access aisle, is not located on the shortest route of travel to the building, and has an adjacent slope and cross-slope beyond the ANSI maximums. The Court finds that the United States' undisputed evidence supports violations of § 3604(f)(3)(C)(i), and accordingly, the Court grants the United States' motion as to Defendants' liability for parking at complex amenities.

No designated accessible parking spaces serve either complex's refuse or mail facilities. Defendants argue that the facilities are not intended as places where residents would park because residents would merely stay a few minutes. The Grant Defendants simultaneously argue that all facilities are designed to be accessed by vehicles and that the mail and refuse facilities do not require parking. The Court finds these arguments inconsistent. Moreover, Defendants offer no alternate industry standards or comparable equivalent to support their version of vehicular access. They offer merely the testimony of their expert, who reiterates that the access to mail and refuse facilities is intended for only minutes at a time. If the facilities are designed to accommodate drive-in usage, they should also be designed to accommodate vehicles under the requirements of the FHA. To deviate from the ANSI and Guideline requirements, Defendants bear the burden of showing that they have met some comparable standard of access and safety. Defendants failed to show that there is no genuine issue of material fact, and the Court grants the United States' motion for summary judgment on liability for non-compliance of amenity parking, including mail and refuse facilities.

B. Residential Unit Aspects

1. Wyndham Doorways and Thermostats

The FHA requires that "all the doors designed to allow passage into and within all premises within [covered] dwellings [must be] sufficiently wide to allow passage by handicapped persons in wheelchairs." 42 U.S.C. § 3604(f)(3)(C)(ii). The Grant Defendants admit that the doors in each of the 166 ground units at Wyndham are too narrow to meet this standard.

The FHA and regulations also mandate "an accessible route into and through" each ground floor unit. § 3604(f)(3)(C)(iii)(I); 24 C.F.R. § 100.205(c)(3)(i). A covered dwelling unit should not include any features or conditions that inhibit a person with disabilities from moving through a unit

to the same extent as a non-disabled person, such as a change in level greater than 0.5" at the entrance door. HUD Guideline 6, Requirement 4, 56 Fed. Reg. 9507. The Grant Defendants admit that 149 of Wyndham's 166 ground floor units have a step, averaging three to four inches in height, with six units' steps measuring five, seven, or eight inches. These excessive level changes render the dwellings inaccessible to persons with disabilities, in violation of the FHA requirement that there be an accessible route into and through the unit. See Fair Hous. Council, Inc. v. Village of Olde St. Andrews, Inc., 250 F. Supp. 2d 706, 720 (W.D.Ky. 2003).

The FHA and regulations require the placement of environmental controls in accessible locations. 42 U.S.C. § 3604(f)(3)(C)(iii)(II); 24 C.F.R. § 100.205(c)(3)(ii). The Guidelines require that thermostats be no higher than forty-eight inches from the floor, while the ANSI requirements allow thermostats as high as fifty-four inches. The Grant Defendants admit that 149 of the 166 ground floor units have thermostats above fifty-four inches from the floor, ranging from approximately sixty to sixty-four inches. The inaccessible placement of these controls violates the FHA. See Fair Hous. Council, Inc. v. Village of Olde St. Andrews, No. 3:98-cv-630, slip op. at 13 (W.D.Ky. June 18, 2003).

Accordingly, the Court grants summary judgment on Grant Defendants' liability as to the foregoing undisputed violations: Wyndham doorway widths, Wyndham front steps, and Wyndham thermostats.

2. Reinforcements in Bathroom Walls

The FHA and its regulations require covered dwellings to have reinforcements in bathroom walls around all toilets and tubs to allow for later installation of grab bars. 42 U.S.C. § 3604(f)(3)(C)(iii)(III); 24 C.F.R. § 100.205(c)(3)(iii). The Grant Defendants admit that Wyndham

does not have reinforcements in the walls. The United States' expert confirmed that the builders installed reinforcements at Camden, though he stated that the reinforcements were not in the required locations. Without more factual information on reinforcement placement and upon no admission of Defendants, the Court declines to grant summary judgment as to Camden. Defendants' undisputed failure to design and construct reinforcements at Wyndham warrants summary judgment on liability, since the lack of reinforcements for grab bars is a clear violation of the FHA. See Village of Olde St. Andrews, No. 3:98-cv-630, slip op. at 14; Sterling Homes, 1999 WL 1068458, at *5.

3. Wheelchair-accessibility in Kitchens

The FHA requires that covered multifamily dwellings have "usable kitchens . . . such that an individual in a wheelchair can maneuver about the space." 42 U.S.C. § 3604(f)(3)(C)(iii)(IV). HUD's Guidelines provide that "clearance between counters and all opposing base cabinets, countertops, appliances or walls is at least 40 inches." 56 Fed. Reg. 9511. The Grant Defendants admitted that Wyndham's ground floor units have only a thirty-six inch clearance between the kitchen counter and the opposite wall, and their consultant, Bill Scott, reported that this problem persists at Camden. (Def. Expert Report at 5.)

The Grant Defendants argue that the thirty-six inch clearance does not violate the FHA because the forty inch measurement in the Guidelines is arbitrary. Since there are no moving parts at this passageway in kitchens in either Camden or Wyndham to require additional maneuvering space, they argue that the thirty-six inch width is sufficient. They also argue that the space is better defined as a passageway than a kitchen, though it holds a counter along one wall. The entire kitchen, including portions with only a preparation counter, must meet the requirements in the FHA

Guidelines. The Guidelines make no mention of moving parts, so the Court will not regard moving parts as a condition precedent for application of kitchen regulations. Moreover, the Guidelines regarding kitchen areas are not arbitrary. If doorways must be thirty-two inches wide, it follows that areas that require turning and movement in many directions must be wider. The Grant Defendants offered no logical argument for the contention that the forty inch clearance is arbitrary. As with resident parking, the Court will defer to HUD's interpretation of the FHA as long as it is not arbitrary, capricious, or contrary to law. See Chevron, 467 U.S. at 844. The Court finds no reason not to give the Guidelines controlling weight. Accordingly, the Court finds that the kitchen areas of both Wyndham and Camden are not compliant with the FHA. Therefore, the Court grants the United States summary judgment as to the Grant Defendants' liability.

4. Wheelchair-accessibility in Bathrooms

The Guidelines also establish technical specifications for bathrooms, including thirty inches by forty-eight inches of clear floor space parallel to or centered on the sink for a side approach, or perpendicular to and centered on a sink having either no cabinets or removable cabinets to allow a forward approach, and at least eighteen inches from the centerline of the toilet to the tub or side wall. Guideline 2(a)(ii), 56 Fed. Reg. 9511, 9513-14. Each of these requirements aims to provide at least the minimum amount of clear space at the toilet, sink, and tub for a person using a wheelchair to maneuver.

The Grant Defendants admit that the toilet centerlines in the Wyndham "non-handicapped" one-bedroom units are only fifteen inches from the side walls. All Wyndham ground floor units lack the thirty inches by forty-eight inches of clear floor space parallel to and centered on the sink. When the requisite space is not provided or not centered on the sink, persons with disabilities cannot get

close enough to the faucets and the sink to make effective use of them. These deficiencies violate the FHA. See Village of Olde St. Andrews, Inc., No. 3:98-cv-630, slip op. at 14, 17-18; Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc., 40 F. Supp. 2d 700, 713-14 (D.Md. 1999).

IV. Conclusion

Since there is no genuine issue of material fact, Court **GRANTS** the United States' motion for summary judgment as to Defendants' liability as to 1) the routes from all ground floor units to on-site amenities and public streets, 2) clubhouses, 3) Wyndham mail kiosks, 4) parking at complex amenities, 5) Wyndham doorways, 6) Wyndham thermostats, 7) reinforcements in Wyndham bathroom walls, and 8) wheelchair-accessibility of all ground floor kitchens and bathrooms.

A genuine issue of material fact remains as to all other areas. The Court **DENIES** summary judgment on resident parking, visitor parking, and reinforcements in Camden bathroom walls.

IT IS SO ORDERED this 26th day of April 2004.

BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

Notice of Distribution

This notice confirms a copy of the document docketed as number 505 in case 2:01-CV-02069 was distributed by fax, mail, or direct printing on April 27, 2004 to the parties listed.

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