UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JPI CONSTRUCTION, L.P.; MULTIFAMILY CONSTRUCTION, L.L.C.; JPI APARTMENT DEVELOPMENT, L.P. D/B/A JPI CAMPUS QUARTERS; LIFESTYLE APARTMENT DEVELOPMENT SERVICE, L.L.C.; JEFFERSON BEND, L.P. D/B/A JEFFERSON AT MISSION GATE APARTMENTS; JEFFERSON LAKE CREEK, L.P. D/B/A JEFFERSON CENTER APARTMENTS; and APARTMENT COMMUNITY REALTY, L.L.C., Defendants.	Civil Action No. 3:09-cv-412-B

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

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Whitaker v. West Village Ltd. P'ship, No. Civ.A.3:03-CV-0411-P, 2004 WL 1778963 (N.D. Tex. Aug. 4, 2004). 39

Whitaker v. West Village Ltd. P'ship, No. Civ.A.3:03-CV-0411-P, 2004 WL 2046771 (N.D. Tex. Sep. 10, 2004). 38

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Fair Housing: Accessibility Guidelines; Questions and Answers; Supplement to Notice, 59 Fed. Reg. 33362–63 (Jun. 28, 1994). 15

Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. 15740, 15756–57 (Mar. 23, 2000). 16, 20, 47

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I. SUMMARY OF ARGUMENT

Defendants (collectively "JPI") have discriminated against persons with disabilities by engaging in a longstanding pattern or practice—dating back nearly two decades—of building multi-family housing complexes with extensive and significant accessibility barriers, in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601–3619 ("FHA"), and the Americans with Disabilities Act, 42 U.S.C. §§ 12181–12189 ("ADA"). The undisputed facts, established through meticulous, objective surveys performed by highly-trained and nationally known experts retained by the United States, show that accessibility barriers are legion at 32 JPI properties, each selected by JPI for inclusion in this phase of discovery. *See* Dkt. 32, Supp. Joint Status Rep.; Dkt. 33, Second Supp. Joint Status Rep. As the initial owner, developer, and/or general contractor, JPI was responsible for the design and construction of these properties and is liable for violating the FHA and ADA. Accordingly, the Court should, pursuant to Federal Rule of Civil Procedure 56(c), grant partial summary judgment as to liability and order JPI to submit a plan for remedying the violations at the identified properties and for surveying and retrofitting the remaining properties in JPI's portfolio.

II. FACTS

A. Procedural History

On March 4, 2009, the United States filed this action against JPI alleging that JPI designed and constructed multi-family housing in violation of the FHA and ADA. On November 16, 2009, the Court issued a scheduling order identifying the properties in JPI's portfolio that are the subject of this phase of discovery. Dkt. 35. The order provided that the parties would have until December 31, 2010, to inspect each property. For the properties the United States inspected, it filed expert reports containing the detailed findings of each inspection. As provided for in the

scheduling order, JPI's inspectors visited each property inspected by the United States and filed responsive reports.

B. JPI

Since 1991, the specific JPI entities named as defendants and other closely-related JPI entities have collectively engaged in the design and construction of 210 multi-family housing developments in 26 states and the District of Columbia.[1] Ex. 2, Defs. Init. Disc., at 2 n.1 and Ex. C, App. 127, 131–41; Ex. 3, Defs. Resps. to U.S. Interrog. No. 2, App. 142–92; Dkt. 32, Supp. Joint Status Rep., at 24. The 210 JPI properties, including the 32 that are discussed in this motion, were designed and constructed through the collaborative efforts of JPI project-specific partnerships, developers, and general contractors. Collectively, these entities have the following features:

- All JPI entities are headquartered at one centralized location, 600 E. Las Colinas Blvd, Suite 1800, Irving, TX. Ex. 4, Defs. Resps. to U.S. Interrog. No. 7, App. 193–259; Ex. 5, Sec'y of State Certificates of Fact, App. 260–94.

- JPI Partners, L.L.C., whose assumed corporate name is "JPI," provided the personnel for the purchase, development, construction, management, and financial services needs of all other JPI entities.[2] Ex. 6, Motsenbocker Dep. (Jan. 26, 2011), at 18:4–5; 21:4–23; 25:12–26:4, App. 298–300; Ex. 7, Motsenbocker Dep. (Feb. 14, 2011), at 166:16–168:16, App. 311.

- The JPI entities that designed and constructed the 32 properties discussed in this motion share the same managerial officers or officials. Ex. 5, Sec'y of State Certificates of Fact, App. 260–94.

- All JPI entities followed the same FHA/ADA compliance policies and procedures when they designed and constructed the 210 properties. Ex. 7, Motsenbocker Dep. (Feb. 14, 2011), at 190:10–191:17, App. 312; Ex. 6, Motsenbocker Dep. (Jan. 26, 2011), 178:23–25, App. 303.

- The same JPI trademark is widely used on promotional materials and letterhead. Ex. 6 Motsenbocker Dep. (Jan. 26, 2011), at 139:4–20, App. 301.

[1] Jefferson Arts District was under construction at the time of the United States' inspection in April 2010.
[2] JPI Partners, L.L.C. was formerly JPI Partners, Inc. and filed an Articles of Conversion with the Office of the Secretary of State of Texas on August 31, 1999.

- The JPI enterprise has a single corporate mission statement. Ex. 6, Motsenbocker Dep. (Jan. 26, 2011), at 286:17–22, App. 304.

As discussed in Part III.H, *infra*, JPI, because of its operational unity, is liable for the accessibility violations at the properties.

C. Experts

Five accessibility experts were primarily responsible for conducting property inspections for the United States. Ken Schoonover, a licensed professional engineer and head of KMS Associates, Inc., currently chairs the ANSI A117.1 standards committee[3] and has spent his career working with building codes and accessibility standards. *See* Dkt. 47-2, Schoonover Rep., at 2–3; Dkt. 70-2, Schoonover CV. Gina Hilberry, a licensed architect and principal at Cohen Hilberry Architects of St. Louis, has extensive experience in accessibility, including as a certified accessibility inspector/plans examiner with the International Code Council and as a member of the ANSI A117.1 standards committee. Dkt. 50-2, Hilberry Rep., at 2–5, 13–16. Frank Colby, a licensed architect, has served extensively as an FHA and ADA consultant. *See* Dkt. 55-2, Colby Rep., at 4–5, Dkt. 55-5. John Catlin is a licensed architect and founding partner of LCM Architects, LLC and has 34 years of experience as an accessibility specialist. He has served on the United States Access Board and serves as a trainer for the U.S. Department of Housing and Urban Development's ("HUD") Fair Housing Accessibility FIRST Technical Assistance Program (www.fairhousingfirst.org). *See* Dkt. 45-2, LDM Rep., at 3–3; Dkt. 45-3, Catlin CV. Douglas Mohnke is a licensed architect with LCM Architects and has served extensively as an accessibility consultant. *See* Dkt. 45-2, LCM Rep., at 3–5; Dkt. 45-4, Mohnke CV.

[3] The American National Standards Institute ("ANSI") is a non-profit organization that promotes the development of voluntary standards in a variety of fields and industries. The A117.1 committee is dedicated to developing accessibility standards for construction, which is published as the American National Standard for Buildings and Facilities – Providing Accessibility and Usability for Physically Handicapped People, ANSI A117.1. *See infra* Part III.B.

The United States' experts surveyed each property by reviewing the architectural plans, observing and taking measurements of existing features at the property, and comparing those observations and measurements to the HUD regulations, 24 C.F.R. §§ 100.200–205, the Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472–9515 (attached at Ex. 8, App. 587–631),[4] and the 1991 ADA Standards, 28 C.F.R. Part 36, App. A (2010). *See* Dkt. 45-2, LCM Report, at 2; Dkt. 47-2, Schoonover Report, at 13; Dkt. 50-2, Hilberry Report, at 5; Dkt. 55-5, Colby Report, at 5–8. Where the observations or measurements were not in compliance with the regulations, the Guidelines, or the 1991 Standards, those conditions were noted in the expert report filed for each property. The experts inspected all public and common use areas, including buildings such as clubhouses and laundry facilities, as well as pedestrian routes connecting the dwelling units to the public street or sidewalk and the onsite public and common use facilities. The experts inspected the interior of the dwelling units by determining the various unit types at the facility, e.g., one-bedroom units, two-bedroom units, etc., with the assistance of the architectural plans and the current management at the property. Where possible, the experts inspected at least three units of each unit type and recorded the observations and measurements that did not comply with the regulations, the Guidelines or the 1991 Standards. *See* Dkt. 45-2, LCM Report, at 8–9; Dkt. 47-2, Schoonover Report, at 13; Dkt. 50-2, Hilberry Report, at 5; Dkt. 55-5, Colby Report, at 6–8**.** The experts then prepared a detailed inspection report.[5]

[4] The experts also reference ANSI A117.1–1986, as the regulations and Guidelines incorporate ANSI as the basis for Requirement 2, accessible and usable public and common use areas.

[5] All property inspection reports were filed on ECF, and a complete copy was delivered to Judge Kaplan. Given the volume of the inspection reports filed in this case, the expert reports cited in this motion will be referred to by the docket number and have not been separately included in the appendix.

Subsequent to the United States' experts' inspections, individuals retained by JPI reinspected each property and filed an inspection report.[6] These individuals used a wide range of methodologies to inspect the properties for compliance with the FHA and ADA. Paul Sheriff, a wheelchair user who has no training or certification in architecture or engineering, inspected properties by videotaping himself navigating the property using his "custom-built, made-to-measure wheelchair" and then preparing a brief written report. Dkt. 102-1, Sheriff Rep., at 11–16. Mr. Sheriff testified both that he does not take measurements as part of his inspections, Ex. 9, Sheriff Dep. (Jan. 20, 2011), at 124:2–18, App. 653, and that he takes "thousands of measurements" using his wheelchair and physical characteristics. Ex. 9, Sheriff Dep. (Jan. 20, 2011), at 84:4–6, App. 651; Dkt. 102-1, Sheriff Rep., at 14 & n.5. Regardless of which is true, he does not record any measurements in his report that can be compared to, let alone dispute, the United States' experts' measurements.

Dr. Alison Vredenburgh, a researcher with a Ph.D in Industrial-Organizational Psychology, employed a methodology for property inspections consisting of photographing her associate, Dr. Zackowitz, who is not disabled, using a wheelchair in the public and common use areas and in the dwelling unit bathrooms and kitchens. Dkt. 82-1, Vredenburgh Rep., at 1; Ex. 10, Vredenburgh Dep. (Jan. 24, 2011), at 108:15–110:11; 117:21–121:2, App. 661–62, 664–65. The only measurements Dr. Vredenburgh took and recorded were in the unit bathrooms and kitchens. She then compared those measurements to measurements she had tested in a study, detailed in her initial report, which was funded by JPI. Dkt. 78-1, Vredenburgh Rep., at 4–7; Ex. 10, Vredenburgh Dep. (Jan. 24, 2011), at 47:4–16, 114:18–25, App. 660, 663. If the measurements corresponded with measurements she determined to be "accessible" in her study,

[6] JPI did not file an inspection report for Jefferson at Marymoor, which was inspected by the United States' expert prior to the filing of this lawsuit. JPI did file reports for three other properties inspected by the United States prior to filing.

she concluded that the bathroom or kitchen was "usable."[7] Ex. 10, Vredenburgh Dep. (Jan. 24, 2011), at 127:11–129:10, App. 666–67; *see, e.g.*, Dkt 78-2, Vredenburgh Rep., at 11. Dr. Vredenburgh did not measure slopes or cross-slopes of walkways or ramps. *Id.* at 2–3. Dr. Vredenburgh used the same methodology for every inspection. Ex. 10, Vredenburgh Dep. (Jan. 24, 2011), at 138:1–6, App. 668.

Mark Wales, who is not a licensed architect, inspected each property and compared his own observations and measurements with the United States' expert's observations and measurements. *See generally* Dkt. 79-1, Wales Rep.; Dkt. 79-3, Wales Rep., at 2; Ex. 11, Wales Dep. (Jan. 14, 2011), at 68:14–17, App. 675. Mr. Wales then responded to each item in the United States' expert's report by citing back to his main report and providing comments. *See, e.g.*, Dkt. 79-3, Wales Rep., at 2. Mr. Wales described his methodology as relying on "a combination of a lot of things such as safe harbors, the other technical guidance, research, whatever it takes for me to determine whether a reasonable design consistent with the requirements that acts as a requirements [sic] has been obtained." Ex. 11, Wales Dep. (Jan. 14, 2011), at 109:15–111:6, App. 676–77; Dkt. 79-1, Wales Rep., at 75–78 (listing sources relied upon). In many cases, Mr. Wales did not dispute the measurements recorded by the United States' experts. *See, e.g.*, Dkt. 192-2, Wales Rep., at 24 item 133; Ex. 11, Wales Dep. (Jan. 14, 2011), at 264:22–25, App. 670.

Pete Skarzenski is a licensed architect and head of Pete Skarzenski Consulting. He was formerly an architect with the Dallas architectural firm Fusch Serold & Partners, and in that capacity worked on multi-family housing projects for JPI. Ex. 12, Skarzenski Dep. (Feb. 3, 2011), at 36:13–37:3, App. 687. Since 2001, Mr. Skarzenski has consulted with JPI on

[7] Where "CFS" is indicated as the measurement, Dr. Vredenburgh testified that it meant a large space that she "didn't bother to measure." Ex. 10, Vredenburgh Dep. (Jan. 24, 2011), at 125:19–130:1, App. 666–67.

accessibility issues. *Id.* at 57:6–58:10, App. 688–89. Mr. Skarzenski's methodology for property inspections was to take field measurements and apply ANSI A117.1–1986 and the Guidelines and compare his findings with the findings of the United States' expert. *Id.* at 137:5–9; 214:2–4, App. 691, 696.[8] Mr. Skarzenski indicated where he believed the United States' expert misapplied the Guidelines or went beyond the safe harbors available at the time the property was built. Dkt. 86-2, Skarzenski Rep., at 1. Mr. Skarzenski also indicated where he believed a feature's dimensions satisfy another safe harbor and should therefore be deemed accessible. *Id*. Mr. Skarzenski testified that where an item is not included or his reports indicate "no comment," he was not disputing the observation or measurements taken by the United States' expert. Ex. 12, Skarzenski Dep. (Feb. 3, 2011), at 219:13–20, 223:18–19, 281:18–282:21, App. 697–98, 699–700.

D. Material Facts Not In Dispute

The United States' experts found significant violations of the Guidelines at 32 properties inspected by the United States.[9] The detailed undisputed conditions found at each property are contained in the chart attached as Exhibit 1. The chart describes the condition, includes the citation to the United States' expert report for the condition, JPI's experts' response to the particular condition, and the reference to the portion of the FHA Guidelines or ADA standards pertaining to that condition. The United States has included only those property conditions where

[8] Mr. Skarzenski testified that he uses ADAAG for assessing ADA compliance. Ex. 11, Skarzenski Dep. (Feb. 3, 2011), at 214:2–4, App. 696.

[9] On February 15, 2011, the United States supplemented its interrogatory responses to inform JPI that it would not pursue claims regarding the design and construction of 12 properties that were among the 52 in this phase of discovery: Jefferson at ULM, Jefferson Commons (TTU), Virginia State University, Jefferson at Berry Street (University of Minnesota II), Clark Atlanta University (Heritage Commons), Gainesville (U of Florida), North Carolina State University (Wolfpack), Jefferson Commons – Lawrence (KU), Jefferson Commons – OSU (Stillwater II), Jefferson Commons at Star Ranch (Tuscon II), Jefferson Commons at Fresno, and Jefferson at Simi Valley. On April 15, 2011, the United States informed JPI that it would not pursue claims regarding the design and construction of eight additional properties: Jefferson Arts District, Jefferson at Washington Crossing, Jefferson at Bellingham, Providence Place, Jefferson at Logan Circle, Jefferson at Sullivan Place, Jefferson at Young Circle, and Jefferson at City Gate.

the observation or measurement was not contested by JPI's inspector.[10] A summary of the violations found is as follows:

	Requirements of the FHA, 42 U.S.C. § 3604(f)(3)(C)					
Property	Inaccessible public and common use areas	Inaccessible doors	Inaccessible route into and through dwelling unit	Inaccessible environmental controls	Inaccessible kitchens and bathrooms	ADA
Jefferson at Preston	X			X		
Villas at Beaver Creek	X	X	X			X
Jefferson on the Parkway	X				X	
Jefferson at Melrose	X					
Jefferson at Riverchase	X	X			X	
Jefferson at Prestonwood Hills	X				X	X
Jefferson at Frankford	X		X		X	X
Jefferson Hill	X	X				X
Jefferson at Mission Gate	X				X	X
Jefferson Pines	X					
Jefferson Lakes	X				X	
Jefferson Canyon	X					
Jefferson Center	X				X	X
Jefferson at Texas Street	X				X	
Jefferson at Founder's Park	X					X

[10] JPI's inspector may dispute whether the condition or measurement violates the FHA or ADA; however, the existence of the condition or measurement itself is not disputed, so the question of violation is one of law, not fact. The United States' authority for its conclusions that the listed conditions violate the FHA and ADA is discussed in Part III, *infra*.

Jefferson Park (Den Rock)	X	X				
Jefferson at Pin Oak	X	X		X		X
Jefferson at King Farm	X				X	X
Congressional Village	X					X
Jefferson at Fair Oaks	X			X	X	
Jefferson at Coral Square	X				X	
Jefferson Summit	X				X	X
Jefferson at Morgan Falls	X	X	X	X	X	
Jefferson on the River	X	X	X	X		
Jefferson Farms	X	X		X	X	X
Jefferson on the Plaza	X	X				X
Jefferson at Aviara	X					
Jefferson at Emerald Park	X	X		X	X	X
Jefferson at Rock Creek	X	X				
Jefferson at Fox Hollow	X					X
Jefferson at Aspen Ridge	X					
Jefferson at Marymoor	X					

JPI selected the properties that are the subject of this phase of discovery. Dkt. 32, Supp. Joint Status Rep.; Dkt. 33, Second Supp. Joint Status Rep. There is no dispute that these properties were constructed for first occupancy after March 13, 1991. It is also undisputed that although portions of Jefferson at Preston were constructed for first occupancy prior to March 13, 1991, there are buildings at that property that were constructed for first occupancy after that date.

Ex. 13, Def. Resp. to U.S. Interrog. No. 6, App. 702–733; Ex. 6, Motsenbocker Dep. (Jan. 26, 2011), at 159:16–161:23, App. 302.

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate if the pleadings and the record, including any affidavits, "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and the court draws all reasonable inferences regarding the assertions made in a light favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The non-moving party, however, "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 248 (citation and internal quotation marks omitted). Summary judgment must be granted if the nonmoving party has failed to make a sufficient showing on "an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323.

Courts routinely grant summary judgment in FHA design and construction cases where, as here, a plaintiff presents objective evidence that (1) a subject property is covered by the FHA and/or ADA; (2) the defendant is a responsible party for the design and construction of the property; and (3) the property has violations of the substantive provisions of the FHA and/or ADA, which are typically proven by observing conditions at the property, taking measurements of features at the property, and comparing those conditions and measurements to a recognized accessibility standard. *See Savannah-Chatham Cnty. Fair Hous. Council v. Genesis Designer*

Homes, LLC, No. CV406-096, slip op. at 37–39 (S.D. Ga. Jan. 18, 2011) (attached as Ex. 14, App. 770–72) (finding liability where measurements made by plaintiffs' expert were not disputed); *United States v. Shanrie Co.* (*Shanrie II*), 669 F. Supp. 2d 932, 938–39 (S.D. Ill. 2009) (finding liability where facts provided by the United States were undisputed and showed violations of the HUD Guidelines and ANSI); *United States v. Tanski*, No.1:04-CV-714, 2007 WL 1017020, at *16 (N.D.N.Y. Mar. 30, 2007) (noting that "defendants do not dispute the accuracy of the United States' measurements or observations" and holding that "[t]he United States has established as a matter of law that the Tanski properties have the above-listed features and that such features violate section 3604(f)(3)(C)").[11]

B. Design and Construction Requirements of the FHA

In 1988, Congress amended the Fair Housing Act to require that certain multi-family housing developments built for first use and occupancy after March 13, 1991, be designed and constructed with basic features of accessible design for persons with disabilities. *See* 42 U.S.C. §§ 3601–3619. The FHA requires that "covered multi-family dwellings" be designed and constructed in such a manner that:

[11] *See also United States v. Shanrie Co.* (*Shanrie I*), No. 05-CV-306-DRH, 2007 WL 980418, at *10–11 (S.D. Ill. Mar. 30, 2007) (partial summary judgment granted where defendants did not dispute violations of HUD Guidelines); *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1154 (D. Idaho 2003) (where defendants "failed to submit any evidence to demonstrate the accessibility of [covered housing] is in accordance with the Fair Housing Act[,] . . . there is no genuine issue of material fact with respect to the Taigen Defendants' liability under the Fair Housing Act."); *United States v. Quality Built Constr. (Quality Built I)*, 309 F. Supp. 2d 756, 763 (E.D.N.C. 2003) (summary judgment granted where defendants "have not come forward with alternative measurements or any other evidence to show that a triable issue of fact exists"); *United States v. Hallmark Homes, Inc.*, No. CV01-432, 2003 WL 23219807, at *8 (D. Idaho Sept. 29, 2003) (finding liability where expert's analysis showed violations of the HUD Guidelines and ANSI); *Mont. Fair Hous. v. Am. Capital Dev.*, 81 F. Supp. 2d 1057, 1064–69 (D. Mont. 1999) (finding liability based on HUD regulations); *Baltimore Neighborhoods, Inc. v. Rommel Builders*, 40 F. Supp. 2d 700, 713 (D. Md. 1999) ("The Court is satisfied that plaintiffs have established all of the allegations of FHAA violations, with the exception of the lack of reinforcements in the bathrooms, as a matter of law. Defendants do not substantively dispute any of the alleged violations except the lack of reinforcements in the bathrooms."); *Baltimore Neighborhoods, Inc. v. Sterling Homes Corp.*, No. 96-915, 1999 WL 1068458, at *8 (D. Md. Mar. 25, 1999) (finding liability based on undisputed observations by plaintiffs' expert and the HUD Guidelines); *United States v. Richard & Milton Grant Co.*, No. 2:01-cv-2069, (W.D. Tenn. Apr. 27, 2004) (attached as Ex. 15, App. 784–810) (summary judgment on liability granted where defendants did not dispute violations of HUD Guidelines and failed to show compliance with alternate accessibility standards).

(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;

(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.

42 U.S.C. § 3604(f)(3)(C).

The House Judiciary Committee explained that these accessibility requirements reflect "a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream . . . ." and are "essential for equal access and to avoid future de facto exclusion of persons with handicaps." H.R. Rep. No. 711, 100th Cong., 2d Sess., at 18, 27 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173. 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.[12]

[12] 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. 1995) ("The change in nomenclature from 'handicap' to 'disability' reflects Congress' awareness that individuals with disabilities find the term 'handicapped' objectionable.").

Congress made clear that the accessibility requirements of the FHA are to be in place at the time a covered dwelling is ready for first occupancy:

> Because persons with mobility impairments need to be able to get into and around a dwelling unit (or else they are in effect excluded because of their handicap), the bill requires that in the future covered multifamily dwellings be accessible and adaptable.[13] This means that the doors and hallways must be wide enough to accommodate wheelchairs, switches and other controls must be in convenient locations, most rooms and spaces must be on an accessible route, and disabled persons should be able to easily make additional accommodations if needed, such as installing grab bars in the bathroom, without major renovation or structural change. These modest requirements will be *incorporated into the design* of new buildings, resulting in features which do not look unusual and will not add significant additional costs.

Id. at 18 (emphasis added). *See also* 42 U.S.C. § 3604(f)(3)(C). As one court observed:

> The purpose of the accessibility requirements in the [Fair Housing Act] 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.

Shanrie I, 2007 WL 980418, at *5 (S.D. Ill. Mar. 30, 2007).

At the time Congress passed the amendments to the FHA, the American National Standards Institute ("ANSI"), a non-profit organization that promotes the development of voluntary standards in a variety of fields and industries, had a committee dedicated to developing accessibility standards for construction (the A117.1 committee), with the most recent standard at

[13] The use of the terms "adaptive" or "adaptable" in both the statute and the legislative history in no way modifies the requirement that all the features required by the FHA be in place at the time of first occupancy. The concept of adaptive design was well recognized at the time the FHA amendments were passed. The FHA was not intended to provide total accessibility, but rather is based on a standard of adaptable design, which "provide[s] usable housing for handicapped persons without necessarily being significantly different from conventional housing." H.R. Rep. No. 711 at 26. With these basic features of accessibility in place, a disabled person can make further modifications to address his or her particular needs, as provided for by the reasonable modification provisions of the FHA. 42 U.S.C. § 3604(f)(3)(A). *See Mont. Fair Hous.*, 81 F. Supp. 2d at 1065 (rejecting defendants' interpretation of the term "adaptive" as allowing listed FHA features to be added through future remodeling and adopting plaintiffs' definition—"design appropriate for use by persons of all abilities without modification"—as the proper interpretation under the FHA).

the time of enactment being published in 1986.[14] In the FHA, Congress specifically stated that compliance with the American National Standard for Buildings and Facilities – Providing Accessibility and Usability for Physically Handicapped People, ANSI A117.1, "suffices to satisfy the requirements of paragraph (3)(C)(iii)," 42 U.S.C. § 3604(f)(4), thus making the ANSI A117.1 standard a "safe harbor" for compliance with the FHA. In addition to providing the ANSI standard as a safe harbor for compliance, the statute requires HUD to "provide technical assistance to States and units of local government and other persons to implement" the design and construction requirements provided in § 3604(f)(3)(C). 42 U.S.C. § 3604(f)(5)(C). The statute also empowers HUD to issue regulations to implement the FHA. 42 U.S.C. § 3614a; *see also* 42 U.S.C. § 3601 note, Pub. L. No. 100-430, § 13(b) (requiring HUD to issue rules to implement the FHA amendments no later than 180 days after enactment).

Pursuant to its authority to issue regulations and provide technical assistance, on January 23, 1989, HUD issued final rules to implement and enforce the FHA amendments, including the provisions regarding accessible design and construction. 54 Fed. Reg. 3232, 3243–52 (Jan. 23, 1989) (codified at 24 C.F.R. §§ 100.200–205). On June 15, 1990, HUD published the proposed Fair Housing Accessibility Guidelines ("Guidelines") for notice and comment.[15] 55 Fed. Reg. 24370–24487. HUD received comments to the proposed Guidelines from builders, architects, industry representatives, disability advocacy organizations, and accessibility experts. Guidelines, 56 Fed. Reg. at 9475. On March 6, 1991, HUD issued the final Guidelines. 56 Fed. Reg. 9472–

[14] Published since 1961, the ICC/ANSI A117.1 Accessible and Usable Buildings and Facilities is a nationally recognized standard of technical requirements for making buildings accessible. The International Code Council ("ICC") and its precursor organization, the Council of American Building Officials ("CABO"), have been responsible for the document since 1987. The ICC/ANSI A117.1 is developed through a public hearing and deliberative process supervised by ANSI. The document is on a five-year cycle for development. *See* http://www.iccsafe.org/safety/Pages/accessibility-1.aspx#a117/ (last visited Apr. 15, 2011).

[15] At the time the proposed Guidelines were published, HUD recognized that there may be properties in various stages of construction that would be completed after March 13, 1991, and would thus be covered by the design and construction provisions of the FHA. Accordingly, HUD indicated that builders and designers of projects under construction could rely on the proposed Guidelines for compliance with the FHA. 55 Fed. Reg. at 24371.

9515. The Guidelines are a safe harbor for compliance and "provide technical guidance on designing dwelling units as required by the Fair Housing Amendments Act of 1988." *Id.* at 9499.

HUD's Guidelines provide detailed specifications for each feature covered by the FHA, such as specific heights for thresholds and whether and at what degree those thresholds must be beveled, maximum slopes and cross-slopes along accessible routes and on ramps, the amount of clear space necessary for a person in a wheelchair to use a kitchen or bathroom, and maximum and minimum heights for lights, outlets, and environmental controls. *Id.* at 9503–9515. On June 28, 1994, HUD supplemented the Guidelines by issuing explanatory questions and answers about the Guidelines. 24 C.F.R. ch. I, subch. A, app. IV; 59 Fed. Reg. 33362–63 (attached as Ex. 8, App. 633–47). HUD has stated that the Guidelines are intended to prescribe "minimum standards of compliance with the specific accessibility requirements of the Act." Guidelines, 56 Fed. Reg. at 9476.

In addition to the Guidelines,[16] HUD has issued regulations recognizing nine other accessibility standards as safe harbors for demonstrating compliance with the FHA's accessibility requirements. Each safe harbor has been carefully reviewed by HUD to ensure that it provides at least the same level of accessibility as required by the FHA, the HUD regulations, and the Guidelines. *See* Design and Construction Requirements; Compliance With ANSI A117.1 Standards, 72 Fed. Reg. 39540, 39541 (Jul. 18, 2007).[17] These safe harbors are objective

[16] The HUD-recognized safe harbor includes the Guidelines and the explanatory Q&A's published in 1994. 24 C.F.R. § 100.205(e)(2)(i). Although a builder or designer would not have had the benefit of the Q&A's prior to 1994, the Q&A's are still persuasive evidence of HUD's interpretation of the Guidelines even prior to 1994, and are intended to clarify the specifications set forth in the Guidelines. *See* 59 Fed. Reg. at 33362.

[17] The other nine safe harbors are: (1) HUD's Fair Housing Act Design Manual ("Design Manual") (attached as Ex. 8, App. 315–648), (2) ANSI A117.1 (1986) (read in conjunction with the FHA, HUD's regulations, and the Guidelines); (3) CABO/ANSI A117.1 (1992) (read in conjunction with the FHA, HUD's regulations, and the Guidelines); (4) ICC/ANSI A117.1 (1998) (read in conjunction with the FHA, HUD's regulations, and the Guidelines); (5) Code Requirements for Housing Accessibility 2000 ("CRHA"); (6) International Building Code 2000, as amended by the 2001 Supplement to the International Codes; (7) International Building Code 2003, with one condition; (8) ICC/ANSI A117.1 (2003) (read in conjunction with the FHA, HUD's regulations, and the

measures of accessibility that developers can follow to be fully compliant with the FHA. *See* Design and Construction Requirements; Compliance With ANSI A117.1 Standards; Final Rule, 73 Fed. Reg. 63610, 63614 (Oct. 24, 2008). Although compliance with any one of the safe harbors is not mandatory,[18] HUD has made clear that designers and builders who do not fully comply with a safe harbor bear the burden of demonstrating that a property provides at least the minimum level of accessibility required by the FHA, as set forth in the Guidelines. As recently as October 2008, HUD restated the standard for a prima facie showing by a plaintiff in a design and construction case:

> 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. This prima facie case may be rebutted by demonstrating compliance with a *recognized, comparable, objective* measure of accessibility. . . . In making a determination as to whether the design and construction requirements of the Fair Housing Act have been violated, HUD uses the Fair Housing Act, the regulations, and the Guidelines, all of which reference the technical standards found in ANSI A117.1–1986.

73 Fed. Reg. at 63614 (emphasis added).[19] In 2006, the HUD Secretary overruled a HUD administrative law judge's finding that, because the Guidelines were not mandatory, they could not be used to prove a violation of the design and construction provisions of the FHA. *HUD v. Nelson*, No. 05-068FH, 2006 WL 4540542, at *5 (Sep. 21, 2006), *aff'd*, 320 F. App'x 635 (9th

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Guidelines); and (9) International Building Code 2006, with the January 31, 2007 Errata. *See* 24 C.F.R. § 100.205(e); 73 Fed. Reg. at 63610–16.

[18] 56 Fed. Reg. at 9499 (developers may "seek alternative ways to demonstrate that they have met the requirements of" the FHA); *see also* Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. 15740, 15756–57 (Mar. 23, 2000).

[19] HUD has also made clear that designers and builders who selectively choose among the provisions of the different safe harbor standards rather than following one safe harbor in its entirety bear a similar burden:

> The benefit of safe harbor status may be lost if, for example, a designer or builder chooses to select provisions from more than one of the . . . safe harbor documents or from a variety of sources . . . . A designer or builder taking this approach runs the risk of building an inaccessible property. . . . [D]esigners 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.

72 Fed. Reg. at 39438; 73 Fed. Reg. at 63614.

Cir. 2009). The HUD Secretary found that the charging party had proven that the respondent had violated the FHA where the charging party provided uncontested evidence of violations of the Guidelines and respondents had failed to show that its property met a "comparable objective accessibility standard." *Id*. at *6–8.

Courts have recognized and adopted the burden-shifting standard in design and construction cases. *See Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.* (*Olde St. Andrews II*), No. 3:98-CV-630, slip op. at 8 (W.D. Ky. June 18, 2003) (Ex. 16, App. 818) ("[O]nce Plaintiffs have shown that a construction feature does not meet the Guidelines, Defendants undoubtedly face a heavy burden of demonstrating accessibility."), *aff'd*, 210 F. App'x 469, 481–82 (6th Cir. 2006); *Tanski*, 2007 WL 1017020, at *11 ("Courts have held that summary judgment on the issue of design-and-construction discrimination is appropriate where plaintiff demonstrates that 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." (citing *Taigen*, 303 F. Supp. 2d at 1154; *Quality Built I*, 309 F. Supp. 2d at 763)).

Any alternative means used by designers or builders to demonstrate compliance with the FHA must be evaluated and held to the same strict standard as the safe harbors. As HUD has emphasized, any alternative to the safe harbors must be a "recognized, comparable, objective measure of accessibility." 73 Fed. Reg. at 63614. HUD's interpretation is reasonable, given the specific inclusion of ANSI A117.1 in the statute. Although Congress did not intend for the ANSI standard to be the only means of compliance, it recognized the value of accessibility standards. *See* H.R. Rep. No. 711, at 27 ("there may be other local or state *standards* with which compliance is required or there may be other creative methods of meeting these *standards*")

(emphasis added). The need to demonstrate compliance using an objective, comparable standard has been HUD's consistent policy since the passage of the implementing regulations in 1989, as evidenced by HUD's reference to compliance using "ANSI A117.1–1986 *or a comparable standard*" in the regulations. 24 C.F.R. § 100.201 (1989) (emphasis added); *see also* Guidelines, 56 Fed. Reg. at 9479 ("builders and developers may follow alternative *standards* that achieve compliance with the Act's accessibility requirements") (emphasis added). As noted above, the HUD Secretary's decision in *Nelson*, affirmed by the Ninth Circuit, and HUD's comments in connection with the passage of the 2008 final rule, reaffirm the need to rely on objective standards to determine compliance. 2006 WL 4540542, at *6; 73 Fed. Reg. at 63614. Furthermore, HUD's recognition of safe harbors in addition to the ANSI standard as objective measures of compliance accords directly with Congress's intent.

Courts have also recognized the need for reliance on objective standards for determining compliance. In *Tanski*, rather than rely on an objective standard, the defendants sought to introduce evidence, in the form of declarations from residents, that there were disabled persons living at defendants' properties who did not have difficulty using the various features alleged to violate the FHA. 2007 WL 1017020, at *14. In rejecting this evidence, the court stated:

> The Court agrees with the United States that these wholly subjective declarations are not probative on the question of whether the apartments are designed and constructed such that they comply with the requirements of section 3604(f)(3)(C). No reasonable reading of the section supports the view that the Fair Housing Act's requirements may be met by satisfying the accessibility needs of a particular handicapped individual. Rather, a plain reading of section 3604(f)(3)(C) demonstrates that it requires compliance with an objective accessibility standard broadly applicable to handicapped people. The section requires that covered dwellings be "designed and constructed" such that the public use and common use areas be "readily accessible to and usable by handicapped persons"; that all doors be sufficiently wide "to allow passage by handicapped persons in wheelchairs"; and all premises in the dwelling contain specified "features of adaptive design" such as "accessible" routes into and through the dwellings, environmental controls in "accessible locations," and "usable" kitchens and bathrooms. The

> Court's reading of the statute as requiring compliance with a broadly applicable objective accessibility standard is reinforced by the provision in section 3604(f)(4) that the requirements of section 3604(f)(3)(C)(iii) may be satisfied by compliance with the appropriate ANSI requirements.

Id. See also Nelson, 2006 WL 4540542, at *6–7 (overruling ALJ's determination that evidence showing that two disabled persons could navigate the property was sufficient to show property was accessible because it did not meet the requirements of a comparable standard); *Grant*, No. 01-2069, slip op. at 8 (Ex. 15, App. 791) ("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); *United States v. Quality Built Constr.* (*Quality Built II*), 309 F. Supp. 2d 767, 772 n.1 (E.D.N.C. 2003) ("Whether one disabled person may be able to maneuver through the complex and units does not indicate compliance with the Act.").

C. HUD's Interpretation of the FHA Is Entitled to Deference

HUD's interpretation of the FHA, contained in its regulations and in the Guidelines, is entitled to great deference. It is well settled that, when an agency exercises the authority delegated to it to issue regulations with the force of law, the agency's interpretations of the statute that confers such authority are entitled to substantial deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). Under *Chevron*, courts "ordinarily defer to an administering agency's reasonable interpretation of a statute." *Meyer v. Holley*, 537 U.S. 280, 287 (2003) (deferring to HUD's interpretation of the FHA). Therefore, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute, . . . [and courts] have long recognized that

considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 843–44.

HUD's regulations, including the Guidelines, are entitled to *Chevron* deference because (1) Congress expressly delegated to HUD the authority to issue regulations and technical guidance; (2) the Guidelines set forth requirements that have the force of law; and (3) to the extent any ambiguity exists in the statutory requirements, the regulations and the Guidelines reasonably interpret those requirements. *See Mead*, 533 U.S. at 226–27. Thus, for example, in *Village of Olde St. Andrews*, the court concluded that it should defer to the Guidelines' interpretation of the FHA. *Olde St. Andrews I*, 250 F. Supp. 2d 706, 717 & n.9 (W.D. Ky. 2003); *see also Shanrie I*, 2007 WL 980418, at *5 (holding that HUD's interpretation of the FHA in the Guidelines is entitled to *Chevron* deference); *United States v. Edward Rose & Sons*, 246 F. Supp. 2d 744, 751–53 (E.D. Mich. 2003) (giving deference to HUD's interpretation of the Act's design and construction requirements as set forth in the proposed regulations, the Guidelines, and the Design Manual), *aff'd*, 384 F.3d 258 (6th Cir. 2004) (giving deference to HUD regulations).[20] Indeed, not only do the Guidelines represent the "minimum standards of compliance," Guidelines, 56 Fed. Reg. at 9476, but they also provide precise instructions for what is necessary to make a feature accessible under the FHA.

[20] Alternatively, HUD's Guidelines are entitled to an even greater level of deference than *Chevron* deference, as they interpret the 1989 HUD regulations that implemented the FHA. *See Long Island Care At Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) ("agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted") (internal quotation marks omitted); *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (similar); 65 Fed. Reg. at 15763 ("The Guidelines set forth specifications to implement the requirements of 24 C.F.R. 100.205(a) that all covered multi-family dwellings shall be designed and constructed to have at least one building entrance on an accessible route, unless it is impractical to do so because of terrain or unusual characteristics of the site."); 65 Fed. Reg. at 15766 (the Guidelines "set[] forth technical criteria [for kitchens and bathrooms] to meet" the requirements of the FHA and the regulations); 65 Fed. Reg. at 15770 ("The Guidelines specify seven requirements relating to accessibility which reflect the language of the [Fair Housing] Act and the regulations.").

HUD's consistent interpretation that compliance with the design and construction provisions of the FHA requires adherence to an objective standard is entitled to *Chevron* deference. *See supra* Part III.C. Additionally, courts have deferred to HUD's interpretation that a violation of the FHA can be proven by showing that a property does not meet the requirements of the Guidelines or other safe harbor, and if it does not, requiring a designer or builder to show that a property meets a comparable objective standard. This reasonable interpretation is also entitled to deference. *See supra* Part III.C; 73 Fed. Reg. at 63614; *Nelson*, 2006 WL 4540542, at *2.

D. JPI's Properties are Covered Dwellings Under the FHA

The FHA accessibility requirements apply to "covered multifamily dwellings [designed and constructed] for first occupancy" after March 13, 1991. 42 U.S.C. § 3604(f)(3)(C). The term "covered multifamily dwellings" is defined as (a) buildings consisting of four or more units if such buildings have one or more elevators and (b) ground floor units in other buildings consisting of four or more units. 42 U.S.C. § 3604(f)(7); *see also* 24 C.F.R. § 100.205(d). Thus, in an elevator building with four or more units, all units must comply with the FHA, while in a non-elevator building with four or more units, such as many garden-style buildings, only the ground floor units (and the attendant public and common use areas) must comply.[21]

As noted in Part II.D, *supra*, there is no dispute that 31 of the 32 properties at issue in this motion were constructed for first occupancy after March 13, 1991, and portions of Jefferson at Preston are also covered.

[21] As HUD has clearly stated, the definition of "ground floor" is any floor on which there is a building accessible entrance on an accessible route. As a result, a building may include more than one qualifying "ground floor." 24 C.F.R. § 100.201; Guidelines, 56 Fed. Reg. at 9500. In addition, where the first floor containing dwelling units is above grade, all units on that floor must be served by a building entrance on an accessible route, and that floor will be considered a "ground floor." Guidelines, 56 Fed. Reg. at 9500.

E. JPI's Properties Contain Inaccessible Features in Violation of the FHA, HUD's Regulations, and the Guidelines

Covered dwellings must comply with the six[22] accessibility requirements set forth in the FHA. 42 U.S.C. § 3604(f)(3)(C).[23] The United States' experts surveyed each property at issue in this motion to determine compliance with the FHA, HUD's regulations, and the Guidelines. The discussion below outlines the requirements of each FHA accessibility provision and includes the undisputed conditions observed at each property, as listed in Exhibit 1, that violate that provision. Exhibit 1 is not a complete list of the violations at JPI's properties. The complete lists of violations at each property are detailed in the United States' expert reports. For purposes of summary judgment, however, the United States is identifying only those conditions that are either undisputed by JPI's inspectors or are so egregious when compared to the standard provided by the Guidelines that they cannot be legitimately explained by other purported defenses, such as wear and tear, construction "tolerances," or environmental conditions.

1. Accessible public and common use areas, 42 U.S.C. § 3604(f)(3)(C)(i)

Covered dwelling units must be constructed in a manner that "the public use and common use portions of such dwellings are readily accessible to and usable by [disabled] persons." 42 U.S.C. § 3604(f)(3)(C)(i); 24 C.F.R. § 100.205(c)(1). HUD has defined an "accessible" public and common use area as one that "can be approached, entered, and used by individuals with physical disabilities. The phrase 'readily accessible to and usable by' is synonymous with accessible." 24 C.F.R. § 100.201; Guidelines, 56 Fed. Reg. at 9499. An accessible public and common use area is one that "complies with the appropriate requirements of ANSI A117.1–

[22] The FHA is often referred to as having seven requirements, which is based on the fact that there are seven requirements listed in the Guidelines. Requirement 1 of the Guidelines deals with site impracticality and the determination of whether a unit is a covered dwelling unit. If a dwelling unit is determined to be covered under Requirement 1, that triggers the requirement to include the six accessibility features listed in the FHA and set out as Requirements 2 through 7 of the Guidelines.

[23] The United States has not alleged violations of the requirement for reinforcements in bathroom walls to allow later installation of grab bars, 42 U.S.C. § 3604(f)(3)(C)(iii)(III), and therefore it is not a subject of this motion.

1986, a comparable standard or these guidelines." Guidelines, 56 Fed. Reg. at 9499; *see also* 24 C.F.R. § 100.201 (updated to include additional ANSI standards). The Guidelines Requirement 2 lists the basic components of accessible and usable public and common use areas, which fall under two basic requirements: (1) accessible routes to and within public and common use areas, and (2) accessible public and common use facilities. Guidelines, 56 Fed. Reg. at 9504–05. The Guidelines specify that, except where indicated, the public and common use areas must comply with the appropriate section of the ANSI standard. *Id.*

a. Accessible routes

HUD has defined an "accessible route" as "a continuous unobstructed path connecting accessible elements and spaces in a building or within a site that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by people with other disabilities." 24 C.F.R. § 100.201; Guidelines, 56 Fed. Reg. at 9499. HUD has further defined "accessible route" as "a route that complies with the appropriate requirements of ANSI 117.1–1986, a comparable standard, or Section 5, Requirement 1 of these guidelines." Guidelines, 56 Fed. Reg. at 9499. Accessible routes can include corridors, floors, parking access aisles, curb ramps, walks, and ramps. 24 C.F.R. § 100.201; Guidelines, 56 Fed. Reg. at 9499.

Accessible routes must be provided "from public transportation stops, accessible parking spaces, accessible passenger loading zones, and public streets or sidewalks to accessible building entrances." Guidelines, 56 Fed. Reg. at 9505. Accessible routes must connect "accessible buildings, facilities, elements and spaces that are on the same site." *Id*. Accessible routes must also connect "accessible building and facility entrances with accessible spaces and elements within the building or facility, including adaptable dwelling units." *Id*. Elements of accessible routes that must be given careful attention include: width of route, slope of route, cross-slope,

surface texture of ground and floor surfaces, curb ramps, headroom, and protruding objects. Guidelines, 56 Fed. Reg. at 9505; Ex. 8, Design Manual at 1.6, App. 351.[24] For example, slopes steeper than 8.33%, or 1:12, are not usable by many people with disabilities and cannot be considered part of an accessible route. Guidelines, 56 Fed. Reg. at 9505; Ex. 8, Design Manual at 1.7, App. 352. "Stairs shall not be part of an accessible route." Ex. 17, ANSI A117.1–1986 4.3.8, App. 852.

The only exception to the requirement for accessible pedestrian routes is where "site or legal constraints *prevent* a route accessible to wheelchair users between covered multi-family dwellings and public or common-use facilities elsewhere on the site." Guidelines (Req. 2), 56 Fed. Reg. at 9505 (emphasis added). To qualify for the exception, the conditions must meet the vehicular exception test set out in Requirement 1 of the Guidelines: the slope of the finished grade between covered dwellings and the public or common use facility must exceed 8.33%, or other physical barriers or legal constraints outside the control of the owner must prevent installation of an accessible pedestrian route. Guidelines (Req. 1(5)), 56 Fed. Reg. at 9504. In such cases, access may be provided via a vehicular route as long as necessary elements, such as parking and curb ramps, are provided at the public and common use facility. *Id*. HUD explained its creation of this exception in the Guidelines by stating that "[w]ith respect to access via a vehicular route, 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

[24] The Design Manual, which "explains the application of the Guidelines to all aspects of multi-family housing projects," Ex. 8, at 2, App. 322, is entitled to *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Olde St. Andrews I*, 250 F. Supp. 2d at 717 n.9; *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d. 579 (D.C. Cir. 1997) (giving deference to reasonable interpretation of regulation in technical assistance manual not subject to notice and comment). The Design Manual is persuasive because it reflects the careful, exhaustive, and persuasive analysis of HUD, the agency that has the responsibility to implement the FHA and great expertise in interpreting and enforcing it.

be situations in which an accessible pedestrian route is not practical, *because of factors beyond the control of the owner*." Guidelines, 56 Fed. Reg. at 9485 (emphasis added).

HUD has emphasized that developers cannot claim "an exemption from the obligation to build accessible pedestrian routes by merely planning for or constructing routes with running slopes in excess of 8.33%. Such an interpretation would produce a result that is inconsistent with the requirements of the Act and Guidelines." Final Report of HUD Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code, 70 Fed. Reg. 9738, 9744 (Feb. 28, 2005). It is clear that the uncontrollable factors must *prevent* the creation of an accessible pedestrian route, and the exception may not be used merely at the discretion of the owner, designer, or builder. As noted above, exceptions must be narrowly construed, and the burden is on JPI to show that the vehicular exception test has been met. *See Grant*, No. 01-2069, slip op. at 11–14 (Ex. 15, App. 794–97) ("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."). JPI cannot meet this burden.[25]

JPI's properties contain violations of the requirement for accessible routes as follows:

1. At 24 properties, continuous accessible pedestrian routes are not provided to some dwelling units and public and common use areas or require the user to travel in the vehicular drive. Ex. 1, Items 1–62, 147, 421, App. 3–19, 37, 98.
2. At 27 properties, required accessible routes have running slopes at or greater than 10% and/or cross-slopes at or greater than 6%, significantly exceeding the 5% slope

[25] James Knight, a civil engineer identified as an expert by JPI, testified that the vehicular exception could be used only where there were site constraints. Ex. 18, Knight Dep. (Feb. 12, 2011), at 97:3–20, App. 917. He also testified that an accessible pedestrian route could not include the vehicular way. *Id*. at 109:6–14, App. 918.

and 2% cross-slope limits,[26] respectively, of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.3.7, Ex. 17, App. 852. Ex. 1, Items 63–146, 207–12, 289–94, App. 19–37, 48–49 68–69.

3. At two properties, required accessible routes have ramps with slopes at or greater than 12%, significantly exceeding the 8.33% limit of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.8.2, Ex. 17, App. 861. Ex. 1, Items 148–49, App. 37–38.
4. At 21 properties, required accessible routes have curb ramps with slopes at or greater than 12% and/or cross-slopes at or greater than 6%, significantly exceeding the 8.33% and 2% limits, respectively, of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.7.2 and 4.3.7, Ex. _17, App. 860, 852. Ex. 1, Items 150–212, App. 38–49.
5. At 23 properties, required accessible routes have steps, curbs, or abrupt level changes significantly exceeding the ¼-inch or ½-inch (beveled) limit of the Guidelines, with no ramps provided or curb ramps that are blocked in violation of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.3.8. and 4.5.2, Ex. 17, App. 852, 859. Ex. 1, Items 62, 213–98, App. 19, 49–70.
6. At two properties, required accessible routes are at or less than 30 inches wide, significantly less than the 36-inch minimum of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.3.3, Ex. 17, App. 852. Ex. 1, Items 299–300, App. 70.
7. At eight properties, thresholds at doorways in the public and common use areas have an abrupt level change at or greater than 1 inch, significantly higher than the ½-inch

[26] Running slopes greater than 5% (or 8.33% for ramps) and cross-slopes greater than 2% are violations if they occur at any point on the accessible route. Nowhere in the Guidelines or ANSI does it suggest that excess slopes and cross-slopes are compliant if they occur only for a certain distance or if the "average" of the slope falls within the standard. *See* Ex. 17, ANSI 4.3.7, App. 852 ("Nowhere shall the cross slope of an accessible route exceed 1:50."); ANSI 4.8.2, App. 861 ("The maximum slope of a ramp in new construction shall be 1:12.").

beveled limit of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.13.8, Ex. 17, App. 874. Ex. 1, Items 298, 301–08, 352, App. 70–72, 83.

8. At seven properties, maneuvering clearance at doors to the public and common use areas is sloped at least 4%, significantly greater than the Guidelines requirement for level maneuvering clearance at doors, 56 Fed. Reg. at 9505, and ANSI 4.13.6, Ex. 17, App. 871. Ex. 1, Items 309–17, App. 73–74.
9. At 12 properties, maneuvering clearance at doors to covered dwelling unit entrances is sloped at least 4%, significantly greater than the Guidelines requirement for level maneuvering clearance at doors, 56 Fed. Reg. at 9505, and ANSI 4.13.6, Ex. 17, App. 871. Ex. 1, Items 318–32, App. 75–78.
10. At 13 properties, pull-side maneuvering clearance at doors and gates in the public and common use areas is at or less than 12 inches, significantly less than the 18-inch minimum in the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.13.6 & Fig. 25(a), Ex. 17, App. 871. Ex. 1, Items 333–52, App. 79–83.
11. At 22 properties, doors or gates in public and common use areas have no reachable hardware or have hardware that requires tight grasping, tight pinching, or twisting of the wrists to operate, in violation of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.13.9, Ex. 17, App. 874. Ex. 1, Items 351, 353–81, App. 83–89.
12. At four properties, primary entry doors to covered units have hardware that requires tight grasping, tight pinching, or twisting of the wrists to operate, in violation of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.13.9, Ex. 17, App. 874. Ex. 1, Items 383–86, App. 89–90.

b. Accessible public and common use facilities

Public and common use areas that must be accessible include parking, corridors, rental offices, trash rooms, clubhouses, common toilet rooms, laundry rooms, and common use tenant storage rooms. Guidelines (Req. 2), 56 Fed. Reg. at 9505; Ex. 8, Design Manual at 2.3, App. 406. Where more than one public or common use facility is provided at a site, such as multiple swimming pools, at least one facility must be accessible. Guidelines (Req. 2), 56 Fed. Reg. at 9505. Where more than one fixture in a room is provided, such as in toilet rooms or bathing facilities provided for public or common use, at least one fixture of each type must be accessible per room. *Id.*; ANSI 4.22.4, App. 886.

JPI's properties contain violations of the requirement for accessible public and common use areas as follows:

1. At 13 properties, the unprotected underside of stairways protrude into the path of travel and no cane-detectible barriers are provided to allow visually impaired persons to safely navigate the route as provided by the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.4.1–2 & Fig. 8(d), Ex. 17, App. 852, 857. Protruding objects need not be on the accessible route to be a violation. Ex. 17, App. 852, ANSI 4.4.1. Ex. 1, Items 387–402, App. 90–94.
2. At 17 properties, accessible parking is not provided or is noncompliant because there is no access aisle, the access aisle has running slopes at 10% or greater or cross-slopes at 6% or greater, or the access aisle is significantly less than the 60-inch minimum of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.6, Ex. 17, App. 859–60. Ex. 1, Items 147, 403–22, App. 37, 94–98.

3. At nine properties, the common use garages have an interior width less than 12 feet, significantly less than the 14-foot, 2-inch requirement of the Guidelines, Q&A 14(c), Ex. 8, App. 643. It is also significantly less than the 13-foot total width of an accessible parking space plus access aisle provided for in ANSI 4.6, Ex. 17, App. 859–60. Ex. 1, Items 422, 429–36, App. 98–101.
4. At eight properties, there are violations in the common use bathrooms such as lack of adequate clear floor space, lack of grab bars, a curb at the shower door that is too high, and controls that required tight grasping, tight pinching, or twisting of the wrists to operate, in violation of the Guidelines, 56 Fed. Reg. at 9505, and ANSI 4.16, 4.19, 4.21, 4.22, Ex. 17, App. 876–81, 884–86. Ex. 1, Items 437–45, App. 101–02.

2. Usable doors, 42 U.S.C. § 3604(f)(3)(C)(ii)

The FHA requires that "all the doors designed to allow passage into and within all premises within such dwellings [must be] sufficiently wide to allow passage by handicapped persons in wheelchairs." 42 U.S.C. § 3604(f)(3)(C)(ii); 24 C.F.R. § 100.205(c)(2). Interior dwelling unit doors meet this requirement if they provide "nominal" 32 inches of clear width, which allows a variance of ¼ to ⅜ inches. Guidelines (Req. 3), 56 Fed. Reg. at 9506; Ex. 8, Design Manual at 3.5, App. 439. Failure to provide doors that meet these specifications violates the Act. *Grant*, No. 01-2069, slip op. at 19–20 (Ex. 15, App. 802–03); *Quality Built I*, 309 F. Supp. 2d at 763–64; *Quality Built II*, 309 F. Supp. 2d at 775–76; *Rommel Builders*, 40 F. Supp. 2d at 713–14; *Sterling Homes*, 1999 WL 1068458, at *4; *HUD v. Perland Corp.*, No. 05-96-1517 8, 1998 WL 142159, at *5, 7 (HUDALJ Mar. 30, 1998).

At 11 properties, interior dwelling unit doors designed for user passage have clear widths at 30 inches or less. Ex. 1, Items 446–67, App. 102–110.

3. Accessible route into and through a dwelling, 42 U.S.C. § 3604(f)(3)(C)(iii)(I)

The Act requires that for all covered units there be "an accessible route into and through the dwelling." 42 U.S.C. § 3604(f)(3)(C)(iii)(I); 24 C.F.R. § 100.205(c)(3)(i). An accessible route is "a continuous unobstructed path connecting accessible elements and spaces . . . that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by people with other disabilities." 24 C.F.R. § 100.201. This means that the accessible route must be (1) sufficiently wide and (2) lacking in abrupt changes in level so residents with disabilities can safely use all rooms and spaces. Ex. 8, Design Manual at 4.3, App. 452. For example, recognizing that persons with disabilities may trip and cannot readily roll over or negotiate paths that have barriers such as steps or high thresholds, the Guidelines limit the height of these barriers and/or require that they be ramped. On an accessible route, thresholds or other changes in level between ¼-inch and ½-inch must be beveled and all changes in level above ½-inch must be ramped. Thresholds at the primary entrance door must be ¾-inch or less and beveled. Guidelines (Req. 4), 56 Fed. Reg. at 9507.

JPI's properties contain violations of the requirement for an accessible route into and through the dwelling unit as follows:

1. At four properties, thresholds at the exterior of unit entry doors are at or greater than 1 inch high and are not beveled or sloped, which does not meet the ½-inch or ¾-inch beveled limit of the Guidelines, 56 Fed. Reg. at 9507. They also do not meet the 1 ¼-inch sloped permissible limit of the Design Manual, at 4.12, App. 461. Ex. 1, Items 468–72, App. 110–11.
2. At one property, thresholds at the interior of unit entry doors are at or greater than 1 inch high, significantly higher than the ½-inch requirement of the Guidelines, 56 Fed.

Reg. at 9507, and also higher than the ¾-inch permissible limit of the Design Manual, at 4.12, App. 461. Ex. 1, Item 469, App. 110.

4. Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations, 42 U.S.C. § 3604(f)(3)(C)(iii)(II)

The FHA requires "light switches, electrical outlets, thermostats, and other 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 specify that such controls must be located no lower than 15 inches and no higher than 48 inches above finished floor level. Guidelines (Req. 5), 56 Fed. Reg. at 9507.[27] The placement of such controls outside of the range set in the Guidelines violates the Act. *Balachowski v. Boidy*, No. 95-CV-06340, 2000 WL 1365391, at *2, *6 (N.D. Ill. Sept. 20, 2000); *Montana Fair Hous.*, 81 F. Supp. 2d at 1066–67, 1069; *Perland*, 1998 WL 142159, at *5, *7.

At seven properties, thermostats are at or more than 58 inches above the floor, significantly higher than the 48-inch maximum of the Guidelines, 56 Fed. Reg. at 9507. They are also significantly higher than the 54-inch maximum for a side reach provided in ANSI 4.2.6, Ex. 17, App. 852. Ex. 1, Items 473–82, App. 111–14.

5. Usable kitchens and bathrooms, 42 U.S.C. § 3604(f)(3)(C)(iii)(IV)

The FHA requires covered units to include "usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space." 42 U.S.C. § 3604(f)(3)(C)(iii)(IV); 24 C.F.R. § 100.205(c)(3)(iv). The Guidelines set forth technical specifications for the clear floor space and dimensions that are necessary to ensure that kitchens and bathrooms comply with the FHA.

[27] ANSI A117.1–1986 allows a height of 54 inches if the clear floor space allows a parallel approach by a person using a wheelchair. ANSI 4.2.6, Ex. 17, App. 852.

a. Usable kitchens

The proper design and construction in kitchens is essential to allow a person to maneuver among appliances and to safely use appliances. The dimensional requirements include a 30 x 48-inch clear floor space either parallel or perpendicular to and centered[28] on all kitchen appliances[29] so that a person using a wheelchair can reach the operable parts, such as the faucet. Guidelines (Req. 7), 56 Fed. Reg. at 9511; Ex. 8, Design Manual at 7.3, App. 493. The Guidelines further state that the minimum clearance between counters and all opposing base cabinets, countertops, appliances, or walls must be at least 40 inches to allow sufficient maneuvering space. Guidelines (Req. 7), 56 Fed. Reg. at 9511, Ex. 8, Design Manual at 7.7, App. 497. To ensure that the 40-inch clear aisle is achieved, designers and builders must provide a sufficiently deep space for refrigerators and other appliances and must select an appliance that will not project into the 40 inches of clear floor space. *See Grant*, No. 01-2069, slip op. at 21–22 (Ex. 15, App. 804–05) (rejecting the argument that "the forty inch measurement in the Guidelines is arbitrary," and granting summary judgment as to liability where defendants provided only 36 inches of clearance in the kitchens). In "U-shaped" kitchens with a sink, range, or cooktop at its base, the Guidelines require a 60-inch diameter turning circle, which is "necessary for a person using a wheelchair to approach and position themselves parallel to the

[28] The text of the Guidelines does not use the words "centered" when specifying the required clear floor space. However, the figures in the Guidelines clearly show centering. Guidelines, 56 Fed. Reg. at 9512–14. The Design Manual, first published in August 1996 and containing HUD's interpretation of the Guidelines, specifies centering. Ex. 8, Design Manual at 7.5, App. 495 ("The parallel clear floor space at [kitchen] sinks, as at ranges and cooktops, must be centered on the bowl or appliance."); *accord Olde St. Andrews II*, No. 3:98-CV-630, slip op. at 14 (Ex. 16, App. 824) (noting that kitchen designs violated the FHA because "there is not the required 30" x 48" clear floor space parallel to and centered on the sinks").

[29] Designers and builders have two options for ensuring that kitchen appliances such as ranges, cooktops, and sinks comply with the FHA. First, the Guidelines specify a 30 x 48-inch clear floor space centered on the sink or appliance for a parallel approach. Guidelines Req. 7, 56 Fed. Reg. at 9511–12; Ex. 8, Design Manual at 7.4–7.6, App. 494–96. The required clear floor space may be perpendicular to the sink or appliance where knee and toe space is provided. Ex. 8, Design Manual at 7.4–7.6, App. 494–96. Knee space can be achieved by providing an easily removable base cabinet. *Id.* at 7.12–7.13, App. 502–03.

appliance or fixture at the base of the U." Guidelines (Req. 7), 56 Fed. Reg. at 9511; Ex. 8, Design Manual at 7.9, App. 499.

JPI's properties contain violations of the requirement for usable kitchens as follows:

1. At nine properties, the clearance between counters and all opposing base cabinets, countertops, appliances, or walls is at or less than 36 inches, significantly less than the minimum 40-inch requirement of the Guidelines, 56 Fed. Reg. at 9511. Ex. 1, Items 483–502, App. 114–19.
2. At five properties, the turning radius provided in U-shaped kitchens is less than 51 inches, significantly less than the 60-inch minimum in the Guidelines, 56 Fed. Reg. at 9511. Ex. 1, Items 503–08, App. 119–20.
3. At two properties, the 30 x 48-inch clear floor space at the kitchen sink or range is off-center by more than 9 inches and is not compliant with the Guidelines, 56 Fed. Reg. at 9511. Ex. 1, Items 509–11, App. 120–121.

b. Usable bathrooms

The Guidelines also define several essential features for usable bathrooms, including sufficient space to permit a wheelchair user to enter a bathroom, close the door, and open the door from the inside, as well as safely use the features. For example, as with kitchens, the dimensional requirements include a 30 x 48-inch clear floor space either parallel to or perpendicular to and centered[30] on the bathroom lavatory so that a person using a wheelchair can

[30] *See supra* note 28; Guidelines, 56 Fed. Reg. at 9512–14; Ex. 8, Design Manual at 7.47, App. 537; *see also Quality Built II*, 309 F. Supp. 2d at 777 (granting plaintiff's motion for summary judgment where "[t]he evidence presented by Plaintiff shows that . . . in the second bathroom there is not 30 inches by 48 inches of clear floor space parallel and centered on the lavatory, and the lavatory is [improperly] positioned with the centerline of the sink 15 inches from the adjacent sidewall"); *Grant*, No. 01-2069, slip op. at 22–23 (Ex. 15, App. 805–06) (explaining that "[w]hen 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," and holding that "[t]hese deficiencies violate the FHA"); *Tanski*, 2007 WL 1017020, at *15 (holding that the government established a violation of the FHA "as a matter of law" by demonstrating that the bathrooms lack a "30 by 48 inch clear-floor space centered on the lavatory in the

reach the operable parts, such as the faucet. Guidelines (Req. 7), 56 Fed. Reg. at 9511; Ex. 8, Design Manual at 7.47, App. 537. The Guidelines further require that no less than 18 inches exist between the centerline of the toilet to the tub or sidewall so that there is sufficient space to install grab bars and to transfer to the toilet from a wheelchair. Guidelines (Req. 7), 56 Fed. Reg. at 9511–15. *See Grant*, No. 01-2069, slip op. at 22 (Ex. 15, App. 805) (noting that "[t]he Guidelines also establish technical specifications for bathrooms, including . . . at least eighteen inches from the centerline of the toilet to the tub or side wall," and holding that the defendants violated the FHA by locating the toilets only 15 inches from the side wall); *Tanski*, 2007 WL 1017020, at *13, 15–16 (holding that defendants violated the FHA by locating the toilet closer than 18 inches to the bathtub).

JPI's properties contain violations of the requirement for usable bathrooms as follows:

1. At five properties, the clear floor space is not provided in the bathroom to allow a wheelchair user to enter and close the door as provided in the Guidelines, 56 Fed. Reg. at 9511. Ex. 1, Items 512–18, App. 121–122.
2. At five properties, the required clear floor space at the toilet is not provided as illustrated in the Guidelines, 56 Fed. Reg. at 9511 and 9513. In most cases, the clear floor space is obstructed by the placement of the toilet in an alcove. Ex. 1, Items 519–27, App. 122–124.
3. At two properties, the centerline of the toilet is located less than 15 inches from the adjacent wall, significantly less than the 18-inch dimension provided in the Guidelines, 56 Fed. Reg. at 9511 and 9513. It is also less than the 16 to 18-inch

bathrooms"); *Shanrie I*, 2007 WL 980418, at *10 (finding that the Guidelines require centering of clear floor space in kitchens and bathrooms).

permissible dimension found in the most recent versions of ANSI. Ex. 1, Items 528–29, App. 124–125.

4. At two properties, the 30 x 48-inch clear floor space is more than 9 inches off-center at the bathroom lavatory and is not compliant with the Guidelines, 56 Fed. Reg. at 9511 and 9514. Ex. 1, Items 527, 530, App. 124–125.

F. JPI's Properties Contain Inaccessible Features in Violation of the ADA

In addition to the FHA, certain public use areas of multi-family residential dwellings, such as leasing spaces, public bathrooms, and parking available to the public, are covered by the ADA, which establishes design requirements for the construction and alteration of public facilities. 42 U.S.C. § 12183. The ADA requires the Department of Justice ("DOJ") to promulgate regulations to enforce the design and construction provisions of the ADA. *Id*. § 12186(b). In accordance with that mandate, DOJ has implemented mandatory requirements for accessibility in new construction. The 1991 ADA Standards for Accessible Design ("1991 Standards")[31] were published on July 26, 1991, and were mandatory for all new construction built for first occupancy after January 26, 1993. *Id*. § 12183; 28 C.F.R. §§ 36.104, 36.401, App. A.[32] The DOJ regulations implementing the ADA are entitled to *Chevron* deference. *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). For multifamily housing, HUD has made clear that the ADA accessibility requirements for new construction are applicable to "common areas . . . within residential facilities . . . if they are open to persons other than residents and their guests." *Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about*

[31] The 1991 Standards were originally referred to as the ADA Accessibility Guidelines ("ADAAG"). 28 C.F.R. § 36.406, App. A (1994). The United States Access Board has also published guidelines known as the ADAAG. The Access Board's ADAAG is not the same as the 1991 Standards and does not have legal authority. *See* http://www.access-board.gov/ada/ (last visited Apr. 15, 2011).

[32] Effective March 15, 2011, DOJ has revised the ADA regulations and adopted the 2010 ADA Standards for Accessible Design, which are permitted for new construction beginning September 15, 2010, and mandatory for all new construction permitted or begun after March 15, 2012. 28 C.F.R. § 36.406.

the Guidelines (June 28, 1994) (Ex. 8, App. 637). Therefore, "[r]ental offices and sales office for residential housing, for example, are by their nature open to the public, and are places of public accommodation and must comply with the ADA requirements in addition to all applicable requirements of the Fair Housing Act." *Id.*

In most cases, the ADA violations at the properties are also FHA violations in the public and common use areas discussed in Part III.E.1, *supra*. Where a violation is both an FHA and ADA violation, the citations to the FHA Guidelines and the 1991 ADA standards are included for each item in Exhibit 1. *See* Ex. 1, Items 5, 42, 46–47, 100, 110, 130, 155–63, 175–77, 179, 190, 198, 263, 295, 310, 342, 346, 373–74, 439–40, 442, App. 4, 14–15, 26, 28, 35, 39–40, 42, 44, 46, 61–62, 69, 73, 80–81, 87, 101–02. Additionally, at six properties, there is no van-accessible parking at the leasing office as required by the ADA, or the accessible parking is otherwise noncompliant. 28 C.F.R. Pt. 36, App. A, §§ 4.1.2(5), 4.6. Ex. 1, Items 423–28, App. 98–99.

G. The Accessibility Violations Constitute a Pattern or Practice of Discrimination and Denial of Rights to a Group of Persons

The FHA and ADA authorize the Attorney General to bring suit where he has reasonable cause to believe that a defendant has (1) engaged in a pattern or practice of discrimination, or (2) denied rights to a group of persons where such denial raises an issue of "general public importance." 42 U.S.C. §§ 3614(a), 12188(b)(1)(B). Both apply here.

A "pattern or practice" is established when the evidence shows "more than the mere occurrence of isolated . . . or sporadic discriminatory acts." *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Instead, it must be shown that discrimination is the defendant's usual practice. *Id.* In this case, the undisputed facts show that JPI designed and constructed 32 multifamily housing properties with violations of the FHA and ADA. This

represents a systemic denial of housing rights and access for persons with disabilities and harms not only current residents and visitors with disabilities but also any future buyers or renters with disabilities. This constitutes a "pattern or practice" of discrimination. *See Tanski*, 2007 WL 1017020, at 24 ("Having already found multiple violations of section 3604(f)(3)(C) in a total of 362 covered units . . . , the Court has no difficulty finding a pattern or practice of Fair Housing Act violations."); *Quality Built I*, 309 F. Supp. 2d at 760.

It is not necessary for the United States to prove that every property designed or constructed by JPI contains FHA violations, nor is it necessary for every feature at a property to contain violations.[33] *See Genesis*, No. CV406-096, slip op. at 37–38 (Ex. 14, App. 770–71) (holding that evidence that some aspects of a development comply with the FHA is "wholly non-material and do[es] nothing to create an issue of fact as [to] FHA liability"); *see also United States v. Lansdowne Swim Club*, 894 F.2d 83, 89 (3d Cir. 1990) (holding that the court "need not find that [defendant] always discriminated to find that it engaged in such a pattern or practice") (public accommodations case); *United States v. Ironworkers Local 86*, 443 F.2d 544, 551–52 (9th Cir. 1971) (holding that defining pattern or practice to mean that defendants "uniformly engaged in a course of conduct aimed at denying rights secured by the Act" was overly restrictive and was not what was intended by Congress) (employment case); *Davis v. The Mansards*, 597 F. Supp. 334, 345 (N.D. Ind. 1984) (even though significant numbers of blacks

[33] Defendants' statistician Joseph Kadane opines that the United States' experts cannot extrapolate the measurements from one unit to another unit of the same type because the units were not chosen using statistical random sampling, and therefore the experts' conclusions must be limited to only the units they surveyed. Ex. 19, App. 922–25. Statistical random sampling is neither necessary nor appropriate where, as here, the United States' experts reviewed multiple units of each design. Moreover, random sampling is not an issue for the exterior violations. Nevertheless, even if the experts' opinions were limited only to the surveyed units, the numerous violations found at the hundreds of surveyed units are more than sufficient to show a pattern or practice of discrimination or a denial of rights to a group of persons. *See Genesis*, No. CV406-096, slip op. at 38–39 (Ex. 14, App. 771–72) (holding that "mildly variant or slightly modified construction as compared to floor plans is irrelevant" and does not create a genuine issue of material fact).

were rented to, evidence showed that defendants sought to control complex's black population by discouraging all black applicants but allowing a few to be admitted) (FHA case).

The facts also establish a denial of housing rights to a group of individuals that raises an issue of general public importance. The Attorney General's determination that a matter raises an issue of general public importance is not reviewable. *See United States v. Bob Lawrence Realty*, 474 F.2d 115, 125 n.14 (5th Cir. 1973); *Shanrie I*, 2007 WL 980418, at *9 ("[C]ourts have consistently refrained from reviewing the Attorney General's determination that a matter is of general public importance."). Accordingly, under § 3614(a), this Court need only decide whether JPI's conduct denied a group of persons rights guaranteed under the FHA. *See Taigen & Sons*, 303 F. Supp. 2d at 1139 ("[T]he Court concludes that if the Taigen Defendants have inadequately designed and constructed Centennial Trail to serve persons with disabilities, the Taigen Defendants have denied a group of persons rights granted by the Fair Housing Act and such a denial raises an issue of general public importance.").

H. JPI Is Liable for Accessibility Violations at the Properties

It is well established that "[w]hen a group of entities enters into the design and construction of a covered dwelling, all participants *in the process as a whole* are bound to follow the FHAA." *Rommel Builders*, 3 F. Supp. 2d at 665; *see also Quality Built I*, 309 F. Supp. 2d at 761; *Tanski*, 2007 WL 1017020, at*22 ("The purpose of the Fair Housing Act to create available housing for the handicapped is best served by imposing broad liability on all those people and entities that are involved in designing and constructing the various aspects of a covered multi-family dwelling."); *Shanrie I*, 2007 WL 980418, at *8 ("HUD's technical assistance brochure . . . states that architects, builders, building contractors, site engineers, and any other person involved

in the design and construction of residential housing must comply with the FHA.").[34] "Entities who are involved in the design and construction of housing covered by the FHA must make it their business to ensure that such housing meets the accessibility requirements of the FHA." *Shanrie I*, 2007 WL 980418, at *8.[35]

JPI is liable for the undisputed discriminatory conditions discussed in this motion. JPI has already conceded that it is responsible for these properties by representing to the Court and to the United States that JPI designed and constructed 210 properties, including the 52 properties in the initial phase of discovery. Ex. 2, Defs. Init. Disc., at 2 n.1 and Ex. C, App. 127, 131–41 (where "JPI" is defined as the seven named defendants, and JPI stated that "attached hereto as Exhibit C is a list of [210] properties designed and constructed by JPI since 1991"); Dkt. 32, Supp. Joint Status Rep., at 1, 24, 32 (where "JPI" is defined as the seven named defendants, JPI stated that "[o]ver the past 20 years, JPI has steadily built 210 unique multi-family properties, located in 26 states and the District of Columbia," and that "52 properties (25 percent of the portfolio)" would "approximate the vast diversity of JPI's portfolio").

Moreover, "in civil rights actions, 'superficially distinct entities may be exposed to liability if they are in fact, a single, integrated enterprise.'" *Schweitzer v. Advanced*

[34] In *Whitaker v. West Village Limited Partnership*, No. Civ.A.3:03-CV-0411-P, 2004 WL 2046771, at *1 (N.D. Tex. Sep. 10, 2004), the court found that the construction defendant was not liable because it did not both design *and* construct the properties at issue. In a prior opinion, the court refused to dismiss claims against the architect because plaintiffs had alleged that the architect had both designed the property and had supervisory authority over construction. *Whitaker v. West Village Ltd. P'ship*, No. Civ.A.3:03-CV-0411-P, 2004 WL 1778963, at *4 (N.D. Tex. Aug. 4, 2004). The FHA should not be read to require that a defendant both design *and* construct a property to prove liability. *See Mont. Fair Hous.*, 81 F. Supp. 2d at 1069 ("Nothing in the legislative history supports [a] wooden reading of 'design and construct,' and the purpose of the Act is best fulfilled by a disjunctive reading.") Furthermore, as the owner and/or developer of the properties, JPI had full authority over each project, including hiring the architects, planning the design, and constructing the properties.

[35] It is not necessary to include all participants in the design and construction process in a lawsuit to find liability for one participant in the process. The United States' decision not to include architects or site engineers who may have been involved in the design and construction of JPI's properties has no bearing on whether JPI is liable for the FHA violations. Each participant in the process has a non-delegable duty to comply with the FHA. *See, e.g.*, *United States v. Shanrie Co.*, 610 F. Supp. 2d 958, 961 (S.D. Ill. 2009) (citing *United States v. Gambone Bros. Dev. Co.*, No. 06-1386, 2008 WL 4410093, at *8 (E.D. Pa. Sep. 25, 2008)).

Telemarketing Corp., 104 F.3d 761, 763 (5th Cir. 1997) (quoting *Trevino v. Celanese Corp*, 701 F.2d 397, 404 (5th. Cir. 1983)); *see also Epie v. Owens*, No. 3:09-CV-1681-D, 2010 WL 5620959, at *3–4 (N.D. Tex. 2010). The "single, integrated enterprise" test considers "(1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control." *Schweitzer*, 104 F.3d at 764; *see also Radio and Television Broad. Technicians Local 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (establishing same four-part test under NLRA).

As discussed in Part II.B, *supra*, JPI, consisting of the named Defendants and other affiliated JPI entities, is a single, integrated enterprise. There is ample evidence of the JPI's operational unity. One JPI entity, JPI Partners, L.L.C., provided all other JPI entities with the personnel for the design and construction process. The entities followed the same FHA and ADA policies and procedures. The same JPI trademark is widely used on promotional materials and letterhead. JPI has a single corporate mission statement. The JPI entities that designed and constructed the properties discussed in this motion shared the same managerial officers or officials. Each JPI entity was headquartered in the same office space at 600 E. Los Colinas Blvd., Suite 1800, Irving, TX. Because of these entities' operation as a single, integrated enterprise, JPI is liable for the discriminatory conditions at the properties discussed in this motion.

I. JPI Has Not Complied with Any Other Recognized, Objective Measure of Accessibility

Having established that the undisputed facts show violations of the FHA Guidelines at JPI properties and that JPI is responsible for those violations, the burden shifts to JPI to prove that it complied with another "*recognized, comparable, objective* measure of accessibility." 73 Fed. Reg. at 63614 (emphasis added). *See supra* Part III.B. JPI cannot meet this burden.

Through interrogatories, the United States specifically asked JPI to identify whether any property was built in accordance with a HUD-recognized safe harbor, and if not, what specific standard was used at each property to ensure compliance with the FHA and ADA. Ex. 20, Defs. Resps. to U.S. Interrog. No. 5, App. 926–51. JPI has not identified any specific safe harbor or standard used for any property. *Id*. Indeed, given the numerous egregious violations of the Guidelines at the properties discussed in this motion, JPI cannot show that these properties comply with another safe harbor. The Guidelines are generally accepted as the least restrictive of all the safe harbors,[36] and HUD reviewed the other safe harbors to ensure that they provide *at least* the same level of accessibility as the Guidelines, *see* 72 Fed. Reg. at 39541. Thus, evidence that the properties do not comply with the Guidelines is, in effect, proof that they do not comply with *any* safe harbor.

The opinions offered by the individuals retained by JPI do not demonstrate that JPI complied with a recognized, objective, measurable standard at any of the properties. The use of a recognized, objective, measurable standard is necessary to ensure consistency and provide the basic level of accessibility required by the FHA. The ANSI standard, for example, is developed through a consensus process by a committee comprised of a diverse and balanced group of interested parties. The ANSI process requires that all views and objections be considered and concerted efforts be made toward resolution. *See* Dkt. 47-2, Schoonover Rep., at 9–11; Ex. 17, ANSI A117.1–1986, App. 833. The process ensures objectivity, and the resulting standard provides consistent criteria for designers, builders, and disabled persons to rely upon. *See* Dkt. 47-2, Schoonover Rep., at 4.

[36] Ex. 12, Skarzenski Dep., at 64:23–65:18, App. 690; Ex. 9, Sheriff Dep., at 119:23–120:14, App. 652; Dkt 47-2, Schoonover Rep., at 13; Dkt. 141-1, LCM Rep., at 2–6.

Paul Sheriff does not use any standard; his methodology is to evaluate accessibility by videotaping himself navigating the property in his custom-made wheelchair. His methodology is inherently subjective and specific to his physical characteristics and abilities.[37] As discussed above in Part III.B, courts have repeatedly rejected evidence of the ability of a person with disabilities to navigate a property as insufficient to prove accessibility. *See Tanski*, 2007 WL 1017020, at *14; *Nelson*, 2006 WL 4540542, at *6–7; *Quality Built I*, 309 F. Supp. 2d at 772 n.1; *Grant*, No. 2:01-cv-2069, slip op. at 8 (Ex. 15, App. 791).

Dr. Vredenburgh's methodology of photographing her non-disabled associate using a wheelchair and positioning herself at various features at a property suffers from the same unreliability as Mr. Sheriff's approach. Evidence of one person's ability to use a feature at a property is not evidence of accessibility as required by the FHA. Dr. Vredenburgh testified that it was not her opinion that if one person in a wheelchair could use a feature then it was accessible to all wheelchair users and claimed that her methodology merely showed the positioning of an average-sized woman in a wheelchair. Ex. 10, Vredenburgh Dep. (Jan. 24, 2011), at 117:21–121:2, App. 664–65. She admitted that another wheelchair user performing the same inspection may have different abilities and obtain different results. *Id*. at 120:23–121:2, 124:12–20, App. 664–65.[38]

Dr. Vredenburgh's conclusions about her measurements of kitchens and bathrooms rely on her own research to evaluate compliance. Dkt. 78-1, Vredenburgh Rep., at 4–7; Ex. 10, Vredenburgh Dep. (Jan. 24, 2011), at 47:4–16, 114:18–25, App. 660, 663. Although she did not measure the running slopes and cross-slopes of walkways and ramps, she also makes conclusions

[37] *See* Dkt. 141-1, LCM Rep., at 97–108; Dkt. 142-1, Schoonover Rep., at 4, 15–16; Dkt. 144-1, Hilberry Rep., at 16–29.

[38] Dr. Vredenburgh testified that her opinions in this case are not applicable to new construction, and she was not offering any opinion as to accessibility features that should exist at the time of design and construction. Rather, her opinion was focused on whether an existing feature at a JPI property could be adapted. Ex. 10, Vredenburgh Dep. (Jan 24, 2011), at 108:3–10, App. 661.

about what is an accessible running slope and cross-slope based on another study funded by another defendant in a design and construction case. Dkt. 78-1, Vredenburgh Rep., at 7–10; Ex. 21, Vredenburgh Dep. (*United States v. Edward Rose & Sons*, Sep. 29, 2004), at 315:5–25, App. 954. While research that evaluates accessibility for persons with disabilities may be useful in developing a standard, Dr. Vredenburgh's research is not itself a recognized standard.[39] *See* Dkt. 142-1, Schoonover Rep., at 25–31.

Mark Wales describes his methodology as relying on "a combination of a lot of things such as safe harbors, the other technical guidance, research, whatever it takes for me to determine whether a reasonable design consistent with the requirements that acts as a requirements [sic] has been obtained." Ex. 11, Wales Dep. (Jan. 14, 2011), at 109:15–111:6, App. 676–77; Dkt.179-2, Wales Rep., at 75–78. Although Mr. Wales stated in his JPI deposition that his approach is not subjective, Ex. 11, Wales Dep., at 110:2–3, App. 677, in prior testimony he has repeatedly described his methodology and approach to accessibility in general as subjective.[40]

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[39] The reliability of Dr. Vredenburgh's research and the conclusions she draws about what is accessible to a broad range of disabled persons are also highly questionable. *See* Dkt. 139-1, Iezzoni Rep.; Dkt. 140-1, Bradtmiller Rep., Dkt. 141-1, LCM Rep., at 68–96; Dkt. 142-1, Schoonover Rep., at 16–17, 25–31.

[40] Q. Would you apply a set of technical criteria to make the determination of whether a public use or a common use area is readily accessible to and usable by handicapped persons?
A. Under this section, no. It would be a subjective determination based on my experience and understanding and reference materials.
Ex. 22, Wales Dep. (*United States v. Edward Rose & Sons*, Oct. 5, 2004), at 154:2–10, App. 963; *see also* 89:3–90:25; 109:17–112:18; 150:3–151:6, App. 958–62.

Q. And at the very bottom, the last paragraph, it says, "Therefore, the design and construction of covered multi-family dwellings, as well as the determination of compliance with the Fair Housing Act are subjective." Did I read that accurately?
A. Yes.
Q. So if it's subjective, does that mean that one consultant might reasonably believe that something is usable, and another consultant might reasonably believe the opposite?
A. Yes.
Ex. 23, Wales Dep. (*United States v. Shanrie Co.*, Mar. 10, 2006), at 174:15–177:12, App. 969–70.

Q. In your expert report in this case, you state on the first page that the FHA requirements related to design and construction do not include prescriptive technical criteria, therefore, the design and construction of covered multi-

Mr. Wales's approach is subjective, vague, and unreliable. The following is a typical example of Mr. Wales's reasoning for determining that a particular condition is not a violation of the FHA:

> Slopes and cross slopes at doorways and gates have been limited in some instances, however, the basis for such limitation is not clear. Some references indicate that the slope at a doorway should be limited to 5% (Goldsmith, Selwyn (1984). Designing For the Disabled. RIBA Publications Limited: London, England). Others indicate that they should be limited to 2% in all directions. However, I have found nothing that proves that doorways and the landing adjacent to them are not accessible at higher slopes.
>
> Some argue that it is difficult to negotiate doors for persons in wheelchairs when the landings are sloped. I have found nothing, based on empirical research, to indicate the true limit of slope of a doorway landing beyond which it becomes inaccessible.

Dkt. 79-1, Wales Rep., at 42. In this example, Mr. Wales cites no recognized accessibility standard, merely citing to "some" references and arguments and vaguely relying on "empirical research." Mr. Wales provides no alternative standard for the maximum 2% cross-slope required by the Guidelines, 56 Fed. Reg. at 9505, Ex. 17, ANSI 4.3.7, App. 852, thus allowing him to conclude that any cross-slope above 2% called out by the United States' expert is not a violation of the FHA, no matter the egregiousness of the violation. As noted above, research alone cannot be considered a recognized standard, and Mr. Wales has admitted that he is not an expert on applying or evaluating the research to which he cites. Ex. 25, Wales Dep. (*ERC v. Post Properties*, Oct. 30, 2008), at 177:6–184:6, App. 981–83. As another example, Mr. Wales cites standards that are not and were not intended to be applicable to new construction, such as safe

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family dwellings, as the determination of compliance with the Fair Housing Act, are subjective. What do you mean by that?
A. I mean that without required technical -- prescriptive technical criteria, a person designing and building something under Fair Housing would be allowed to simply make it accessible by using other methods than -- or other technical criteria that they feel is appropriate to make something accessible.
Q. And would that determination depend on the individual builder or builders' subjective determination of what is accessible?
A. Yes. I think under the Fair Housing Act, they have the option to use whatever alternate method they choose to use to comply with the Fair Housing Act.
Ex. 24, Wales Dep. (*United States v. Richard & Milton Grant Co.*, Apr. 5, 2006), at 5:15–6:12, App. 974–75.

harbor standards applicable to existing structures and historic buildings. Mr. Wales reasons that "[e]ven if the safe harbors choose to limit the use of some of those slopes to existing buildings or historic buildings, the slopes are nonetheless accessible according to those standards." Dkt. 166-5, Wales Rep., at 29; Ex. 11, Wales Dep. (Jan. 14, 2011), at 255:3–256:10, App. 678a.

Essentially, Mr. Wales's methodology is to use "whatever it takes," *Id*. at 109:23, App. 676, to allow him to conclude that a condition called out by the United States' expert is not a violation of the FHA. By his own admission, his approach is subjective. Therefore, Mr. Wales's approach cannot be used as a basis to prove accessibility as required by the FHA.

Of all of JPI's property inspectors, Pete Skarzenki's methodology most closely approximates the inspection methodology used by the United States' experts. In fact, Mr. Skarzenski testified that, although the Guidelines are not mandatory, he recommends evaluating compliance with the FHA by using field measurements and comparing them to the Guidelines and ANSI–1986. Ex. 12, Skarzenski Dep. (Feb. 3, 2011), at 138:19–139:9, 151:2–7, App. 692–93. Mr. Skarzenski does not generally dispute the observations or measurements provided by the United States' experts. Rather, he offers his own interpretation of the Guidelines or argues that a feature meets the requirements of a different safe harbor. Dkt. 86-2, Skarzenski Rep., at 1. Not only are Mr. Skarzenski's interpretations of the Guidelines incorrect, but they are also self-serving given his close involvement with JPI as both a consultant and a design professional with Fusch Serold. Additionally, it is not appropriate to selectively choose individual specifications from any safe harbor. Doing so in effect creates a new standard, and safe harbor status may be lost. 72 Fed. Reg. at 39438; 73 Fed. Reg. at 63614. JPI has not shown that this cherry-picking approach creates at least the same level of accessibility as required by the Guidelines.

In short, by employing various non-objective methodologies and offering opinions untethered to any recognized—or recognizable—accessibility standard, those retained by JPI to challenge the findings of the United States' experts have failed to do so. Instead, their reports only underscore what is not in dispute: over a period of nearly two decades, JPI has built a diverse array of multi-family properties across the country that contain extensive and significant accessibility barriers, in violation of the FHA and ADA.

J. JPI Has Not Shown that Any Property Qualifies for the Site Impracticality Exemption

JPI has not made a claim of site impracticality at 19 of the properties at issue in this motion. To the extent that it makes that claim regarding the remaining 13 properties, the evidence is insufficient as a matter of law to establish this defense. Although the FHA itself does not contain any exemption based on site constraints, s*ee* 42 U.S.C. § 3604(f)(3)(C), Congress recognized that the terrain at certain building sites may pose "unique building problems" that should be taken into consideration in determining compliance with the FHA. H.R. Rep. No. 711, at 27. HUD's regulations reflect this consideration by requiring that covered multifamily dwellings "must have 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). In the Guidelines, HUD sets forth specific, narrowly tailored "site impracticality" tests that must be used before any otherwise covered dwelling units may be exempted from the FHA requirements. Guidelines (Req. 1), 56 Fed. Reg. at 9503–04. These tests are further clarified in the Design Manual. Ex. 8, 1.43–1.55, App. 388–400. No matter which test is used, at least 20 percent of the ground floor units on any site must comply with the Guidelines. Guidelines (Req. 1), 56 Fed. Reg. at 9503. As described in Part III.C, *supra*, HUD's interpretation of its requirements regarding site impracticality is entitled to deference.

The site impracticality exemption, like any exemption to the FHA, must be construed narrowly in light of the FHA's broad remedial purposes. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731–32 (1995); *Fair Hous. Advocates Assoc. v. City of Richmond Heights*, 209 F.3d 626, 634 (6th Cir. 2000). "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." 24 C.F.R. § 100.205(a); *see Fair Hous. Advocates*, 209 F.3d at 634 ("Federal courts have repeatedly concluded that the party claiming the exemption 'carries the burden of proving its eligibility for the exemption,' and that "[e]xemptions from the [FHA] are to be construed narrowly, in recognition of the important goal of preventing housing discrimination.'") (quoting *Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc.*, 3 F.3d 1472, 1475 (11th Cir. 1993), *cert. denied*, 513 U.S. 808 (1994)).

For site impracticality to apply, the tests provided in the Guidelines must be done *before* construction. Guidelines (Req. 1), 56 Fed. Reg. 9503–04. Both tests in the Guidelines refer to analysis of the "undisturbed site." *Id*. HUD commentary indicates that "[t]he slope analysis is performed at the early stages of the development process, in preparation for planning the use of the site." 55 Fed. Reg. at 24378–79; *see also* Ex. 8, Design Manual, at 1.4, App. 349; 65 Fed. Reg. at 15750 ("the site impracticality exception cannot be applied to instances in which the lack of an accessible route is due to manmade barriers, such as the failure to provide a walkway or the construction of a step"); *Grant*, No. 2:01-cv-2069, slip op. at 11 (Ex. 15, App. 794) (rejecting as "circular" defendants' argument that "they cannot comply with the FHA because the units, as built, do not comply with the FHA requirements" and holding that defendants had not met their burden to show site impracticality). Indeed, allowing designers and builders to calculate impracticality long after construction would contradict the stated purpose of the exemption—to

address instances where creating an accessible route was impractical. If a site or an individual building does not qualify for the exemption based on one of the two tests, the dwelling units are covered by the FHA and are *required* to have an accessible building entrance on an accessible route. Guidelines (Req. 1), 56 Fed. Reg. 9503–04.

The United States served an interrogatory asking JPI to identify any property or portion of a property that JPI contends is subject to the site impracticality exemption. Ex. 26, Defs. Resps. to U.S. Interrog. No. 8, App. 985–1006. JPI's response was vague, stating that "JPI's third-party design professionals and consultants took into account the fact that the terrain or unusual characteristics of the site occasionally made it impractical to design and construct the ground floor units with an accessible entrance on an accessible route." *Id*. No specific property was identified.

The United States also served requests for admission asking JPI to admit that it had not performed the site impracticality tests at any of the properties either before or after construction. Ex. 27, Defs. Resps. to Req. for Admis., App. 1007–1107. JPI admitted that site impracticality does not reduce the number of covered units at 19 of the 32 properties at issue in this motion. *Id*. JPI denied the requests for admission at the remaining 13 properties, but JPI has never provided any evidence showing that anyone performed the tests as required by the Guidelines.[41] JPI's inspectors testified that they had not performed site impracticality tests on any of the properties. Ex. 9, Sheriff Dep. (Jan. 20, 2011), at 135:13–136:10, App. 654; Ex. 12, Skarzenski Dep., at 189:4–192:1, App. 694–95; Ex. 11, Wales Dep. (Jan. 14, 2011), at 138:11–21, App. 678. Rather, JPI's inspectors' claims of impracticality amount to cursory conclusions that if an accessibility

[41] JPI's inspectors assert that the only standards JPI is required to meet are the minimum accessibility requirements contained in the language of the FHA itself. *See, e.g.*, Dkt. 79-1, Wales Rep., at 5. To take that argument to its logical conclusion, however, would preclude application of the site impracticality exemption, as it is not included in the FHA. JPI's inspectors' approach is to use the Guidelines or other safe harbors when they are helpful to JPI, such as exempting units under site impracticality, but then disregard them when the application of an appropriate standard would show noncompliance with the FHA.

barrier exists, it must be because the site was impractical. This is the same tautological argument rejected by the court in *Grant*, No. 2:01-cv-2069, Slip op. at 11 n.5 (Ex. 15, App. 794) ("[T]he 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."). Vague assertions by JPI's inspectors cannot meet the strict requirements of the site impracticality exemption.[42] JPI has not met its burden of proving impracticality at any property, and therefore all ground floor units at JPI's properties are covered by the FHA.

IV. THE COURT SHOULD ORDER JPI TO SUBMIT A REMEDIAL PLAN

Courts have ordered defendants to submit detailed retrofit plans to remedy violations of the design and construction requirements of the FHA and ADA. *Shanrie II*, 669 F. Supp. 2d at 940 (ordering defendants to submit a remedial plan within 45 days to include a detailed description with deadlines of how defendants intend to retrofit properties and to describe how responsibility will be allocated amongst them); *United States v. Sharlands Terrace, LLC*, Nos. 3:04-CV-00292-LRH-RAM, 3:04-CV-00397-ECR-VPC, 2008 WL 4547209, at *4 (D. Nev. Oct. 1, 2008) (ordering defendants to submit a detailed remedial plan within 45 days); *Tanski*, 2007 WL 1017020, at *25–26 ("The Court orders the Tanski defendants to submit, within 45 days . . . a detailed remedial plan with appropriate timetables to retrofit the noncompliant units in the Tanski properties so that they comply with the Fair Housing Act."); *Paralyzed Veterans of Am. v.*

[42] For example, in response to the United States' expert's statement that an accessible route is not provided to certain units at Jefferson Lakes, Mr. Wales indicates that the lack of an accessible route "could have been based on site considerations" based on the fact that so many other accessible features are included at the property. Dkt. 93-1, Wales Rep., at 32, Item 50. In his Beaver Creek report, Mr. Skarzenski states that the site was impractical because "the steep topography at this location was relatively obvious and based on my experience I was able to gauge where it exceeded 10%." Dkt. 86-2, Skarzenski Rep., at 2–4. He admitted that he had not seen the original grades at the site and he did not take measurements. *Id.*; Ex. 12, Skarzenski Dep. (Feb. 3, 2011), at189:9–20, App. 694.

Ellerbe Becket Architects & Eng'rs, 950 F. Supp. 393, 405–06 (D.D.C. 1996) (ordering retrofit plan under Americans with Disabilities Act). [43]

Accordingly, the United States requests that the Court order JPI to promptly submit (1) a detailed remedial plan with appropriate timetables identifying how JPI will remedy the undisputed discriminatory conditions identified in this motion, and (2) a plan for conducting accessibility surveys and appropriate retrofits of the other properties in JPI's portfolio, *see* Ex. 2, Defs. Init. Disc., at 2 n.1 and Ex. C, App. 127, 181–41. Should the Court order JPI to submit such plans, the United States requests the opportunity to respond. [44]

V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant partial summary judgment as to liability against JPI and order JPI to promptly submit both a detailed remedial plan to address demonstrated violations and a plan for surveying the other properties in JPI's portfolio.

[43] This is consistent with courts' long-standing practice of ordering remedial plans to redress civil rights violations. *See Milliken v. Bradley*, 433 U.S. 267, 283 (1977) (education); *United States v. Blaine Cnty*, 363 F.3d 897, 901 (9th Cir. 2004) (voting); *Glover v. Johnson*, 138 F.3d 229, 234 (6th Cir. 1998) (prisons); *Young v. Pierce*, 640 F. Supp. 1476, 1480 (E.D. Tex. 1986) (requiring HUD to submit remedial plan to desegregate publicly-funded housing), *vacated and remanded on other grounds*, 822 F.2d 1368 (5th Cir. 1987). Requiring a defendant to propose a remedial plan is consistent with the "path well-worn by equity judges overseeing complex, institutional litigation." *See Henrietta D. v. Giuliani*, 246 F.3d 176, 182 (2d Cir. 2001).

[44] Should the Court grant the United States' motion for partial summary judgment as to liability, the United States intends to seek monetary damages for aggrieved persons, 42 U.S.C. § 3614(d)(1)(B); other appropriate injunctive relief, 42 U.S.C. § 3614(d)(1)(A)–(B); and civil penalties, 42 U.S.C. § 3614(d)(1)(C).

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Respectfully submitted,

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Certificate of Service

I, Andrea K. Steinacker, hereby certify that on the 15th day of April, 2011, I served the Memorandum in Support of United States' Motion for Partial Summary Judgment as to Liability via the Court's CM/ECF system to:

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