REBNY®
REAL ESTATE BOARD OF NEW YORK

MEMO ENDORSED

November 3, 2010

BY HAND

Hon. Richard M. Berman
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007

If the parties here (Govt + Developer + Architect) wish to comment, they are respectfully requested to do so by Nov. 9, 2010 @ noon. They are not required to do so.

SO ORDERED:
Date: 11/4/10
Richard M. Berman
Richard M. Berman, U.S.D.J.

Re: United States v. L&M 93rd Street LLC, et al.
10 Civ. 7495 (RMB)

Dear Judge Berman:

On behalf of the Real Estate Board of New York ("REBNY"), which represents more than 12,000 owners, brokers, and managers of real property in New York City, and in light of the questions raised in Your Honor's Administrative Order in the above-referenced action dated October 22, 2010, we are submitting this letter to bring to the Court's attention the grave concerns of New York City's real estate industry regarding the proposed consent decree that has recently been submitted for the Court's approval.

The real estate industry strongly supports the importance of providing access to people with disabilities in multifamily residential apartment buildings. More specifically, we appreciate the importance of compliance with the design and construction requirements of the Fair Housing Act. Since 1987, even prior to the enactment of these provisions of the Fair Housing Act, design and construction in this City has been governed by New York City Local Law 58, which provides a detailed and comprehensive code of accessibility that is inclusive of all of the requirements of the Fair Housing Act (REBNY collaborated with disability rights groups in connection with passage of that law). The City's current accessibility law, which became effective in 2009, also incorporates all of the requirements of the Fair Housing Act. *See* 42 U.S.C. § 3604(f)(5)(A) ("If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C) [the design and construction provisions of the Fair Housing Act], compliance with such laws shall be deemed to satisfy the requirements of that paragraph").

The proposed Melar consent decree, however, is creating tremendous uncertainty for New York City real estate and construction. Components of the consent decree would create inconsistencies with New York City law and call into question every building in the City completed after March 13, 1991, buildings whose owners and developers believed they were complying with both local and federal accessibility requirements.

The United States Attorney's Office is already pursuing similar investigations against at least 10 additional real estate developers that in total have designed or constructed thousands of housing units in New York City since 1991. REBNY estimates that there are approximately 176,000 dwelling units across the City that could be subjected to investigation and face similar penalties through enforcement by the U.S. Attorney's Office. The costs associated with mandating these kinds of modifications in existing buildings, or in those that are well into their design or construction phases, could be prohibitively high, especially given today's struggling economy and real estate capital crisis.

Further, the implications for affordable housing in the City could be even more severe. The City, through the Department of Housing Preservation and Development ("HPD"), explicitly mandated the use of Local Law 58, and now the City's new accessibility code, in its architectural standards for all affordable housing projects that it oversees. According to HPD, the City has financed more than 64,000 new-construction affordable housing units since 1991. A consent decree that will invariably result in passing unnecessary and wasteful costs onto future tenants is not good policy, but more importantly we believe that it is well beyond the appropriate goals of the Fair Housing Act.

We agree that the proposed consent decree, in the Court's words, "appears to impose costly and bureaucratic additional burdens" on the Developer. In particular:

- **Aggrieved Persons Fund** – Consistent with the consent decree recently entered in *United States v. CVP I, et al.*, No. 08 Civ. 7194 (SHS) (S.D.N.Y.) ("Avalon Bay"), the Melar consent decree requires the Developer to deposit monies into a fund to compensate aggrieved persons (*see* ¶¶ 25-35 & Appendix E). However, unlike the Avalon Bay decree, monies not used to compensate aggrieved persons do not revert to the Developer. Such a reversion would have ensured that the Developer not be compelled to pay an amount beyond what is actually necessary to compensate aggrieved persons. Without a reversion, this provision in essence imposes an unauthorized additional penalty on the Developer. The fund amount, moreover, appears excessive, given REBNY's understanding that the building, which only opened in 2006, has not received a single complaint regarding accessibility.

- **Accessibility Project Fund** – The consent decree also requires the Developer to establish an Accessibility Project Fund in the amount of $288,300 (*see* ¶ 37). The decree does not identify any violations or other bases for the establishment of this sizeable fund, which effectively imposes a back door penalty on the Developer. Moreover, to the extent that the fund is intended as a proxy for specific retrofits, it underscores the unfairness to the Melar and countless other developers who will be confronted with the Hobson's choice of imposing potentially unneeded, unwanted retrofits on tenants or paying significant monies into an amorphous Accessibility Project Fund.

- **Retrofit Provisions** – The Melar consent decree requires various retrofits to correct alleged violations of the Fair Housing Act that REBNY does not agree are violations at all. Among these items, the consent decree requires the Developer to move kitchen ranges two inches, with the attendant disruption caused by the removal and replacement of kitchen countertops; the Developer is required to do so because in the current configuration the ranges are not centered on the parallel clear floor space in front of the ranges (*see* Appendix B at p.3). But this requirement is imposed notwithstanding that New York City's accessibility code and the Fair

Housing Act do not require that the ranges be centered. REBNY views these types of provisions, which do not remedy any actual violations of the law, as burdensome, wasteful, and costly, without any corresponding benefit to current or future residents of the building.

- **Retrofits Not "On Request"** – The consent decree also requires the Developer to impose potentially unwanted modifications to residential units rather than allowing the Developer to do so upon request. Tenants may not want the disruption of a retrofit construction or may prefer the existing components, which may even have factored into the decision to rent that particular apartment. For example, the consent decree requires the Developer to enter current tenants' apartments and either recess walls or replace their refrigerators with smaller refrigerator units, for the purpose of slightly widening the distance between the refrigerator and the opposing counter (*see* Appendix B at pp. 2-3). This approach has been imposed notwithstanding that the "adaptive" solution of offering a smaller refrigerator at the request of a disabled tenant comports fully with the requirements of the Fair Housing Act. *See Phillips v. Downtown Affordables, LLC*, CV. No. 06-00402 DAE-BMK, 2007 WL 2668637, at *6-*8 (D. Haw. Sept. 5, 2007). By mandating these retrofits within a prescribed timeframe, rather than allowing them on request of a tenant, the consent decree causes undue disruption, removes choice from all tenants, and raises the possibility of significant owner/tenant disputes.

- **Future Construction** – Finally, the Decree imposes intrusive government oversight over future construction in the City (*see* ¶¶ 22-24), when the government would have no authority in this area absent the Decree. As discussed above, the City has a detailed and comprehensive local accessibility code, and owners and developers are obligated to design and construct their buildings pursuant to it. The provisions of the consent decree governing future construction heighten the uncertainty that now pervades the industry, threatening to deter future development and hamper the economic recovery of New York, again without improving New York City's accessibility laws or increasing accessibility in the City's buildings.

The Real Estate Board recognizes that parties to a litigation choose to settle for a variety of reasons, and we do not purport to speak for the Developer regarding its reasons for signing the consent decree. From the industry's perspective, however, the unduly onerous and burdensome terms of the proposed consent decree far exceed the appropriate reach of the law, and we are deeply concerned about the implications of this consent decree for the thousands of other buildings in the City, publicly and privately owned, that are subject to the design and construction provisions of the Fair Housing Act.

We thank the Court for its consideration of this submission.

Respectfully,

Steven Spinola

cc: (by Electronic Mail)
Brian M. Feldman, Esq.
John M. Hadlock, Esq.