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RMB

U.S. Department of Justice

United States Attorney
Southern District of New York

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October 29, 2010

BY HAND
Honorable Richard M. Berman
United States District Court
for the Southern District of New York
500 Pearl Street, Room 650
New York, New York 10007

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

Dear Judge Berman:

Plaintiff the United States of America (the "Government") respectfully submits this letter in response to the Court's Administrative Order, dated October 22, 2010 (the "Order"), directing that the Government and defendant L&M 93rd Street LLC ("the Developer Defendant") explain more fully the bases for several provisions in the proposed Consent Decree (the "Proposed CD") relating to The Melar, a multifamily dwelling in Manhattan.

The Proposed CD is a product of approximately two years of extensive and intense negotiations between sophisticated counsel. Those negotiations included not only the undersigned attorneys, but, moreover, the input of supervisory attorneys at the United States Attorney's Office for the Southern District of New York, counsel in the Housing and Civil Enforcement Section at the Civil Rights Division of the Department of Justice in Washington, D.C., as well as the Office of the Assistant Attorney General for Civil Rights. The Proposed CD represents a compromise by both sides, and, as explained below, each term within the Proposed CD is necessary and appropriate to achieve the parties' purposes. As further set forth below, each of those terms is entirely consistent with the Fair Housing Act ("FHA"), which provides the statutory basis for the Government's suit in this matter.

I. BACKGROUND

A. The Fair Housing Act's Accessibility Requirements

As background, the FHA's design and construction requirements, codified at 42 U.S.C. § 3604(f)(3)(C), were promulgated to ensure that people with disabilities will have access to multifamily housing. Those requirements are not intended as a unrealistic "standard of total accessibility," but rather to mandate "basic features" of accessibility that could be "eas[ily] incorporate[d] in housing design and construction." H.R. REP. No. 100-711, 1988 U.S.C.C.A.N. 2173, 2188-89 (1988). As Congress recognized, the consequence of failing to provide such basic features of accessibility is stark — a "person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying 'No Handicapped People Allowed.'" *Id.* at 2186.

The FHA specifies several methods for enforcing its accessible design and construction requirements. As relevant here, the Government is authorized to bring a civil action, based on a defendant's denial of rights under the FHA, seeking injunctive and equitable relief, as well as compensatory and punitive damages. *See* 42 U.S.C. § 3614; *see generally United States v. CVP I, et al.*, 08 Civ. 7194 (SHS) (consent decree approved on Oct. 15, 2010); *United States v. Shanrie Co., Inc.*, 669 F. Supp. 2d 932 (S.D. Ill. 2009); *United States v. Tanski*, 1:04-CV-714, 2007 WL 1017020 (N.D.N.Y. Mar. 30, 2007). In addition, any "aggrieved person" can commence a civil action to seek actual and punitive damages, injunctive relief, as well as costs and fees, based on a violation of FHA's design and construction requirements. *See* 42 U.S.C. § 3613; *see also e.g., Davis v. Lane Management, LLC*, 524 F. Supp. 2d 1375, 1377-78 (S.D. Fla. 2007) (awarding default judgment to plaintiff with disabilities and against rental building owner for compensatory damages and punitive damages, each in the amount of $420,000).

The Government brought this action to enforce the FHA with respect to the design and construction of The Melar, a residential rental property in Manhattan.

B. The Court's Review of FHA Consent Decrees

As recognized by the authorities cited in the Court's Order, consent decrees are the most favored means of resolving FHA suits, such as this one. *See Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980) ("in this case under the Fair Housing Act national policy . . . strongly favors settlement"), *cited by* Order at 2; *Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 358-39 (E.D.N.Y. 1982) ("voluntary out of court settlement of disputes is highly favored in the law, . . . particularly . . . in Fair Housing Act cases, where the alternative to voluntary agreement – a court-ordered injunction – may inhibit cooperation and voluntary compliance"), *cited by* Order at 4. *Cf. Local No. 93 v. City of Cleveland*, 478 U.S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving

the objectives of Title VII"), *cited by* Order at 3; *Patterson v. Newspaper & Mail Delivers' Union of New York & Vicinity*, 514 F.2d 767, 771 (2d Cir. 1975) ("the clear policy in favor of encouraging settlements must also be taken into account, particularly in an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals"), *cited by* Order at 2. "Because of the consensual nature of the decree, voluntary compliance is rendered more likely," and "[s]ettlements also contribute greatly to the efficient utilization of scarce federal judicial resources." *Metro. Hous. Dev. Corp.*, 616 F.2d at 1014 & n.10.

Consistent with these principles, the Government seeks to resolve Fair Housing Act cases, such as this one, through consent decrees, whenever possible. *See, e.g., CVP I*, 08 Civ. 7194 (SHS) (consent decree entered on Oct. 15, 2010); *United States v. Berk-Cohen Assocs.*, 09 Civ. 4368 (DLC) (consent decree entered on Feb. 19, 2010). "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

Because "it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all," *Local No. 93*, 478 U.S. at 522, a court's review of a proposed FHA consent decree is limited. As the Second Circuit has instructed, the role of this Court is to make "only the minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree." *United States v. IBM*, 163 F.3d 737, 740 (2d Cir. 1998) (quoting *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986)). In particular, in reviewing a proposed consent decree, "the court will not substitute its judgment for that of counsel," *Local No. 93*, 478 U.S. at 522, and "need not inquire into the precise rights of the parties nor reach and resolve the merits of the case or controversy," *Metro. Hous. Dev. Corp.*, 616 F.2d at 1014. "Rather, the court must accept the settlement unless there is evidence of procedural unfairness, unreasonableness, or inadequacy." Note, *Executing the Law or Executing an Agenda: Usurpation of Statutory and Constitutional Rights by the Department of Justice*, 37 U. Mich. J. L. Reform 257, 264-65 (2003) (quotation marks omitted), *cited by* Order at 3; *Metro. Hous. Dev. Corp.*, 616 F.2d at 1014.[1] Indeed, where, as

[1] Courts generally scrutinize consent decrees more searchingly in the context of class action settlements. *See, e.g., Beane v. Bank of New York Mellon*, 07 Civ. 9444 (RMB), 2009 WL 874046 (S.D.N.Y. Mar. 31, 2009). In such cases, a primary concern is the possibility of collusion between the defendant and class counsel, whose interests may run counter to that of the represented class. *In re Nortel Networks Corp. Secs. Litig.*, 01 Civ. 1855 (RMB), 2006 WL 3802198, at *4 (S.D.N.Y. Dec. 26, 2006). No such conflict of interest exists in FHA suits brought by the Attorney General. *United States v. City of Miami*, 614 F.2d 1322, 1332 n.18 (5th Cir. 1980) ("Unlike . . . class actions litigation, [w]hen the Department

here, "'there has been arms length bargaining among the parties . . . there is a presumption in favor of the settlement,' particularly where 'a government agency committed to the protection of the public interest' has participated in and endorsed the agreement." *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 692 (S.D.N.Y. 1988) (quoting *Wellman v. Dickinson*, 497 F. Supp. 824, 830 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 163 (2d Cir. 1981)); *see also City of Miami*, 614 F.2d at 1333 ("the decree . . . should be entitled to a presumption of validity"); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 681 (D.N.J. 1989) ("a presumption of validity attaches").

Significantly, consent decrees entered in FHA cases may properly impose broad and diverse forms of relief. "[P]articularly in a fair housing situation, the existence of a federal statutory right implies the existence of all measures necessary and appropriate to protect federal rights and implement federal policies." *Metro. Hous. Dev. Corp.*, 616 F.2d at 1011. "More importantly, it is the agreement of the parties, rather than the force of the law on which the complaint was originally based, that creates the obligations embodied in a consent decree." *Local No. 93*, 478 U.S. at 522. "Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Id.* at 525.

II. THE PROPOSED CONSENT DECREE SHOULD BE APPROVED

This action arose from an investigation of The Melar conducted by the Government. That investigation, including an inspection of the property, identified numerous conditions that do not comply with the "basic features" of accessible design and construction under the FHA. The Government provided the findings from that inspection to the Developer Defendant. Those findings, in turn, became the basis for extensive settlement discussions, conducted by experienced counsel over approximately two years, which culminated in the Proposed CD.

This letter addresses those aspects of the Proposed CD identified by the Court in its Order.

A. The Aggrieved Persons Fund

The Proposed CD provides for the establishment of a fund by the Developer Defendant, in the amount of $180,000, to compensate persons who allege disability-based discrimination at The Melar ("aggrieved persons"), who may only accept the funds by waiving their own FHA claims against The Melar. This provision, together with accompanying provisions on the resolution of claims on the fund made by aggrieved persons, creates a process through which the Government could

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of Justice advocates a settlement, we need not fear that its pecuniary interests will tempt it to agree to a settlement unfair to unrepresented persons."). In any event, even in class action settlements, courts presume a consent decree is fair so long as, like here, the decree resulted from arms-length negotiations between experienced counsel. *Beane*, 2009 WL 874046, at *4.

facilitate the consensual resolution of such claims. Absent such a process, aggrieved persons are more likely to seek recourse by filing individual lawsuits pursuant to 42 U.S.C. § 3613, requiring the Developer Defendant to incur future litigation costs, as well as federal courts to devote judicial resources to such litigations. The size of the fund was agreed to by the parties, in the context of their overall negotiations.

The FHA expressly provides for the establishment of aggrieved persons funds, like the one set forth in the Proposed CD, as part of the relief to be rewarded in actions, such as this one, brought by the Attorney General under 42 U.S.C. § 3614. *See* 42 U.S.C. § 3614(d)(1)(B) (providing that the court "may award . . . monetary damages to persons aggrieved"); *see* H.R. Rep. 100-711, 1988 U.S.C.C.A.N. 2173, 2201 (1988) (explaining that, in cases brought by the Attorney General, "relief may awarded to all persons affected by the discriminatory housing practice"). As Congress explained, aggrieved persons funds promote efficiency: "Allowing the court to award monetary relief to persons aggrieved avoids later duplicative litigation as such persons bring actions to vindicate their rights." H.R. Rep. 100-711, 1988 U.S.C.C.A.N. at 2201; *see also United States v. Balistrieri*, 981 F.2d 916, 935 (7th Cir. 1992).

Funds like the one established in the Proposed CD have been a regular feature of past settlements under the FHA, including the consent decree signed by Judge Stein on October 15, 2010 in *CVP I*, 08 Civ. 7194 (SHS) (filed Oct. 15, 2010) (providing for $2,045,600 aggrieved persons fund). *See generally* http://www.justice.gov/crt/housing/fairhousing/caseslist.htm#disabil (listing cases with similar consent decrees).

B. The Accessibility Fund

The Proposed CD also provides for the establishment of a fund by the Developer Defendant, in the amount of $288,300, to be devoted to constructing facilities that would benefit persons with disabilities (the "Accessibility Fund"). Although, as noted above, the Court need not locate a statutory basis for agreed-upon features of a consent decree, *see Local No. 93*, 478 U.S. at 522, the Accessibility Fund comes within the Court's authority to reward "such other relief as the court deems appropriate" in suits, like this one, brought by the Attorney General, *see* 42 U.S.C. § 3614(d)(1)(B).

The Accessibility Fund was the product of compromise. The Government seeks to have defendants bring every feature within every unit of a subject property into full compliance with the FHA. *See United States v. Shanrie Co., Inc.*, 07-491-DRH, 2010 WL 996750, at *2 (S.D. Ill. Mar. 17, 2010) ("[it] is unacceptable and would defeat the purposes of the FHA [to] leave [even] some units [i]naccessible to disabled individuals"). Where the Government prevails on its view of FHA compliance at trial, it may seek an order requiring retrofits to ensure full compliance. In settlement negotiations, where defendants identify difficulties with respect to certain retrofits sought by the Government, the Government may, in lieu

of requiring certain retrofits, instead seek to further the objectives of the FHA by requiring the construction of additional features substantially improving accessibility at a property. Here, the Accessibility Fund serves such a purpose.

A fund similar to the Accessibility Fund was approved in the consent decree signed by Judge Stein in *CVP I*, 08 Civ. 7194 (SHS) (consent decree filed Oct. 15, 2010), and many other consent decrees have similarly required defendants to provide features substantially improving accessibility, which would not otherwise be required by the FHA, *see* http://www.justice.gov/crt/housing/fairhousing/caseslist.htm#disabil (listing, for instance, *United States v. West Creek, L.L.C.* (D. Del); *Memphis Ctr. For Independent Living v. Makowsky Constr. Co.* (W.D. Tenn.); *United States v. Cedar Builders, Inc.* (E.D. Wash); *United States v. Rose & Sons* (E.D. Mich.); and *United States v. Joyner* (E.D.N.C.)).

C. Notice Provision Regarding New Construction

The parties also negotiated a provision whereby the Developer Defendant would notify the Government of any future design or construction activities coming within the scope of the FHA. This notice provision – which only lasts for the three-year term of the Proposed CD – allows the Government to monitor the Developer Defendant's future compliance with the FHA.

The notice provision is consistent with the purposes of the FHA; indeed, it exists to ensure compliance with the FHA. It comes within the scope of "such preventive relief . . . as is necessary to assure the full enjoyment of the rights granted by the [FHA]," which the Court may award the Government in an FHA action brought by the Attorney General. 42 U.S.C. § 3614(d)(1)(A). Such notice is entirely consistent with the relief imposed by other courts in other FHA actions. *See, e.g., Johnson v. Kakvand*, 192 F.3d 656, 659 (7th Cir. 1999) (requiring, in case involving violations of FHA by lender, "a record of each loan application submitted" during a five-year period); *United States v. Real Estate One, Inc.*, 433 F. Supp. 1140, 1156 (E.D. Mich. 1977) (holding that "the judgment must also provide for the defendant to maintain records with the names, addresses, and phone numbers (if available) of all persons involved in every instance in which a prospective black buyer visits a suburban office" for a five-year period); *see also United States v. Shanrie Co., Inc.*, 07-491-DRH, 2008 WL 4566309, at *3 (S.D. Ill. Oct. 1, 2008) (ordering defendants to maintain "records related to certain covered multifamily dwellings" and to "report to the United States regarding any future housing-discrimination complaints").

Parties have agreed to notice provisions similar to this one in many other settlements under the FHA. *See, e.g. CVP I*, 08 Civ. 7194 (SHS) (consent decree filed Oct. 15, 2010); *see also* http://www.justice.gov/crt/housing/fairhousing/caseslist.htm#disabil (listing cases with similar consent decrees).

D. Training and Review Provisions

The parties further agreed in the Proposed CD that the Developer Defendant and its employees shall familiarize themselves with the FHA's design and construction requirements by (i) undergoing training on such requirements and (ii) personally reviewing the Fair Housing Accessibility Guidelines. These provisions are designed to prevent future violations of the FHA, as it is much more cost effective to avoid any FHA design and construction violations in the first instance than to retrofit properties already constructed. In light of Congress's recognition that non-compliance with the FHA effectively precludes people with disabilities from housing opportunities, and considering the costs associated with retrofitting fully occupied buildings, such as The Melar, we respectfully submit that the limited set of future obligations that the Proposed CD imposes on the Developer Defendant are entirely appropriate.

These training and review provisions, like the notice provision, are consistent with the purposes of the FHA and fall within the scope of "such preventive relief . . . as is necessary to assure the full enjoyment of the rights granted by the [FHA]," which the Court may award the Government in an FHA action brought by the Attorney General. 42 U.S.C. § 3614(d)(1)(A). Courts, in fact, have repeatedly ordered similar relief in other FHA cases. *See, e.g.*, *Johnson*, 192 F.3d at 659 (requiring "educational programs . . . to inform . . . employees of their duties under [the FHA]"); *Shanrie Co., Inc.*, 2008 WL 4566309, at *3 ("Defendants shall ensure that their agents and employees read and understand the terms of the Court's injunctive relief, and that the Defendants, as well as certain agents and employees, shall receive FHA training"); *Real Estate One, Inc.*, 433 F. Supp. at 1150 ("The defendant shall be required to put into a effect a program of education").

Parties have agreed to provisions similar to these in many other settlements under the FHA. *See, e.g. CVP I*, 08 Civ. 7194 (SHS) (consent decree filed Oct. 15, 2010); *Berk-Cohen Assocs.*, 09 Civ. 4368 (DLC) (consent decree entered on Feb. 19, 2010); *see also* http://www.justice.gov/crt/housing/fairhousing/caseslist.htm#disabil (listing cases with similar consent decrees).

E. Three-Year Term

As the Court noted in the Order, the parties agreed that the Proposed CD should have a three-year term, which, subject to the Court's approval, may be extended on a motion of the Government asserting that the interests of justice requires such extension. This is consistent with the Supreme Court's observation that "public law settlements are often complicated documents designed to be carried out over a period of years." *Local No. 93*, 478 U.S. at 524 n.13 (quotation marks omitted).

Here, the three-year term serves several functions. As an initial matter, the three-year period allows the Developer Defendant to implement certain retrofits

over time, granting the defendant greater flexibility as to when, exactly, it must make those retrofits. This flexibility increases the likelihood that retrofits will be made during times when apartments are vacant, thereby resulting in fewer disruptions to existing tenants and lower costs for the Developer Defendant. Likewise, the three-year term increases the likelihood that "on demand" retrofits (*i.e.*, those retrofits which the Developer Defendant agreed to provide only upon a tenant's demand) will be requested and made; and, each additional retrofit made during the three-year period will increase accessibility at The Melar. Moreover, the three-year term ensures that injunctive relief aimed at preventing future violations of the FHA will operate over a meaningful period of time.

The three-year term is a reasonable compromise, and it reflects other precedents in this area. The term is a compromise because, if the Government were to prove its case, it could seek permanent injunctions, rather than injunctions limited to three years. The term likewise reflects terms set by courts on similar obligations in other FHA cases. *See, e.g.*, *Johnson*, 192 F.3d at 659 (imposing five-year terms for FHA injunctions); *Shanrie Co., Inc.*, 2008 WL 4566309, at *3 (imposing three-year term for FHA injunctions); *Real Estate One, Inc.*, 433 F. Supp. at 1156 (imposing five-year term for FHA injunctions).

Parties have agreed to provisions similar to these in many other settlements under the FHA. *See, e.g., CVP I*, 08 Civ. 7194 (SHS) (consent decree filed Oct. 15, 2010) (providing for four-year term); *Berk-Cohen Assocs.*, 09 Civ. 4368 (DLC) (consent decree entered on Feb. 19, 2010) (providing for three-year term); *see generally* http://www.justice.gov/crt/housing/fairhousing/caseslist.htm#disabil (listing cases with similar consent decrees).

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We thank the Court for an opportunity to offer a more detailed explanation of certain terms of the Proposed CD. As set forth above, the terms of the Proposed CD are both procedurally and substantively fair, are consistent with the FHA and further its purposes, and were the product of arms-length negotiation over approximately two years between sophisticated counsel. The Proposed CD allows the parties to achieve finality and conserves judicial resources.

The Government therefore respectfully requests that the Court enter the Proposed CD. We also respectfully request that the Court direct the Clerk's Office to enter this letter on the docket to be maintained as a part of the record in this case.

Respectfully,

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