U.S. Department of Justice

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July 21, 2011

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

MEMO ENDORSED
P 10

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

Dear Judge Berman:

In accordance with Your Honor's direction at the June 30 conference, we respectfully submit, for the Court's review, two copies of (i) a fully executed, revised, proposed consent decree (the "Revised Developer Decree"), which resolves the claims against defendant L&M 93rd Street LLC ("Developer"); and (ii) a fully executed proposed consent decree (the "Architect Decree"), which resolves the claims against defendant Costas Kondylis & Partners, LLP ("Architect"). To provide the Court with some of the information relevant to its review, we also summarize below the relevant provisions of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("FHA"), the procedural history of this action, and the events leading up to execution of the two enclosed decrees. In that regard, these decrees not only are products of extensive, arms' length negotiations, but they also adhere to the purpose of the FHA's design and construction provisions — to ensure the inclusion of "basic features" of accessibility. Further, the Revised Developer Decree reflects modifications that address two specific concerns that the Court has noted.

The Revised Developer Decree and the Architect Decree, in short, are fair, equitable, and consistent with the FHA's purpose. Accordingly, we request – on behalf of all parties – that the Court approve these proposed decrees.

I. The Fair Housing Act's Accessibility and Enforcement Provisions

As Congress recognized, unless persons with disabilities have access to housing that contains accessible features, they "are [as] effectively excluded from living in a particular dwelling . . . as by a posted sign saying 'No Handicapped People Allowed.'" H.R. Rep. No. 100-711, at 25 (1988). Accordingly, Congress added the accessible design and construction provisions to the FHA in 1988, to ensure that multifamily dwellings constructed for occupancy after March 13, 1991 would have

"basic features" of accessibility that can be "eas[ily] incorporated in housing design and construction." *Id.* at 26-27.

Specifically, the FHA requires that the "public use and common use" areas must be "readily accessible to and usable" by persons with disabilities and that "all the doors designed to allow passage into and within all" covered dwellings must be "sufficiently wide to allow passage by" persons with disabilities using wheel chairs. *See* 42 U.S.C. § 3604(f)(3)(C)(i)–(ii). The FHA also requires "all premises within such dwellings" to have features that provide (i) accessible routes; (ii) light switches, electrical outlets, and environmental controls, such as thermostats, in accessible locations; (iii) reinforcements in bathroom walls for installation of grab bars; and (iv) maneuvering spaces in kitchens and bathrooms for persons using wheelchairs. *Id.* § 3604(f)(3)(C)(iii).

To ensure compliance with these requirements, the FHA provides several mechanisms of enforcement. First, the Government can bring civil actions to seek injunctive and equitable relief, civil penalties, as well as compensatory and punitive damages on behalf of aggrieved persons. *See* 42 U.S.C. § 3614; *see generally 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). Further, "aggrieved persons" themselves can commence civil actions based on violations of the FHA's accessibility requirements to obtain actual and punitive damages, injunctive relief, and costs and fees. *See* 42 U.S.C. § 3613; *see also Davis v. Lane Management, LLC*, 524 F. Supp. 2d 1375 (S.D. Fla. 2007).

II. Background on the Proposed Decrees

A. The Melar and the Government's Investigation

The Melar – the multifamily dwelling at issue in this action – is a twenty-two story apartment building, located at 250 West 93rd Street in Manhattan. The Melar has 143 apartment units, as well as public and common use areas such as a rental office, a fitness room, and laundry rooms. The Melar was designed and constructed by the Developer and the Architect approximately from 2004 to 2007.

Prior to initiating this action, the Government conducted an investigation of The Melar, which included an inspection of the building's public and common areas and individual dwelling units. That investigation revealed, in the Government's view, some conditions not in compliance with the FHA's accessible design and construction requirements — including, among others, features that inhibit accessibility for persons in wheelchairs, such as mailboxes that are too high to reach; excessively high thresholds; insufficient clear floor spaces in bathrooms for maneuvering; and kitchen entrances that are too narrow. *See* Complaint, ¶¶ 9–11.

B. The Parties' Pre-Litigation Negotiations

To facilitate a consensual resolution of issues relating to the design and

construction of The Melar, the Government shared the findings of its investigation with the Developer and the Architect. Based on these findings, the parties engaged in extensive settlement discussions, starting in 2008. In September 2010, the Government and the Developer reached agreement on the terms of a proposed consent decree for resolving claims against the Developer relating to The Melar (the "Original Developer Decree").[1]

The Original Developer Decree resulted from more than one and half years of arms' length negotiations. That proposed decree reflected compromises, by both the Government and the Developer, on matters such as how to apply the FHA's requirements to features at The Melar; whether it is feasible to retrofit certain allegedly inaccessible features at The Melar, given that construction was finished; the speed with which retrofits should be made; and what amount the Developer should pay into an aggrieved persons fund (the "Aggrieved Persons Fund") and what the amount of civil penalty should be. Specifically, under the Original Developer Decree, the Developer agreed, among other things, (i) to retrofit – in accordance with deadlines specified in that decree – some of the features at The Melar that the Government has alleged to be inaccessible; (ii) to deposit $180,000 into the Aggrieved Persons Fund; (iii) to set up a separate, $288,3000 fund for purposes of investing in accessibility-enhancing features and services at The Melar and in a new building contemplated by one of the owners of the Developer (the "Accessibility Project Fund"); (iv) to provide education and training on accessibility to its employees and agents; (v) to pay a civil penalty of $40,000; and (vi) to abide by certain injunctive requirements during the term of that decree.

C. The Court's Questions about Terms of the Original Developer Decree and the Government's Responses[2]

On September 30, 2010, the Government commenced this action, asserting claims under the FHA against the Developer and the Architect relating to their design and construction of the Melar. Simultaneously, the Government also submitted the Original Developer Decree for the Court's review.

In an Administrative Order issued on October 22, 2010, and during a telephone conference on November 10, 2010, the Court sought explanations for aspects of the Original Developer Decree, and expressed concerns about some of the provisions in that decree. *See* Transcript of November 16, 2010 Conference ("Nov. 16 Conf. Tr.") at 3-4. Specifically, the Court invited the parties to explain several aspects of that decree, including: the amount of function of the Aggrieved Persons Fund; the amount and function of the Accessibility Project Fund; the purposes of a

[1] A copy of the Original Developer Decree, which previously was submitted to the Court, also is enclosed for purposes of comparison.

[2] While the Court was reviewing the Original Developer Decree, the Government and the Architect reached a settlement, and submitted a fully executed Architect Decree to the Court's review on November 10, 2010.

provision requiring the Developer to provide information concerning other covered constructions; the usefulness of the education and training provisions; and the length of the term of the Original Developer Decree. *See* Administrative Order at 2-3. Further, as the Court explained on November 10, 2010, an "overarching question" concerned the respective roles and responsibilities of the federal government and New York City officials in ensuring that multifamily dwellings in New York City comply with the FHA's accessibility requirements. *See* Nov. 16 Conf. Tr. at 3-4.

We responded to the Court's questions in a series of letter submissions and at two conferences in November 2010 and March 2011. First, although it is disputed by the Developer, we noted that, as a legal matter, complying with Local Law 58 ("Local Law 58") – the New York City accessibility code in effect when the Melar was designed and constructed– did not constitute compliance with the FHA under both federal and local law. In that regard, the FHA expressly states that "[d]eterminations of a . . . local government . . . shall not be conclusive in [FHA] enforcement proceedings." 42 U.S.C. § 3604(f)-(6)(B). Moreover, as the City itself recognized in a 2007 memorandum, FHA's accessibility requirement "is not reflected in the current city building code [*i.e.*, Local Law 58]." *See* City's Memorandum in Support of Law of July 3, 2007, at 74, available at http://www.nyc.gov/html/dob/downloads/pdf/cons_code_mis.pdf.

Second, and as a practical matter, we reported that, contemporaneously with this action, the City appeared to be utilizing the consultative process established by the Department of Housing and Urban Development ("HUD") for providing technical assistance regarding the FHA to state and local governments.[3] *See* Transcript of March 14, 2011 Conference ("March 14 Conf. Tr.") at 4-5. Specifically, we reported that it appears that, in December 2010, officials from the City contacted HUD officials to discuss the interrelationship between New York City's current local accessibility code and the FHA. HUD, in turn, offered to provide technical assistance to the City upon request.

Third, in response to the Court's question about the amount of the Aggrieved Persons Fund, we explained that the $180,000 amount resulted from arms' length negotiations among counsel. *See* Letter from the U.S. Attorney's Office, dated October 29, 2010 ("Oct. 29 USAO Letter"), at 4. Further, we noted that establishing such a fund promotes efficiency because – as Congress recognized – it "avoids later duplicative litigation" brought by aggrieved persons. *See* H.R. Rep. 100-711, at 29; *see also United States v. Balistrieri*, 981 F.2d 916, 935 (7th Cir. 1992). The Court, in turn, noted its concern with the fact that, under the Original Developer Decree, a disability rights organization, rather than the Developer, would receive any sum remaining in the Aggrieved Persons Fund at the end of the term of that decree. *See* Nov. 16 Conf. Tr. at 16-18.

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[3] HUD is the federal agency principally responsible for administering the FHA. *See* 42 U.S.C. § 3608.

Fourth, and as we reported, the Accessibility Project Fund reflects a compromise between the Government and the Developer as to whether the Developer must bring all features at The Melar into full compliance with the FHA. *See* Oct. 29 USAO Letter, at 5. Specifically, the Government proposed establishment of the Accessibility Project Fund in lieu of requiring the Developer to make certain retrofits. The amount of that fund, in turn, was the product of negotiations. *Id.* Finally, we explained that any part of the fund not spent to improve accessibility would be forfeited by the Developer because to do otherwise would give the Developer an incentive not to invest the money in accessibility improvements. *See* Nov. 16 Conf. Tr. at 20.

Fifth, the notice, training, and review provisions in the Original Developer Decree are all types of "preventive relief . . . necessary to assure the full enjoyment of the rights granted by the [FHA]." 42 U.S.C. § 3614(d)(1)(A). As we advised the Court, these provisions are appropriate here because they provide an effective means for the Government to monitor the Developer's future compliance with the FHA. *See* Oct. 29 USAO Letter at 5-6.

Finally, as we explained in our Oct. 29 Letter, the three-year term of the decree served the interests of both the public and the Developer. *See id.* at 7. Specifically, the public benefits from a three-year term because more "on-demand" retrofits are likely to be made, thus enhancing accessibility in the long run. A three-year term also benefits the Developer, by providing greater flexibility as to when, exactly, it must make different retrofits at The Melar.

D. Proceedings to Date

In response to the Court's Administrative Order directing the parties to explain various aspects of the Original Developer Decree, the Developer, by letter dated November 2, 2010, began to express reservations about that agreement. The Developer raised concerns about certain retrofit obligations, the Aggrieved Persons Fund, the Accessibility Project Fund, the impact of Local Law 58, future construction restrictions, and the education requirements. In an effort to address the reservations raised by the Court and then the Developer, the Government and the Developer engaged in further negotiations between November 2010 and March 2011, including a settlement conference before Magistrate Judge Dolinger. However, these discussions did not result in a new consensual resolution.

At the conference on March 14, 2011, the Developer informally sought leave to withdraw its consent to the Original Developer Decree. *See* March 14 Conf. Tr. at 17-20. The Court required the Developer to formally move for withdrawal of its consent, and stayed discovery, as well as the due date for defendants' responsive pleadings, pending the resolution of the Developer's motion to withdraw. *See id.* An industry group, the Real Estate Board of New York ("REBNY"), also moved to intervene in connection with that motion to withdraw. But the Court denied REBNY's motion. *See* Decision and Order dated April 5, 2011. The Developer filed its motion on April 15, 2011, and the Architect joined in that motion.

In the meantime, the Government and the Developer resumed their negotiations, and these settlement discussions have proved productive. Specifically, as we advised the Court previously, the Government and the Developer reached an agreement in principle on June 20, 2011, and, on June 28, agreed on the terms of the Revised Developer Decree.

On July 20, 2011, the Government and the Developer executed that decree. Further, the Architect also has consented to resubmit the fully executed Architect Decree for the Court's review in light of the Revised Developer Decree.

E. Modifications in the Revised Developer Decree

In their recent negotiations, the Government and the Developer agreed to change the Original Developer Decree in several respects. Specifically, the Revised Developer Decree reflects substantive modifications in the following aspects:

- Aggrieved Persons Fund: The Original Developer Decree required the Developer to pay to a disability rights organization any sum in this fund that has not been distributed to aggrieved persons by the end of that decree's term. *See* Original Developer Decree at ¶ 35. By contrast, under the Revised Developer Decree, any such "remainder . . . shall be released to the Developer." Revised Developer Decree at ¶ 35.

- Accessibility Project Fund: The Original Developer Decree established an Accessibility Project Fund at $288,300 to be used to improve the accessibility for handicapped persons, 50% of which must be expended on The Melar and 50% could be expended in a new building to be developed by one of the owners of the Developer, subject to Government approval in advance. Any portion of the Fund not expended, as provided, would be paid to the Government. The Revised Developer Decree increases the amount that may be expended on a new building to 75%, gives the Government only a limited veto right over how the money is expended and provides that any part of the Fund not expended, as provided, will be paid to a charitable organization that benefits persons with disabilities.

- Educational Program: The Original Developer Decree required the Developer to provide a copy of that decree to its agents, supervisors and employees involvement in the design and construction of The Melar as well as those involved in apartment rentals and building services at The Melar. *See* Original Developer Decree at ¶¶ 38-41. By contrast, the Revised Developer Decree permits the Developer to give the designated agents, supervisors and employees – in lieu of the entire decree – "a summary of the [ ] Decree, designed to provide personnel with information relevant to their positions." Revised Developer Decree at ¶ 42.

- Posting of Notice to Potential Victims: The Original Developer Decree required the Developer to post notices to potential victims in four major newspapers in the New York area — the *Wall Street Journal*, the *New York Times*, the *New York Post*, and the *Daily News*. *See* Original Developer Decree at ¶ 26. By contrast, under the Revised Developer Decree, the Developer only needs to post such notices in two of these newspapers — the *Wall Street Journal* and the *New York Post*. *See* Revised Developer Decree at ¶ 26.

- Kitchen Entry Retrofit: The Original Developer Decree required the Developer to remove a section of a wall in certain apartments, which limits the clearance space at the entry to the kitchens. *See* Original Developer Decree, Appendix B at 3. Under the Revised Developer Decree, the Developer has the option of either removing a section of the wall or installing a low-profile refrigerator, to create the appropriate amount of clearance space. *See* Revised Developer Decree, Appendix B at 2-3.

- Kitchen Range Retrofit: The Original Developer Decree required the Developer to move the kitchen ranges in certain apartments to the side by two inches, to create a more center-lined approach to these ranges. *See* Original Developer Decree, Appendix B at 3. The Revised Developer Decree does not require this retrofit.

II. The Court Should Approve the Revised Developer Decree and the Architect Decree

A. The Standard for the Court's Review of the Proposed Consent Decrees

As courts have long recognized, consensual resolutions of FHA cases are "highly favored" because they encourage "cooperation and voluntary compliance," limit litigation costs, and reduce the burden on judicial resources. *Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 358-59 (E.D.N.Y. 1982); *see also Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (recognizing "a clear policy in favor of [ ] settlements" in FHA cases). Further, in the design and construction context, settlements advance the purpose of the FHA, and benefit the public, by ensuring that inaccessible features are retrofitted promptly, rather than after lengthy litigation.

In light of the policy favoring settlement in FHA cases, judicial review of a proposed consent decree does not entail an inquiry "into the precise legal rights of the parties" or resolving "the merits of the claims or controversy." *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980). Instead, the Court "need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties." *Id.* Further, because "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally

based, that creates the obligations embodied in a consent decree," *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 522 (1986), the Court "is not necessarily barred from entering a consent decree merely because [it] provides broader relief than the court could have awarded after a trial," *id.* at 525.

B. The Revised Developer Decree and the Architect Decree Are Fair and Reasonable and Adhere to the Purpose of the FHA

"[A] presumption of fairness, adequacy, and reasonableness attaches to [a] settlement" that is the "product of arms' length bargaining" between experienced counsel. *In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 480-81 (S.D.N.Y. 2009); *see also In re Nortel Networks Corp. Sec. Litig.*, 01 Civ. 1855 (RMB), 2006 WL 3802198, at *4 (S.D.N.Y. Dec. 26, 2006).

Here, the proposed resolution of this action – as embodied in the Revised Developer Decree and the Architect Decree – resulted from almost three years of negotiations among counsel for the Government, the Developer, and the Architect, as well as input from the Court. Specifically, the two proposed decrees reflect compromises by all parties relating to issues such as the timing and extent of retrofits at The Melar, the amounts of penalties and compensation, and the scope and duration of the injunctive terms. *See supra* at 3-5. For example, as a result of the most recent negotiations, and to reduce the Developer's compliance costs, the Government agreed to reduce the number of newspapers in which notices to potential victims must be posted, *see* Revised Developer Decree at ¶ 26, and to give the Developer the option to either remove a section of the wall in certain kitchens or to install low-profile refrigerators, *see id.* Appendix B at 2. The Revised Developer Decree and the Architect Decree, in short, are products of "arms' length bargaining"; and the Court can accord "the presumption of fairness, adequacy, and reasonableness" to these proposed decrees. *See In re IPO Sec. Litig.*, 671 F. Supp. 2d at 480-81.

In addition, and as discussed above, *see supra* at 4-5, the retrofits, injunctive, and financial terms of the Revised Developer Decree are designed to require prompt retrofits to make The Melar more accessible, ensure future compliance with the FHA, and compensate individuals denied housing opportunities as result of inaccessibility. These terms, accordingly, adhere to the basic purpose of the FHA – to "extend [ ] the principle of equal housing opportunity to [ ] persons [with disabilities]" and to compensate victims of housing discrimination. *See* H.R. Rep. No. 100-711, at 2.[4]

[4] Further, it appears that, prompted by the Court's questions, the City has begun to engage in a consultative process with HUD to seek technical assistance on harmonizing the local accessibility code in New York City with the requirements of the FHA. *See* March 14 Conf. Tr. at 4-5. Thus, this process resolves any concern of conflicting or inconsistent enforcement of the FHA's requirements.

C. Modifications in the Revised Developer Decree Address the Court's Concerns About the Aggrieved Persons Fund and Educational Programs

Finally, to the extent that the Court expressed concerns about the Original Developer Decree's mandate for any leftover sum in the Aggrieved Persons Fund to be paid to a disability rights group, *see* Nov. 16 Conf. Tr. at 16-18, or the training requirement for the Developer's agents, employees, and supervisors, *see* Administrative Order at 3, the Government has agreed to modifications in the Revised Developer Decree that address such concerns.

Specifically, if the full amount of Aggrieved Persons Fund has not been fully distributed to aggrieved persons by the end of the Revised Developer Decree's term, such funds will "be released to the Developer [ ]." *See* Revised Developer Decree at ¶ 35. Further, rather than requiring all of the Developer's agents, employees, and supervisors to review the Revised Developer Decree in its entirety, the Developer can provide its personnel with appropriate summaries of the decree that are tailored to the particular duties of such personnel. *See id.* at ¶ 42.

* * * * *

We thank the Court for the opportunity to set forth the relevant background, and to offer an explanation for the terms of enclosed proposed decrees. As set forth above, we respectfully submit that the terms of these decrees are procedurally and substantively fair, further the purposes of the FHA's design and construction provisions, address the questions and concerns that the Court has raised, and allow the parties to achieve a consensual resolution of this matter without the expenditure of additional resources. Accordingly, on behalf of all parties, we respectfully request that the Court approve the Revised Developer Decree and the Architect Decree.

Respectfully,

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Encl. (3).

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As the parties have been advised, the Court is approving the consent decree (relating to the developer + the architect) as modified, following representations by the parties. Good job! Aug. 8, '11 conference vacated.

SO ORDERED:
Date: 7/22/11

Richard M. Berman

Richard M. Berman, U.S.D.J.